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DEPARTMENT OF AGRICULTURE

Rural Housing Service

7 CFR Part 1951

[Docket No. RHS–20–CF–0011]

Notification of Direct Loan Payment Deferrals for the Community Facilities Direct Loan Program

AGENCY: Rural Housing Service, USDA.

ACTION: Temporary policy.

SUMMARY: The Rural Housing Service, hereinafter referred to as the Agency, will temporarily allow borrowers with direct loans within the Community Facilities (CF) Program to request payment deferrals during the period specified in the **DATES** section of this notification. This temporary authorization applies to CF direct loan borrowers who are experiencing temporary cash flow issues due to the Coronavirus (COVID–19) pandemic. The Agency will provide the option of principal and interest payment deferrals to borrowers impacted by COVID–19 for up to one year due to hardship on a case-by-case basis.

DATES: This policy is effective May 12, 2020 and the temporary authorization to request payment deferrals under this notification expires on September 30, 2020.

FOR FURTHER INFORMATION CONTACT: Anita Outen, Community Facilities, at 202–720–1497 or via email at *Anita.Outen@usda.gov.*

SUPPLEMENTARY INFORMATION: CF has the statutory authority to defer principal and interest payments in accordance with 7 U.S.C. 1981a of the Consolidated Farm and Rural Development Act, section 331A. Beginning immediately and through September 30, 2020, the Community Facilities Direct Loan Program may assist borrowers that are temporarily unable to continue making payments of principal and interest due because of temporary cash flow issues resulting from the COVID–19 pandemic, by deferring payments for a period no longer than one year from the date the original payment is due. The borrower must request any payment deferments from the Agency in writing. The State Directors have the authority to approve the payment deferral on loans where the aggregate balance of principal and interest on the loan is $10 million or less. Any loans over that amount will require Agency Administrator approval. Any deferral request for a CF project that has both a CF Direct Loan and a CF Guaranteed Loan, where the request will modify the parity arrangement that is presently in place or that has a different deferral term, will require Agency Administrator review and concurrence. The Agency will notify the borrower when payment deferral requests do not meet the Agency's requirements. The Agency does not consider a loan that is under a deferral agreement to be a delinquent loan. After September 30, 2020, borrowers must resume obtaining Agency approval in accordance with all applicable program regulations, forms, and existing authorities. This guidance applies to all borrowers that had a current repayment status as of March 1, 2020. Borrowers that were delinquent prior to March 1, 2020 will continue to be serviced under 7 CFR part 1951, subpart E, and 7 CFR part 1956, subpart C.

Paperwork Reduction Act: In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the information collection activities associated with this notification are covered under OMB Number: 0575–0066. This notification contains no new reporting or recordkeeping requirements that would require approval under the Paperwork Reduction Act of 1995.

Submissions: The Agency is requiring the following information from the CF direct loan borrowers to be considered for a deferral of payments pursuant to this notification:

1. A brief narrative addressing how the COVID–19 pandemic has impacted the operation of the facility and hindered the borrower's cash flow indicating that the circumstances were beyond the borrower's control. The narrative should also include the borrower's name and account information as well as a proposed operations plan that addresses scheduled loan repayment at the end the agreement. The proposed plan can include reamortization of the remaining payments within the original loan term after the deferral period expires. All proposals should be in accordance with the CF servicing regulations outlined at 7 CFR part 1951, subpart E;

2. The borrower must provide documentation, such as but not limited to: a statement of cashflows or current income and expenses approved by an official of the borrower, a statement of temporary closure approved by an official of the borrower, or a proclamation or order from a government entity requiring temporary closure or significant reduction of facility operations. The documentation must substantiate the narrative provided under item #1; and

3. Form RD 1951–10, Community Programs Workout Agreement will be signed by both parties prior to executing any payment deferral action.

The borrower should contact the appropriate State Office by telephone to discuss the request for payment deferral prior to submitting the required documents. The State Office contact information is available at: *https://www.rd.usda.gov/contact-us/state-offices.* Unpaid interest accruing during a deferral agreement is not subject to the limitation of the accrued interest under 7 CFR 1951.221(a)(2)(ii).

Bruce W. Lammers,
Administrator, Rural Housing Service.

[FR Doc. 2020–08429 Filed 4–17–20; 4:15 pm]
BILLING CODE 3410–XY–P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 324

RIN 3064–AF49

Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans; Correction

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Final rule; correcting amendment.

SUMMARY: The Federal Deposit Insurance Corporation (FDIC) is correcting its rule text in conjunction with the interagency interim final rule

that appeared in the **Federal Register** on April 13, 2020, titled ''Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans.'' This correction is necessary to conform the FDIC's rule text to the regulations of the other federal banking agencies that issued that interagency interim final rule.

DATES: Effective April 21, 2020.

FOR FURTHER INFORMATION CONTACT: *FDIC:* Michael Phillips, Counsel, *mphillips@fdic.gov;* Catherine Wood, Counsel, *cawood@fdic.gov;* Francis Kuo, Counsel, *fkuo@fdic.gov,* Supervision Branch, Legal Division, Federal Deposit Insurance Corporation, 550 17th Street NW, Washington, DC 20429.

SUPPLEMENTARY INFORMATION: On April 13, 2020, the Office of the Comptroller of the Currency (OCC), Board of Governors of the Federal Reserve System (Board), and the FDIC (collectively, the agencies) published a final rule ''Regulatory Capital Rule: Paycheck Protection Program Lending Facility and Paycheck Protection Program Loans'' (PPPL final rule).[1] In the wake of economic disruptions caused by COVID–19, the Board of Governors of the Federal Reserve System authorized each of the Federal Reserve Banks to participate in the Paycheck Protection Program Lending Facility (PPPL Facility), pursuant to section 13(3) of the Federal Reserve Act, to provide liquidity to small business lenders and the broader credit markets, to help stabilize the financial system, and to provide economic relief to small businesses nationwide. The PPPL final rule allows banking organizations to neutralize the regulatory capital effects of participating in the facility.

The PPPL final rule permits banking organizations to exclude exposures pledged as collateral to the PPPL Facility from a banking organization's total leverage exposure, average total consolidated assets, advanced approaches-total risk-weighted assets, and standardized total risk-weighted assets, as applicable. The PPPL final rule also amends section 32 of the FDIC's regulatory capital rule to clarify that PPP covered loans originated by a banking organization under the Paycheck Protection Program will receive a zero percent risk weight.[2]

This correcting amendment will add a new § 324.131(e)(3)(viii) to the FDIC's regulatory capital rule in conformance with the regulatory capital rules of the other federal banking agencies.

For the reasons stated in the preamble, the FDIC corrects 12 CFR part 324 as follows:

PART 324—CAPITAL ADEQUACY OF FDIC-SUPERVISED INSTITUTIONS

■ 1. The authority citation for part 324 continues to read as follows:

Authority: 12 U.S.C. 1815(a), 1815(b), 1816, 1818(a), 1818(b), 1818(c), 1818(t), 1819(Tenth), 1828(c), 1828(d), 1828(i), 1828(n), 1828(o), 1831o, 1835, 3907, 3909, 4808; 5371; 5412; Pub. L. 102–233, 105 Stat. 1761, 1789, 1790 (12 U.S.C. 1831n note); Pub. L. 102–242, 105 Stat. 2236, 2355, as amended by Pub. L. 103–325, 108 Stat. 2160, 2233 (12 U.S.C. 1828 note); Pub. L. 102–242, 105 Stat. 2236, 2386, as amended by Pub. L. 102–550, 106 Stat. 3672, 4089 (12 U.S.C. 1828 note); Pub. L. 111–203, 124 Stat. 1376, 1887 (15 U.S.C. 78o–7 note); Pub. L. 115–174; Pub. L. 116–136, 134 Stat. 281.

■ 2. Amend § 324.131 by adding paragraph (e)(3)(viii) to read as follows:

§ 324.131 Mechanics for calculating total wholesale and retail risk-weighted assets.

* * * * *

(e) * * *

(3) * * *

(viii) The risk-weighted asset amount for a Paycheck Protection Program covered loan as defined in section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) equals zero.

* * * * *

Federal Deposit Insurance Corporation.

Dated in Washington, DC, on April 15, 2020.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2020–08361 Filed 4–20–20; 8:45 am]

BILLING CODE 6714–01–P

[1] 85 FR 20387 (April 13, 2020).

[2] *See* the definition of ''total capital'' in the FDIC's capital rules in 12 CFR 324.2.

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133–AF15

Temporary Regulatory Relief in Response to COVID–19

AGENCY: National Credit Union Administration (NCUA).

ACTION: Temporary final rule.

SUMMARY: The NCUA Board (Board) is temporarily modifying certain regulatory requirements to help ensure that federally insured credit unions (FICUs) remain operational and liquid during the COVID–19 crisis. Specifically, the Board is temporarily raising the maximum aggregate amount of loan participations that a FICU may purchase from a single originating lender to the greater of $5,000,000 or 200 percent of the FICU's net worth. The Board is also temporarily suspending limitations on the eligible obligations that a federal credit union (FCU) may purchase and hold. In addition, given physical distancing policies implemented in response to the crisis, the Board is tolling the required timeframes for the occupancy or disposition of properties not being used for FCU business or that have been abandoned. These temporary modifications will be in place until December 31, 2020, unless extended.

DATES: This rule is effective from April 21, 2020 through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: *Policy and Analysis:* Amanda Parkhill, Director, Policy Division, Office of Examination and Insurance, at (703) 518–6360; *Legal:* Ariel Pereira, Staff Attorney, Office of General Counsel, at (703) 518–6540; or by mail at: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION:

I. Background
II. Legal Authority
III. Section-by-Section Analysis
IV. Regulatory Procedures

I. Background

The COVID–19 pandemic has created uncertainty for FICUs and their members. The Board is working with federal and state regulatory agencies, in addition to FICUs, to assist FICUs in managing their operations and to facilitate continued assistance to credit union members and communities impacted by the coronavirus. As part of these ongoing efforts, the Board is temporarily modifying certain regulatory requirements to help ensure that FICUs remain operational and liquid during the COVID–19 crisis. The Board has concluded that the amendments will provide FICUs with necessary additional flexibility in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system. The temporary amendments are effective upon publication and will be in place through the end of calendar year 2020, unless the Board takes action to extend their effectiveness.

In general, two of the temporary amendments will expand the authority of FICUs to purchase loans and participations in loans, thereby enhancing their ability to meet liquidity needs. Specifically, the Board is temporarily raising the maximum aggregate amount of loan participations

that a FICU may purchase from a single originating lender to the greater of $5,000,000 or 200 percent of the credit union's net worth. The Board is also temporarily suspending certain limitations on the types of eligible obligations that a FICU may purchase and hold. The third regulatory amendment addresses a requirement that may be difficult, if not impossible, to meet during the pandemic. Given the physical distancing policies in effect, the Board is tolling the required timeframes for the occupancy or disposition of properties not being used for FCU business or that have been abandoned.

Section III of this preamble discusses the temporary regulatory amendments in greater detail.

II. Legal Authority

The Board is issuing this temporary final rule pursuant to its authority under the Federal Credit Union (FCU) Act.[1] The FCU Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all FICUs. For example, section 120 of the FCU Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the act.[2] Section 209 of the FCU Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate to carry out its role as share insurer for all FICUs [3] Other provisions of the act confer specific rulemaking authority to address prescribed issues or circumstances.[4] Accordingly, the FCU Act grants the Board broad rulemaking authority to ensure that the credit union industry and the National Credit Union Share Insurance Fund (NCUSIF) remain safe and sound.

III. Section-by-Section Analysis

A. Aggregate Limit on Loan Participation Purchases (§ 701.22(b)(5)(ii))

Section 107(5)(E) of the FCU Act authorizes an FCU to engage in participation lending with other credit unions, credit union organizations, or financial organizations in accordance with written policies of the FCU's board of directors.[5] The NCUA has implemented this statutory provision in § 701.22 of its regulations, which applies to all FICUs. The statute contains no limitation on the amount of participations that an FCU may purchase from any single originating lender.

The regulation limits the aggregate amount of loan participations that a FICU may purchase from any one originating lender to the greater of $5,000,000 or 100 percent of the FICU's net worth.[6] As explained in the preamble to the final rule that established the limitation, the purpose of the provision is to mitigate the exposure of FICUs to concentration risk.[7] The preamble explained that in prescribing concentration limits on loan participations, the Board's goal was ''to strike an appropriate balance between mitigating risk and fostering the industry's growth and stability.'' [8]

The Board continues to believe that a cap is an important protection against FICU insolvency. However, consistent with the NCUA's 2018 Regulatory Reform Agenda, the Board also believes that, as currently formulated, the limitation may be overly prescriptive.[9] Additional regulatory flexibility is especially warranted during the present COVID–19 crisis when many FICUs are seeking to maintain adequate liquidity. Accordingly, the Board believes that temporarily raising the cap is necessary to strike the balance it sought in originally promulgating the rule and encourages FICUs to engage in appropriate due diligence in this context.

Under the temporary final rule, the aggregate limit below which a waiver from the appropriate NCUA regional director is not required will be raised to the greater of $5,000,000 or 200 percent of the FICU's net worth. The increase will help safeguard the stability of FICUs during the crisis, without undue additional risk to the safety and soundness of the credit union system. Subsequent to the temporary rule's expiration at the close of December 31, 2020, a FICU must return into compliance with the current limitation (that is, the greater of $5,000,000 or 100 percent of its net worth) by either ceasing to purchase loan participations from the originating lender or requesting a waiver as provided in the regulation.

B. Purchase, Sale, and Pledge of Eligible Obligations (§ 701.23(b))

Section 107(13) of the FCU Act authorizes an FCU, ''in accordance with rules and regulations prescribed by the Board,'' to purchase, sell, or pledge all or part of an eligible obligation to one of its own members.[10] The NCUA has implemented this authority in its regulations at § 701.23(b)(1)(i) and § 703.21(b)(2)(i), which provides that an FCU may purchase an eligible obligation from any source, provided the FCU is empowered to grant the loan or the loan is refinanced within 60 days following its purchase so that it is a loan the FCU is empowered to grant.

The purpose of the refinancing requirement is to help ensure that loans *purchased* by an FCU comply with the statutory and regulatory requirements applicable to loans *made* by the FCU. Although the Board's longstanding policy is that all eligible obligations of an FCU, whether made or purchased, comply with the requirements and goals of the FCU Act, the explicit statutory language of the FCU Act does not necessarily compel this. Given the COVID–19 emergency, the Board believes that the balance weighs in favor of adopting a closer reading of the text of the statute and suspending the refinancing requirement for a temporary period to promote the extension of credit and flow of liquidity in the credit union system generally.

As noted, the FCU Act and § 701.23 generally do not authorize an FCU to purchase a loan unless the person liable on the loan is a member of that credit union. The Board's publicly articulated interpretation since the 1979 rulemaking that implemented section 107(13), is that Congress did not intend section 107(13) to be an express prohibition on purchases of obligations made to non-members provided they are authorized by other sections of the FCU Act.[11]

The Board's regulations in 12 CFR 701.23 generally require that purchased eligible obligations be obligations of the purchasing FCU's members. However, § 701.23(b)(2) provides certain limited exceptions to the general requirements for well-capitalized FCUs with composite CAMEL ratings of ''1'' or ''2.'' [12] The regulations authorize these FCUs to purchase the eligible obligations of any FICU or of any liquidating credit union without regard to whether they are obligations of the purchasing FCU's members. As the Board has previously noted, these types of purchases could be construed as

[1] 12 U.S.C. 1751 *et al.*

[2] 12 U.S.C. 1766(a).

[3] 12 U.S.C. 1789.

[4] An example of a provision of the FCU Act that provides the Board with specific rulemaking authority is section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.

[5] 12 U.S.C. 1757(5)(e).

[6] 12 CFR 701.22(b)(5)(ii).

[7] 78 FR 37946 (June 25, 2013).

[8] *Id.* at 37951.

[9] 83 FR 65926, 65946–65947 (Dec. 21, 2018).

[10] 12 U.S.C. 1757(13).

[11] 44 FR 27068, 27069 (May 9, 1979).

[12] Section 701.23 also contains exceptions to the membership requirement for certain purchases of student loans and real estate loans that an FCU purchases to complete a pool for sale. The Board established this exception in the 1979 final rule discussed above. 44 FR 27068 (May 9, 1979).

being made under section 107(14) of the FCU Act, which does not impose a membership requirement, as opposed to under section 107(13).[13] Section 107(14) authorizes FCUs to ''purchase all or part of the assets of another credit union and to assume the liabilities of the selling credit union and those of its members.'' This statutory interpretation is consistent with the general principle that the more specific provision or authority applies in favor of the more general provision.

Although the Board continues to believe that this exception should generally be limited to FCUs with CAMEL 1 or 2 composite ratings, it also recognizes the urgent need to support the extension of credit and facilitate downstream loan purchases as a tool to manage liquidity. The Board, therefore, is temporarily amending its regulations to authorize FCUs with CAMEL composite ratings of 1, 2, or 3 to purchase eligible obligations of FICUs and liquidating credit unions irrespective of whether the obligation belongs to the purchasing FCU's members.[14] FCUs may continue to hold obligations purchased pursuant to this temporary final rule subsequent to the rule's expiration at the close of December 31, 2020.

The Board notes that the restrictions temporarily relieved in § 701.23 do not apply to state-chartered, federally insured credit unions. Any such restrictions applicable to state-chartered credit unions would be based on state laws or regulations. The Board also notes that this temporary final rule does not modify the current authority of FCUs under § 701.23 to purchase the obligations of a liquidating credit union without regard to whether the obligations belong to the purchasing FCU's members.

C. FCU Occupancy and Disposal of Acquired Premises (§ 701.36(c))

Section 107(4) of the FCU Act authorizes an FCU to purchase, hold, and dispose of property necessary or incidental to its operations.[15] The Board has implemented and interpreted this provision of the FCU Act in its regulation at 12 CFR 701.36. In general, an FCU may invest in property only that it intends to use to transact credit union business or in property that supports its internal operations or serves its members. Among other provisions, § 701.36: (1) Limits FCU investments in fixed assets; and (2) establishes occupancy, planning, and disposal requirements for acquired and abandoned premises.

The regulation provides that if an FCU acquires premises, including unimproved land or unimproved real property, it must partially occupy them ''no later than six years after the date of acquisition,'' subject to the NCUA granting a waiver.[16] Further, an FCU must make diligent efforts to dispose of abandoned premises and any other real property it does not intend to use in transacting business. Additionally, the FCU must advertise for sale premises that have been abandoned for four years.[17] The specific terms of these requirements do not stem directly from the FCU Act but instead reflect the Board's judgment in implementing the general statutory provision.

In response to the COVID–19 crisis, many state and localities have implemented physical distancing measures to arrest the spread of the disease.[18] These health-related restrictions on the mobility of individuals make the changes in occupancy and dispositions required by § 701.36 extremely difficult. Accordingly, the Board is temporarily tolling the regulatory mandated timeframes. This temporary change appropriately reflects the unique circumstances while maintaining consistency with the statutory provision as interpreted and implemented by the Board. Any days that fall within the period commencing on April 21, 2020 and concluding at the close of December 31, 2020, shall not be counted for purposes of determining an FCU's compliance with the regulatory time periods. This temporary deferral will provide FCUs with additional flexibility to comply with the prescribed time periods, while still complying with the statutory and regulatory goals of ensuring that properties acquired or held by FCUs are used for credit union business.

Example One: An FCU closed on the purchase of an office building 30 days before April 21, 2020 (that is, the temporary final rule is published on the 31st day following acquisition). Under the temporary regulatory amendment, January 1, 2021 would be deemed the 31st day following acquisition for purposes of calculating the six-year deadline for partial occupancy.

Example Two: An FCU has an abandoned parcel of land that, under § 701.36(c)(2), it is required to advertise for sale no later than November 9, 2020 (i.e., that fourth year anniversary of the date the parcel was abandoned). Under this temporary final rule, the FCU would have an additional amount of time to meet this requirement equal to the number of days between the publication date and January 1, 2021.

IV. Regulatory Procedures

A. Administrative Procedure Act

The Board is issuing the temporary final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).[19] Pursuant to the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.''[20]

The Board believes that the public interest is best served by implementing the temporary final rule immediately upon publication in the **Federal Register**. The Board notes that the COVID–19 crisis is unprecedented. It is a rapidly changing situation and difficult to anticipate how the disruptions caused by the crisis will manifest themselves within the financial system and how individual credit unions may be impacted. Because of the widespread impact of a pandemic and the speed with which disruptions have transmitted throughout the United States, the Board believes it is has good cause to determine that ordinary notice and public procedure are impracticable and that moving expeditiously in the form of a temporary final rule is in the best of interests of the public and the FICUs that serve that public. The temporary regulatory changes are proactive steps that are designed to alleviate potential liquidity strains and are undertaken with expedience to ensure the maximum intended effects are in place at the earliest opportunity.

The Board values public input in its rulemakings and believes that providing the opportunity for comment enhances

[13] Section 107(14) is codified in 12 U.S.C. 1757(14). For the Board's prior statements on this matter, please refer to 66 FR 58656, 58660 (Nov. 23, 2001); 51 FR15055, 15059 (Mar. 15, 2001), and 76 FR 81421, 81426 (Dec. 28, 2011).

[14] Generally, credit unions with a CAMEL composite rating lower than 3 are considered to be in ''troubled condition'' under the NCUA's regulations. 12 CFR 700.2.

[15] 12 U.S.C. 1757(4).

[16] 12 CFR 701.36(c)(1).

[17] 12 CFR 701.36(c)(2).

[18] *See, https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.* (''[A] a vast majority of Americans—nine in 10 United States residents—are now or will soon be under instructions to stay at home.'')

[19] 5 U.S.C. 551 *et seq.*

[20] 5 U.S.C. 553(b)(3).

its regulations. Accordingly, the Board often solicits comments on its rules even when not required under the APA, such as for the rules it issues on an interim-final basis. The Board, however, notes that the provisions in this rule are temporary in nature, and designed specifically to help credit unions affected by the COVID–19 pandemic. The amendment made by the temporary final rule will automatically expire at the close of December 31, 2020, and are limited in number and scope. For these reasons, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[21] Because the rules relieves currently codified limitations and restrictions, the temporary final rule is exempt from the APA's delayed effective date requirement. As an alternative basis to make the rule effective without the 30-day delayed effective date, the Board finds there is good cause to do so for the same reasons set forth above regarding advance notice and opportunity for comment.

B. Congressional Review Act

For purposes of the Congressional Review Act,[22] the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a ''major'' rule. If the OMB deems a rule to be a ''major rule,'' the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[23]

For the same reasons set forth above, the Board is adopting the temporary final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[24] In light of current market uncertainty, the Board believes that delaying the effective date of the rule would be contrary to the public interest for the same reasons discussed above.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.[25] For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid Office of Management and Budget (OMB) control number.

The impact of this temporary rule on information collection requirements are estimated as follows:

701.22—OMB No. 3133–0141, Organization and Operation of FCU—Loan Participations. It is anticipated that there will be no increase in the number of credit unions currently participating. It is estimated that these credit unions may see a slight increase in the number of loan participation agreements. The recordkeeping requirement to retain and maintain a copy of the agreement is minimal, and would not impact the recordkeeping burden. Because of the net worth increase, NCUA estimates that the waiver request on the limits will be reduced by 50 percent, for an estimated reduction of 20 burden hours. A total burden hours of 3,025 requested.

701.23—OMB No. 3133–0127, Purchase, Sale, and Pledge of Eligible Obligations. NCUA estimates a minimal increase in the number of respondents from the suspension of the limitations and in the number of agreements. The recordkeeping requirement to retain and maintain these records would increase based on this estimate. Due to the expanded authority, waivers would not be necessary and appeals to the waivers are null during this period. An estimated increase of 2,207 burden hours is due to this change, for a total of 12,747 burden hours requested.

701.36—OMB No. 3133–0040, Federal Credit Union Occupancy, Planning, and Disposal of Acquired and Abandoned Premises. The temporary rule will suspend the time limit assigned to partial occupancy, disposal of abandoned property, and advertisement of the sale of abandoned property, that falls on the date of the publication of this rule through December 31, 2020; not to begin until January 1, 2021. The suspension of time requirements will eliminate the need for a waiver during this period for a reduction of 305 burden hours; for a total of 30 burden hours requested.

The cumulative changes of the burden hours associated with these three information collections requirements total to 1,882. An emergency request for approval has been submitted to OMB for the revisions to the information collection requirements under the OMB control numbers identified above. A separate notice will be published in the **Federal Register** soliciting public comments on these revisions.

D. Executive Order 13132, on Federalism

Executive Order 13132 [26] encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles. The temporary final rule 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. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

E. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this temporary final rule will not affect

[21] 5 U.S.C. 553(d).

[22] 5 U.S.C. 801–808.

[23] 5 U.S.C. 804(2).

[24] 5 U.S.C. 808.

[25] 44 U.S.C. 3507(d).

[26] Executive Order 13132 on Federalism, was signed by former President Clinton on August 4, 1999, and subsequently published in the **Federal Register** on August 10, 1999 (64 FR 43255).

family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.[27]

List of Subjects in 12 CFR Part 701

Aged, Civil rights, Credit, Credit unions, Fair housing, Individuals with disabilities, Insurance, Mortgages, Reporting and recordkeeping requirements.

By the National Credit Union Administration Board, this 16th day of April 2020.

Gerard Poliquin,

Secretary of the Board.

For the reasons discussed above, the NCUA amends part 701 as follows:

PART 701—ORGANIZATION AND OPERATION OF CREDIT UNIONS

■ 1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.;* 42 U.S.C. 1981 and 3601–3610. Section 701.35 is also authorized by 42 U.S.C. 4311–4312.

■ 2. In § 701.22, add paragraph (e) to read as follows:

§ 701.22 Loan participations.

* * * * *

(e) *Temporary regulatory relief in response to COVID–19.* Notwithstanding paragraph (b)(1)(ii) of this section, during the period commencing on April 21, 2020 and concluding on December 31, 2020, the aggregate amount of loan participations that may be purchased from any one originating lender shall not exceed the greater of $5,000,000 or 200 percent of the federally insured credit union's net worth.

■ 3. In § 701.23, add paragraph (i) to read as follows:

§ 701.23 Purchase, sale, and pledge of eligible obligations.

* * * * *

(i) *Temporary regulatory relief in response to COVID–19.* Notwithstanding § 701.23(b), during the period commencing on April 21, 2020 and concluding on December 31, 2020, a Federal credit union may:

(1) Purchase, in whole or in part, and within the limitations of the board of directors' written purchase policies, any eligible obligations pursuant to paragraph (b)(1)(i) and (b)(2)(i) of this section without regard to whether they are loans the credit union is empowered to grant or are refinancing to ensure the obligations are ones the purchasing credit union is empowered to grant; and

(2) Purchase and hold the obligations described in § 701.23(b)(2)(i) through (iv) if the Federal credit union's CAMEL composite rating is ''1,'' ''2,'' or ''3''.

■ 4. In § 701.36, add paragraph (c)(3) to read as follows

§ 701.36 Federal credit union occupancy and disposal of acquired and abandoned properties.

* * * * *

(c) * * *

(3) *Temporary regulatory relief in response to COVID–19.* Any days that fall within the period commencing on April 21, 2020 and concluding on December 31, 2020, shall not be counted for purposes of determining a federal credit union's compliance with the required time periods described in paragraphs (c)(1) and (2) of this section.

* * * * *

[FR Doc. 2020–08434 Filed 4–20–20; 8:45 am]

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[27] Public Law 105–277, 112 Stat. 2681 (1998).

NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 722

RIN 3133–AF17

Real Estate Appraisals

AGENCY: National Credit Union Administration (NCUA).

ACTION: Interim final rule with request for comments.

SUMMARY: The NCUA Board (Board) is adopting this interim final rule to amend its regulations requiring appraisals of real estate for certain transactions. The interim final rule defers the requirement to obtain an appraisal or written estimate of market value for up to 120 days following the closing of a transaction for certain residential and commercial real estate transactions, excluding transactions for acquisition, development, and construction of real estate. Credit unions should make best efforts to obtain a credible valuation of real property collateral before the loan closing, and otherwise underwrite loans consistent with safety and soundness principles. The Board is providing this relief to allow credit unions to expeditiously extend liquidity to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of the National Emergency declared in connection with coronavirus disease 2019 (COVID–19). The interim final rule is substantially identical to a recent interim final rule issued by the Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (FRB); and Federal Deposit Insurance Corporation (FDIC) (collectively, the other banking agencies) that also defers the requirement to obtain an appraisal or evaluation for up to 120 days following the closing of a transaction for certain residential and commercial real estate transactions.

DATES: The interim final rule is effective April 21, 2020 through December 31, 2020. Comments on the interim final rule must be received no later than June 5, 2020.

ADDRESSES: You may submit written comments, identified by RIN 3133–AF17, by any of the following methods (Please send comments by one method only):

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (703) 518–6319. Include ''[Your Name]—Comments on Interim Final Rule: Real Estate Appraisals'' in the transmittal.
- *Mail:* Address to Gerard Poliquin, Secretary of the Board, National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314–3428.
- *Hand Delivery/Courier:* Same as mail address.

Public Inspection: You may view all public comments on the Federal eRulemaking Portal at *http://www.regulations.gov* as submitted, except for those we cannot post for technical reasons. The NCUA will not edit or remove any identifying or contact information from the public comments submitted. Due to social distancing measures in effect through at least April 30, 2020, the usual opportunity to inspect paper copies of comments in the NCUA's law library is not currently available. After social distancing measures are relaxed, visitors may make an appointment to review paper copies by calling (703) 518–6540 or emailing *OGCMail@ncua.gov.*

FOR FURTHER INFORMATION CONTACT: *Technical information:* Uduak Essien, Director—Credit Markets, (703) 518–6399, and Lou Pham, Senior Credit Specialist, (703) 548–2745, Office of Examination and Insurance. *Legal information:* Rachel Ackmann, Senior Staff Attorney, (703) 548–2601, Office of General Counsel, National Credit Union Administration, each at 1775 Duke Street, Alexandria, VA 22314.

SUPPLEMENTARY INFORMATION:

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I. Introduction

A. Background

Impact of COVID–19 on appraisals and written estimates of market value. Due to the impact of COVID–19, businesses and individuals have a heightened need for additional liquidity. Being able to quickly access equity in real estate could help address this need. However, government restrictions on non-essential movement and health and safety advisories in response to the National Emergency declared in connection with COVID–19,[1] including those relating to social distancing, have led to complications with respect to performing and completing real property appraisals and written estimates of market value needed to comply with federal appraisal regulations. As a result, some borrowers may experience delays in obtaining funds needed to meet immediate and near-term financial needs.

Title XI and the appraisal regulations. Title XI directs each Federal financial institutions regulatory agency to publish appraisal regulations for federally related transactions within its jurisdiction.[2] The purpose of Title XI is to protect federal financial and public policy interests [3] in real estate-related transactions by requiring that real estate appraisals used in connection with federally related transactions (Title XI appraisals) are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision.[4]

Title XI directs the Board to prescribe appropriate standards for Title XI appraisals under its jurisdictions.[5] At a minimum, the statute provides that a Title XI appraisal must be: (1) Performed in accordance with the Uniform Standards of Professional Appraisal Practice (USPAP); (2) a written appraisal, as defined by the statute; and (3) subject to appropriate review for compliance with USPAP.[6] While appraisals are ordinarily completed before a lender and borrower close a real estate transaction, there is no specific requirement in USPAP that appraisals be completed at a specific time relative to the closing of a transaction.

All federally related transactions must have Title XI appraisals. Title XI defines a ''federally related transaction'' as a real estate-related financial transaction [7] that is regulated or engaged in by a federal financial institutions regulatory agency and requires the services of an appraiser.[8] The Board has the authority to determine those real estate-related financial transactions that do not require the services of an appraiser and thus are not required to have Title XI appraisals.[9] The Board has exercised this authority by exempting certain categories of real estate-related financial transactions from its appraisal requirements.[10]

The Board has used its safety and soundness authority to require written estimates of market value for a subset of transactions for which an appraisal is not required.[11] Under the appraisal regulations, for these transactions, credit unions must obtain an appropriate written estimate of market value that is consistent with safe and sound practices.[12]

Authority to defer appraisals and written estimates of market value. In general, the Board requires that Title XI appraisals for federally related transactions occur prior to closing of a federally related transaction.[13] The Interagency Guidelines on Appraisals and Evaluations provide similar information about written estimates of market value.[14] Under this interim final rule, deferrals of appraisals and written estimates of market value will allow for expeditious access to credit. The deferrals, which will be temporary, are offered in response to a National Emergency. Credit unions that defer receipt of an appraisal or written estimate of market value are still expected to conduct their lending activity consistent with safe and sound underwriting principles, such as the ability of a borrower to repay a loan and other relevant laws and regulations.[15] These deferrals are not an exercise of the NCUA's waiver authority, because appraisals and written estimate of market value are being deferred, not waived. The deferrals are also not a waiver of USPAP requirements, given that (1) USPAP does not address the completion of an appraisal assignment with the timing of a lending decision; and (2) the deferred appraisal must be conducted in compliance with USPAP.

The deferral of written estimates of market value reflects the same considerations relating to the impact of COVID–19 as the deferral of appraisals. The Board requires written estimates of market value for certain exempt transactions as a matter of safety and soundness. Written estimates of market value do not need to comply with USPAP, but must be sufficiently robust to support a valuation conclusion. A written estimate of market value can be less complex than an appraisal and usually takes less time to complete than an appraisal, but it also commonly

[1] Proclamation 9994, 85 FR. 15337 (March 18, 2020).

[2] The term ''Federal financial institutions regulatory agencies'' means the FRB, the FDIC, the OCC, the National Credit Union Administration, and, formerly, the Office of Thrift Supervision. 12 U.S.C. 3350(6).

[3] These interests include those stemming from the Federal Government's roles as regulator and deposit insurer of financial institutions that engage in real estate lending and investment, guarantor or lender on mortgage loans, and as a direct party in real estate-related financial transactions. These federal financial and public policy interests have been described in predecessor legislation and accompanying Congressional Reports. *See* Real Estate Appraisal Reform Act of 1988, H.R. Rep. No. 100–1001, pt. 1, at 19 (1988); 133 Cong. Rec. 33047–33048 (1987).

[4] 12 U.S.C. 3331.

[5] 12 U.S.C. 3339.

[6] *Id.*

[7] 12 U.S.C. 3350(5). A real estate-related financial transaction is defined as any transaction that involves: (i) The sale, lease, purchase, investment in or exchange of real property, including interests in property, or financing thereof; (ii) the refinancing of real property or interests in real property; and (iii) the use of real property or interests in property as security for a loan or investment, including mortgage-backed securities.

[8] 12 U.S.C. 3350(4).

[9] Real estate-related financial transactions that the Board has exempted from its appraisal requirement are not federally related transactions under its appraisal regulations.

[10] *See* 12 CFR 722.3(a). The NCUA has determined that these categories of transactions do not require appraisals by state-certified or state-licensed appraisers in order to protect federal financial and public policy interests or to satisfy principles of safety and soundness.

[11] *See* 12 CFR 722.3(d).

[12] The NCUA and the other banking agencies have provided guidance on appraisals and evaluations (referred to as written estimates of market value in part 722) through the Interagency Guidelines on Appraisals and Evaluations. *See* 75 FR 77450 (December 10, 2010), *available at https://www.ncua.gov/files/letters-credit-unions/LCU2010-23Encl.pdf.*

[13] *See* 12 CFR 722.3(a), 722.4(b)&(d) (requiring an appraisal to: (1) Contain sufficient information and analysis to support the institution's decision to engage in the transaction, and (2) be based on the definition of market value in the regulation, which takes into account a specified closing date for the transaction).

[14] *See* 75 FR 77450 (Dec. 10, 2010), available at *https://www.ncua.gov/files/letters-credit-unions/LCU2010-23Encl.pdf.*

[15] *See,* 12 U.S.C. 1786(b) and (e); and 12 CFR 723.4; 12 CFR 741.3(b).

involves physical property inspections. For these reasons, the Board also is using its safety and soundness authority [16] to allow for deferral of written estimates of market value.

By the end of the deferral period, credit unions must obtain appraisals or written estimates of market value that are consistent with safe and sound practices as required by the NCUA's appraisal regulations.

B. Summary of the Interim Final Rule

The interim final rule allows a temporary deferral of the requirements for appraisals and written estimates of market value under the NCUA's appraisal regulations. The deferrals apply to both residential and commercial real estate-related financial transactions, excluding transactions for acquisition, development, and construction of real estate. The Board is excluding transactions for acquisition, development, and construction of real estate because these loans present heightened risks not associated with financing existing real estate.

Under the interim final rule, credit unions may close a real estate loan without a contemporaneous appraisal or written estimate of market value, subject to a requirement that credit unions obtain the appraisal or written estimate of market value, as would have been required under the appraisal regulations without the deferral, within a grace period of 120 days after closing of the transaction. While appraisals and written estimates of market value can be deferred, the Board expects credit unions to use best efforts and available information to develop a well-informed estimate of the collateral value of the subject property. In addition, the Board continues to expect credit unions to adhere to internal underwriting standards for assessing borrowers' creditworthiness and repayment capacity, and to develop procedures for estimating the collateral's value for the purposes of extending or refinancing credit. Loans for acquisition, development, and construction of real estate are being excluded because repayment of loans for such transactions is generally dependent on the completion or sale of the property being held as collateral as opposed to repayment generated by existing collateral or the borrower. The Board also expects credit unions to develop an appropriate risk mitigation strategy if the appraisal or written estimate of market value ultimately reveals a market value significantly lower than the expected market value. A credit union's risk mitigation strategy should consider safety and soundness risk to the institution, balanced with mitigation of financial harm to COVID–19-affected borrowers. The temporary provision permitting credit unions to defer an appraisal or written estimate of market value for eligible transactions will expire on December 31, 2020 (a transaction closed on or before December 31, 2020 is eligible for a deferral), unless extended by the Board. The Board believes that the limited timeframe for the deferral will in some respects help to manage potential risk by balancing the need for immediate relief due to the National Emergency with safety and soundness concerns for risk to credit unions as lenders.

II. Revisions to the Title XI Appraisal Regulations

The interim final rule adds a new, temporary provision to the appraisal regulations in part 722 that provides a 120-day deferral of appraisal and written estimates of market value requirements for all transactions secured by commercial or residential real estate during the National Emergency related to the COVID–19 pandemic, excluding transactions for acquisition, development, and construction of real estate. The interim final rule does not revise any of the existing appraisal exceptions or any other requirements with respect to the performance of written estimates of market value.

The interim final rule will allow credit unions to quickly provide liquidity to owners of commercial and residential property. The temporary provision allowing credit unions to defer appraisals or written estimates of market value for covered transactions will expire on December 31, 2020, unless extended by the Board.

III. Effective Date

The interim final rule is effective April 21, 2020.

IV. Administrative Law Matters

A. Administrative Procedure Act

The Board is issuing this interim final rule without prior notice and the opportunity for public comment and the 30-day delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).[17] Pursuant to the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' [18]

The Board believes that the public interest is best served by implementing the interim final rule as soon as possible. As discussed above, recent events have suddenly and significantly affected global economic activity, increasing businesses' and households' need to have timely access to liquidity from real estate equity. In addition, the spread of COVID–19 has greatly increased the difficulty of performing real estate appraisals and written estimates of market value in a timely manner. This relief will allow credit unions to better focus on supporting lending to creditworthy households and businesses in light of recent strains on the U.S. economy as a result of COVID–19, while reaffirming the safety and soundness principle that valuation of collateral is an essential part of the lending decision. For these reasons, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.[19]

The APA also requires a 30-day delayed effective date, except for (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.[20] Because the rule relieves a restriction, the interim final rule is exempt from the APA's delayed effective date requirement.[21] Additionally, the Board finds good cause to publish the interim final rule with an immediate effective date for the same reasons set forth above under the discussion of 5 U.S.C. 553(b)(B).

While the Board believes that there is good cause to issue the rule without advance notice and comment and with an immediate effective date, it is interested in the views of the public and requests comment on the interim final rule.

B. Congressional Review Act

For purposes of Congressional Review Act, the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a

[16] *Id.*

[17] 5 U.S.C. 553.

[18] 5 U.S.C. 553(b)(B).

[19] 5 U.S.C. 553(b)(B); 553(d)(3). For the same reasons, the Board is not providing the usual 60-day comment period before finalizing this rule. *See* NCUA Interpretive Ruling and Policy Statement (IRPS) 87–2, as amended by IRPS 03–2 and IRPS 15–1. 80 FR 57512 (Sept. 24, 2015).

[20] 5 U.S.C. 553(d).

[21] 5 U.S.C. 553(d)(1).

''major'' rule.[22] If a rule is deemed a ''major rule'' by the OMB, the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication.[23]

The Congressional Review Act defines a ''major rule'' as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.[24]

For the same reasons set forth above with respect to APA requirements, the Board is adopting the interim final rule without the delayed effective date generally prescribed under the Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.[25] In light of households' and businesses' immediate need to access liquidity from real estate equity, combined with the difficulty of obtaining appraisals during the ongoing COVID–19 outbreak, the Board believes that delaying the effective date of the rule would be contrary to the public interest.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) applies to rulemakings in which an agency by rule creates a new paperwork burden on regulated entities or modifies an existing burden.[26] For purposes of the PRA, a paperwork burden may take the form of a reporting, recordkeeping, or a third-party disclosure requirement, referred to as an information collection. The NCUA may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a valid OMB control number.

The information collection requirements of this part is approved under OMB control number 3133–0125, which require that a federal insured credit union retain a records of either the appraisal or estimate, which ever applies. The deferral to obtain an appraisal or estimate will not result in a change in burden; therefore, no submission will be made to OMB for review.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[27] generally requires an agency to consider whether the rule it proposes will have a significant economic impact on a substantial number of small entities. For purposes of the RFA, the Board considers credit unions with assets less than $100 million to be small entities.[28]

The RFA applies only to rules for which an agency publishes a general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b).[29] As discussed previously, consistent with 5 U.S.C. 553(b)(B), the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

Nevertheless, the Board seeks comment on whether, and the extent to which, the interim final rule would affect a significant number of small entities.

E. Executive Order 13132

Executive Order 13132 encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency as defined in 44 U.S.C. 3502(5), voluntarily complies with the executive order to adhere to fundamental federalism principles.

This interim final rule 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. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the executive order.

F. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that this rule will not affect family well-being within the meaning of section 654 of the Treasury and General Government Appropriations Act, 1999, Public Law 105–277, 112 Stat. 2681 (1998).

List of Subjects in 12 CFR Part 722

Appraisal, Appraiser, Credit unions, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

By the National Credit Union Administration Board on April 16, 2020.

Gerard Poliquin,

Secretary of the Board.

For the reasons discussed above, the Board amends 12 CFR part 722 as follows:

PART 722—APPRAISALS

■ 1. The authority citation for part 722 continues to read as follows:

Authority: 12 U.S.C. 1766, 1789, and 3331 *et seq.* Section 722.3(a) is also issued under 15 U.S.C. 1639h.

■ 2. Section 722.3 is amended by adding paragraph (g) to read as follows:

§ 722.3 Appraisals and written estimates of market value requirements for real estate-related financial transactions.

* * * * *

(g) *Deferrals of appraisals and written estimates of market value for certain residential and commercial transactions*—(1) *120-day grace period.* The completion of appraisals and written estimate of market value required under paragraphs (b), (c), and (d) of this section may be deferred up to 120 days from the date of closing.

(2) *Covered transactions.* The deferrals authorized under paragraph (g)(1) of this section apply to all residential and commercial real estate-secured transactions, excluding transactions for acquisition, development, and construction of real estate.

(3) *Sunset.* The appraisal and written estimate of market value deferrals authorized by this paragraph (g) will expire for transactions closing after December 31, 2020.

[FR Doc. 2020–08435 Filed 4–20–20; 8:45 am]

BILLING CODE 7535–01–P

[22] 5 U.S.C. 801 *et seq.*

[23] 5 U.S.C. 801(a)(3).

[24] 5 U.S.C. 804(2).

[25] 5 U.S.C. 808(2).

[26] 44 U.S.C. 3507(d).

[27] 5 U.S.C. 601 *et seq.*

[28] NCUA Interpretive Ruling and Policy Statement 15–1. 80 FR 57512 (Sept. 24, 2015).

[29] 5 U.S.C. 604(a).

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1304, 1306, and 1311

[Docket No. DEA–218I]

RIN 1117–AA61

Electronic Prescriptions for Controlled Substances

AGENCY: Drug Enforcement Administration, Department of Justice.

ACTION: Interim final rule; reopening of comment period.

SUMMARY: The Drug Enforcement Administration (DEA) published an interim final rule in the **Federal Register** on March 31, 2010, which provides practitioners with the option of writing prescriptions for controlled substances electronically. Since publishing the interim final rule, DEA has received questions and requests for clarification on various issues concerning the implementation and technical requirements for the electronic prescribing of controlled substances. DEA is therefore reopening the March 31, 2010, interim final rule to solicit comments from the public on specific issues outlined below regarding the electronic prescribing of controlled substances in anticipation of subsequently publishing a final rule on these topics.

DATES: DEA is reopening a comment period for the interim final rule published March 31, 2010, at 75 FR 16236, which became effective June 1, 2010. Electronic comments must be submitted, and written comments must be postmarked, on or before June 22, 2020. Commenters should be aware that the electronic Federal Docket Management System will not accept comments after 11:59 p.m. Eastern Time on the last day of the comment period.

ADDRESSES: To ensure proper handling of comments, please reference ''RIN 1117–AA61/Docket No. DEA–218I'' on all correspondence, including any attachments.

- *Electronic comments:* DEA encourages that all comments be submitted electronically through the Federal eRulemaking Portal, which provides the ability to type short comments directly into the comment field on the web page or to attach a file for lengthier comments. Please go to *http://www.regulations.gov* and follow the online instructions at that site for submitting comments. Upon completion of your submission, you will receive a Comment Tracking Number for your comment. Please be aware that submitted comments are not instantaneously available for public view on *Regulations.gov*. If you have received a Comment Tracking Number, your comment has been successfully submitted, and there is no need to resubmit the same comment.
- *Paper comments:* Paper comments that duplicate the electronic submission are not necessary and are discouraged. Should you wish to mail a paper comment in lieu of an electronic comment, it should be sent via regular or express mail to: Drug Enforcement Administration, *Attn:* DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, VA 22152.

FOR FURTHER INFORMATION CONTACT: Scott A. Brinks, Diversion Control Division, Drug Enforcement Administration; Mailing Address: 8701 Morrissette Drive, Springfield, Virginia 22152; Telephone: (571) 362–3261.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments

Please note that all comments received are considered part of the public record. They will, unless reasonable cause is given, be made available by DEA for public inspection online at *http://www.regulations.gov.* Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter. The Freedom of Information Act applies to all comments received. If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be made publicly available, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all of the personal identifying information you do not want made publicly available in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be made publicly available, you must include the phrase ''CONFIDENTIAL BUSINESS INFORMATION'' in the first paragraph of your comment. You must also prominently identify the confidential business information to be redacted within the comment.

Comments containing personal identifying information and confidential business information identified as directed above will generally be made publicly available in redacted form. If a comment has so much confidential business information or personal identifying information that it cannot be effectively redacted, all or part of that comment may not be made publicly available. Comments posted to *http://www.regulations.gov* may include any personal identifying information (such as name, address, and phone number) included in the text of your electronic submission that is not identified as directed above as confidential.

An electronic copy of this document is available in its entirety under the tab ''Supporting Documents'' of the public docket of this action at *http://www.regulations.gov* under FDMS Docket ID: DEA–2010–0010 (RIN 1117–AA61/Docket No. DEA–218I) for easy reference.

Background

Historically, where federal law required that a prescription for a controlled substance be issued in writing, that requirement could only be satisfied through the issuance of a paper prescription. DEA, however, amended its regulations in 2010 to provide practitioners with the option of issuing electronic prescriptions for controlled substances (EPCS) in lieu of paper prescriptions. In particular, on June 27, 2008, DEA published a Notice of Proposed Rulemaking (NPRM) describing its plan to revise its regulations to allow the creation, signature, transmission, and processing of controlled substance prescriptions electronically. 73 FR 36722. After considering the comments it had received and revising its proposed rule accordingly, DEA published its Interim Final Rule (IFR) for Electronic Prescriptions for Controlled Substances on March 31, 2010. 75 FR 16236. The IFR's changes became effective June 1, 2010.[1]

The IFR is codified in DEA regulations in 21 CFR parts 1300, 1304, 1306, and 1311. These provisions govern many different aspects of the electronic prescribing process and are explained in significant detail in the IFR. *See* 75 FR 16284–16289. Rather than repeating the IFR's explanation here, this discussion will briefly highlight several aspects of the IFR particularly germane to the issues on which DEA is seeking additional public comment.

The Controlled Substances Act (CSA), 21 U.S.C. 801–904, prevents the diversion of controlled substances into improper channels by requiring that

[1] On October 19, 2011, DEA published a short clarification addressing certain EPCS topics to help ensure that industry properly implemented the requirements of the IFR. 76 FR 64813.

controlled substances only be prescribed by practitioners registered with DEA (or exempt from the registration requirement). Thus, one of DEA's primary goals in the IFR was to ensure that nonregistrants cannot improperly gain access to electronic prescription applications—*i.e.,* the computer software practitioners use to electronically issue their prescriptions. Obviously, if nonregistrants could gain access to these applications, they might be able to use them to fraudulently generate or alter electronic prescriptions for controlled substances, thereby diverting these controlled substances in violation of the CSA.

Thus, the IFR contains a number of measures designed to minimize, to the greatest extent possible, the potential for the diversion of controlled substances through such misuse of electronic prescription applications. These include the IFR's approaches to identity proofing (verifying that the user of an electronic prescription application is who he or she claims to be) and logical access control (verifying that the authenticated user has the authority to perform the requested action).

Under the IFR, a practitioner can only sign and issue an electronic prescription by using an authentication credential, and a practitioner can only receive such a credential after having his or her identity verified. For individual practitioners (as opposed to practitioners associated with an institutional practitioner registrant), such identity proofing is done by authorized third parties that, after verifying a registrant's identity, issue an authentication credential to the registrant. These third parties must be federally approved credential service providers (CSPs) or certification authorities (CAs).

Further, the IFR requires CSPs and CAs to conduct identity proofing at Assurance Level 3 of the National Institute of Standards and Technology (NIST) Special Publication (SP) 800–63–1, ''Electronic Authentication Guideline,'' which allows either in-person or remote identity proofing. Since the IFR was published, changes in technology have led to the creation of new, updated NIST guidelines, NIST SP 800–63–3, ''Digital Identity Guidelines.'' Under NIST SP 800–63–3, the relevant identity proofing assurance level is Identity Assurance Level 2. Identity Assurance Level 2 of NIST SP 800–63–3, like Assurance Level 3 of NIST SP 800–63–1, allows either in-person or remote identity proofing.

The IFR allows institutional practitioners to conduct their own in-house identity proofing as part of their credentialing process of the individual practitioners who will be using the institution's electronic prescribing application to issue prescriptions. If an institutional practitioner chooses to conduct its own internal identity proofing, that process must fulfill a number of specific requirements, such as including review of a government-issued photographic identification of the individual and ensuring that the individual's state authorization to practice is in good standing. Once this process is completed, a separate entity within the institutional practitioner (or an outside CSP or CA) can issue an authorization credential to the individual. In the alternative, rather than conducting its own identity proofing, an institutional practitioner can require individuals to obtain identity proofing and authentication credentials in the same manner as individual practitioners, *i.e.,* through a CSP or CA.

Under the IFR, authorization credentials must be two-factor. That is, a user must supply two different forms of authentication—two ''factors''—to use their credential to issue an electronic prescription. These factors can take one of three forms. A factor can be knowledge-based—something only the practitioner knows—such as a password or a response to a certain question. The factor can be biometric data, such as a fingerprint or iris scan. Or the factor can be a hard token, a cryptographic key stored on a special hardware device, such as a smart card or cellular phone, separate from the computer system containing the electronic prescribing application. Accordingly, to issue an electronic prescription under the IFR, a practitioner must first enter two different factors into the system containing the prescription application (*e.g.,* enter a password, scan a fingerprint, insert a smartcard) before the system will allow that practitioner to issue the prescription.

Identity proofing and two-factor authentication credentials are not the only controls the IFR requires. The IFR also requires electronic prescription applications to use ''logical access controls.'' Logical access controls are controls in the application that ensure that the application only allows DEA registrants (or persons otherwise authorized under the CSA) to electronically sign controlled substance prescriptions (or indicate that prescriptions are ready to be signed). Logical access controls may be by user or role-based; that is, the application may allow permissions to be assigned to individual users or it may associate permissions with particular roles (*e.g.,* physician, nurse), and then assign each individual to the appropriate role.

In a private practice, logical access control must be handled by at least two people within the practice, one of whom must be a DEA registrant who has obtained his or her own two-factor authentication credential. Once a practitioner has received an authentication credential and wishes to use the electronic prescribing application, the two or more individuals who set the access controls first verify that the practitioner's DEA registration is valid. They then set the application's logical access controls to grant the practitioner access to those application functions that indicate a prescription is ready to be signed and that sign controlled substance prescriptions. The individuals handling the access controls must complete this process together: One person must enter the data to grant access, and then another person (who is a DEA registrant and who has an authentication credential) must approve the entry using his or her own authentication credential before the access becomes operational.

Institutional practitioners use a similar but slightly different process to establish logical access control under the IFR. First, at least two individuals within the institution's credentialing office must approve any list of individuals who are to be permitted to use the institution's electronic prescription application to sign controlled substance prescriptions or indicate that controlled substance prescriptions are ready to be signed. After the list is approved, it must be sent to a separate entity within the institution (probably an information technology office) that actually enters the logical access control data and thereby grants the individuals on the list access to the electronic prescription application. This process also requires at least two individuals: One to enter the data to grant access and one to approve this entry.

The IFR's logical access control provisions also require that practitioners lose their permission to electronically sign controlled substance prescriptions (or to indicate that such prescriptions are ready to be signed) in certain scenarios: If the individual practitioner's hard token or other authentication factor is lost, stolen, or compromised; if the individual (or institutional) practitioner's DEA registration expires without renewal; if the individual (or institutional) practitioner's DEA registration is terminated, revoked, or suspended; or if the individual practitioner is no longer

authorized to use the electronic prescription application for whatever reason (such as a practitioner's departure from the institution using the application).

Additionally, the IFR requires that any electronic prescription application used to prescribe controlled substances create and preserve an ''audit trail,'' a record of who accessed the application and certain operations they performed, including specified ''auditable events.'' Among other things, such auditable events, include any setting of or change to logical access controls related to the issuance of controlled substance prescriptions. Whenever an auditable event occurs, an individual authorized to set logical access controls must review the auditable event and determine whether it was a security event that compromised or could have compromised the integrity of the electronic prescription application's prescription records. Any such security events must be reported both to the provider of the electronic prescription application and to DEA within one business day.

The IFR also contains certain provisions governing the transmission of electronic prescriptions for controlled substances. After an electronic prescription for a controlled substance has been digitally signed and issued, the electronic prescription application must transmit the prescription to a pharmacy application (software that manages the receipt and processing of electronic prescriptions) as soon as possible so that the pharmacy can fill the prescription. If the practitioner is informed that the prescription's transmission has failed, he or she may provide a paper or oral (where permitted) prescription as a replacement (including a manually signed printout of the electronic prescription), but must ensure that the replacement prescription indicates that the prescription was originally issued electronically but that transmission failed. Before filling such a replacement prescription, a pharmacist must check his or her records to ensure that the electronic prescription was not already received and filled. If it was, the replacement prescription must be marked void. In this manner, the IFR seeks to ensure that electronic prescriptions will not be filled twice.

Finally, as discussed above, the IFR provides that biometric data, such as a fingerprint, is one of the authentication factors that a practitioner may use to issue a prescription. The IFR also provides certain requirements that an electronic prescription application using biometric data as an authentication factor must meet. On October 24, 2018, the SUPPORT for Patients and Communities Act (SUPPORT Act) was signed into law. The SUPPORT Act mandated that, ''[n]ot later than 1 year after the date of enactment of this Act, the Attorney General shall update the [IFR's] requirements for the biometric component of multifactor authentication with respect to electronic prescriptions of controlled substances.'' [2] This requirement is part of a larger provision that amends the Social Security Act to require e-prescribing (with some exceptions) of drugs prescribed on or after January 1, 2021.[3]

Outstanding EPCS Issues and DEA's Need for Additional Comments

DEA received over 200 comments in response to its 2008 EPCS NPRM. Many of the comments received in response to the NPRM included arguments that the EPCS provisions should allow for more flexible electronic processes similar to those for handling prescriptions for non-controlled substances. DEA's 2010 IFR addressed these comments, but, in light of the complexity of the issues involved and various changes between the NPRM and IFR, also sought further comments about certain issues. *See* 75 FR 16236, 16242, 16243, 16246, 16248, 16251–16253, 16270, 16289, 16294. Since publishing the IFR, DEA has received dozens of comments in response. Nonetheless, given the passage of time since the IFR was published and the rapid pace of technological development—in addition to the questions and requests for clarification that DEA continues to receive about the IFR's requirements—DEA has determined that it would be beneficial to reopen the IFR for comment to solicit comments from the public on specific issues, which are listed below, some of which DEA had previously raised as topics for comment in the IFR. DEA anticipates that such additional comments will prove helpful as it completes its final rule on these topics. In addition, as stated earlier, Congress has required the DEA to ''update'' its regulations on one of these issues, the biometric component of two-factor authentication, and comments from the public may help DEA to do so. DEA would like to remind commenters that any new approaches they are suggesting would be helpful only if DEA is able to adopt these new approaches while still ensuring the security and accountability of systems to identify fraud and prevent diversion.

Thus, DEA is now soliciting public comment on the following issues.

1. DEA currently requires that the authentication credential be two-factor to protect the practitioner from internal misuse, as well as external threats. *DEA is seeking comments in response to the following questions:*

- Is there an alternative to two-factor authentication that would provide an equally safe, secure, and closed system for electronic prescribing of controlled substance while better encouraging adoption of EPCS? If so, please describe the alternative(s) and indicate how, specifically, it would better encourage adoption of EPCS without diminishing the safety and security of the system.
- Are practitioners using universal second factor authentication (U2F)? If so, how (*e.g.,* Near-Field Communication (NFC), Bluetooth, USB, or Passwordless)?
- Are practitioners using cellular phones as a hard token, or as part of the two-factor authentication? Is short messaging service (SMS) being used as one of the authentication factors used for signing a controlled substance prescriptions?

Note: Authenticators using SMS and phone call verification currently fall under RESTRICTED use as outlined in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–63B, ''Authentication and Lifecycle Management,'' sections 5.1.3.3 and 5.2.10. Vulnerabilities evolve over time and implementing organizations should continually evaluate risk to determine long-term suitability.

2. As discussed, the IFR requires that a CSP or CA conduct identity proofing at Assurance Level 3 of the NIST SP 800–63–1, ''Electronic Authentication Guideline.'' As noted, because of updates in technology, NIST SP 800–63–3, ''Digital Identity Guidelines,'' now provides the most current relevant identity proofing guidelines. And, under NIST SP 800–63–3, the relevant assurance level is Identity Assurance Level 2. DEA believes that the ability to conduct remote identity proofing allowed for in Assurance Level 3 of NIST SP 800–63–1 and Identity Assurance Level 2 of NIST SP 800–63–3 ensures that practitioners in rural areas are able to obtain an authentication credential without the need for travel. DEA further believes that application providers work with CSPs or CAs to direct practitioners to

[2] Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act), Public Law 115–271, sec. 2003(c), 132 Stat. 3894, 3927(2018). The Attorney General has delegated the authority to make the required updates to the Administrator of the DEA. *See* 28 CFR 0.100.

[3] SUPPORT Act, sec. 2003(a),(b). This requirement is codified at 21 U.S.C. 1395w–104(e)(7).

one or more sources of two-factor authentication credentials that will be interoperable with their applications. Additionally, an IFR provision, 21 CFR 1311.105, requires that a CSP providing EPCS authentication credentials be approved by the General Services Administration Office of Technology Strategy/Division of Identify Management to conduct identity proofing at Assurance Level 3 or above of NIST SP 800–63–1 (*i.e.,* Identity Assurance Level 2 or above of NIST SP 800–63–3). DEA has received questions asking for clarification of this requirement. *DEA is seeking comment on this approach to identity proofing, as well as any more comments about whether clarification of the language regarding CSP approval would be helpful.*

3. DEA emphasizes that institutional practitioners are allowed, but not required, to conduct identity proofing. If an institutional practitioner decides to have each practitioner obtain identity proofing and the two-factor authentication credential on his or her own, as other individual practitioners do, that is permissible under the rule. *DEA is seeking comment on this approach to identity proofing by institutional practitioners.*

• DEA is also seeking comment on the methods institutional practitioners are using to validate the identity of practitioners remotely. For example, are institutions viewing practitioners' driver's licenses or other forms of identification remotely using video?

4. The IFR requires that any setting of or change to logical access controls related to the issuance of controlled substance prescriptions be defined as an auditable event and that a record of the changes be retained as part of the internal audit trail. *DEA is seeking comment on this approach to logical access control for individual practitioners. In particular, DEA is seeking comment on whether there are any adjustments that DEA could make to this requirement that would reduce its burden on practitioners while still protecting the integrity of EPCS.*

5. As explained above, the IFR sets requirements for how institutional practitioners must establish logical access control for their electronic prescription applications. Among other things, the IFR requires that at least two individuals from the institution's credentialing office provide the part of the institution that controls the computer applications with the names of practitioners authorized to issue controlled substance prescriptions. The entry of the data that grant access to practitioners also requires the involvement of at least two individuals, one to enter the data and another to approve the entry. The institutional registrant is responsible for designating and documenting individuals or roles that can perform these functions. And a practitioner's access must be revoked whenever any of the following occurs: The institutional practitioner's or, where applicable, individual practitioner's DEA registration expires without renewal, or is terminated, revoked, or suspended; the practitioner reports that a token or other factor associated with the two-factor authentication credential has been lost or compromised; or the individual practitioner is no longer authorized to use the institutional practitioner's application. *DEA is seeking comment on this approach to logical access control for institutional practitioners.*

6. The IFR requires that security events—auditable events that compromise or could compromise the integrity of the prescription records of an electronic prescription application—be reported to both the application's provider and DEA within one business day. *DEA is seeking comment from EPCS application users on whether they have experienced a security incident and, if so, whether they have experienced any difficulties reporting it.*

7. *DEA is generally seeking comment on any aspects of the IFR or other EPCS areas where further clarification would be helpful. For example:*

• What types of issues have registrants encountered during the adoption and implementation of EPCS into their workflow, particularly where a prescriber uses an electronic health record (electronic medical record)?

• What types of devices are currently being used to create, sign, transmit, and process controlled substances electronically? For example, are practitioners using iOS or Android mobile devices, Chromebooks, Windows Laptop/Desktops, Mac OS, or others?

• Are there problems using two-factor authentication due to the method used to complete verification (*e.g.,* prohibited or limited cellular service, restriction on external USB devices, offline system access)?

• Has two-factor authentication caused barriers to efficient workflows?

• Have staff workflows at long-term and post-acute care facilities faced barriers during the adoption and implementation of EPCS?

8. Many institutions have implemented biometrics as part of their authentication credentialing for electronic applications. *DEA is seeking comments in response to the following questions:*

• What types of biometric authentication credentials are currently being utilized (*e.g.,* fingerprint, iris scan, handprint)?

• How has the implementation of biometrics, as an option for meeting the two-factor authentication requirement, benefited the EPCS program?

• Are there alternatives to biometrics that could result in a greater adoption rate for EPCS while continuing to meet the authentication requirements? If so, please describe the alternative(s) and indicate how, specifically, it would be an improvement on the authentication requirements in the IFR.

9. Previous commenters have expressed concern regarding failed transmissions of electronic prescriptions. *DEA is seeking comment in response to the following questions:*

• Have any entities experienced failed transmissions (*e.g.,* an EPCS being sent to the wrong pharmacy, an incorrectly filled out EPCS, an EPCS fails to send, the pharmacy does not have the prescribed controlled substance in stock, or the pharmacy rejects the EPCS)?

• If any failed transmissions have occurred, what alternative means of submitting the prescription to the pharmacy have been used?

Uttam Dhillon,

Acting Administrator.

[FR Doc. 2020–07085 Filed 4–20–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 328

[Docket ID FEMA–2020–0018]

Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use; Exemptions

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Notification of exemptions.

SUMMARY: The Federal Emergency Management Agency (FEMA) announces exemptions from a temporary final rule that FEMA published in the **Federal Register** on April 10, 2020.

DATES: *Applicability date:* This notification applies beginning on April 17, 2020.

ADDRESSES: You may review the docket by searching for Docket ID FEMA–2020–

0018, via the Federal eRulemaking Portal: *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Daniel McMasters, Program Analyst, Office of Policy and Program Analysis, 202–709–0661, *FEMA-DPA@fema.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

On April 10, 2020, the Administrator of the Federal Emergency Management Agency Administrator (FEMA Administrator or the Administrator) published a temporary final rule (the ''rule'') to allocate certain scarce or threatened materials for domestic use, so that these materials may not be exported from the United States without explicit approval by FEMA.[1] The rule aids the response of the United States to the spread of COVID–19 by ensuring that certain scarce or threatened health and medical resources are appropriately allocated for domestic use.[2]

The Administrator issued the rule under the authority of the Defense Production Act of 1950, as amended (DPA),[3] and related executive orders and delegations.[4] Most prominently, on April 3, 2020, the President signed a Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use (Memorandum).[5] In the Memorandum, the President directed the Secretary of Homeland Security, through the Administrator, and in consultation with the Secretary of Health and Human Services (HHS), to use any and all authority available under section 101 of the DPA to allocate to domestic use, as appropriate, five types of personal protective equipment (PPE) materials (covered materials).

Consistent with the Memorandum, the rule provides that until August 10, 2020, and subject to certain exemptions, no shipments of covered materials may leave the United States without explicit approval by FEMA.[6] The rule requires U.S. Customs and Border Protection (CBP), in coordination with such other officials as may be appropriate, to notify FEMA of an intended export of covered materials.[7] CBP must temporarily detain any shipment of such covered materials pending the Administrator's determination whether to return for domestic use, issue a rated order for, or allow the export of part or all of the shipment.[8] In making such determination, the Administrator may consult other agencies and will consider the totality of the circumstances, including: (1) The need to ensure that scarce or threatened items are appropriately allocated for domestic use; (2) minimization of disruption to the supply chain, both domestically and abroad; (3) the circumstances surrounding the distribution of the materials and potential hoarding or price-gouging concerns; (4) the quantity and quality of the materials; (5) humanitarian considerations; and (6) international relations and diplomatic considerations.[9]

In addition to providing for the determination described above, the rule includes one exemption to the requirement that covered materials not leave the United States without explicit approval by FEMA. In the interest of promoting the national defense, the Administrator determined to generally allow the export of covered materials from shipments made by or on behalf of U.S. manufacturers with continuous export agreements with customers in other countries since at least January 1, 2020, so long as at least 80 percent of such manufacturer's domestic production of such covered materials, on a per item basis, was distributed in the United States in the preceding 12 months.[10] If FEMA determines that a shipment of covered materials falls within this exemption, such materials may be exported without further review by FEMA, provided that the Administrator may waive this exemption and fully review shipments of covered materials, if the Administrator determines that doing so is necessary or appropriate to promote the national defense.[11]

Pertinent to this notification, the rule also provides that the Administrator may establish, in his discretion, additional exemptions that he determines necessary or appropriate to promote the national defense and will announce any such exemptions by notice in the **Federal Register**. This notification announces such exemptions.

Notice of Additional Exemptions

Pursuant to 44 CFR 328.102(d)(2), section 101 of the DPA, and related authorities, the Administrator has determined that it is necessary and appropriate in order to promote the national defense to exempt certain categories of covered materials from the requirements of 44 CFR 328.102(a) and (b). The Administrator may waive any of these exemptions at any time and fully review shipments of covered materials under 44 CFR 328.102(b) if the Administrator determines that doing so is necessary or appropriate to promote the national defense. In addition, if CBP believes that any manufacturer, broker, distributor, exporter, or shipper of any covered materials is intentionally modifying its shipments in a way to take advantage of one or more of these exemptions, diverting materials from the United States market, or otherwise trying to circumvent the FEMA review requirements in 44 CFR 328.102(b) through application of any of the exemptions, CBP may detain a shipment and forward information about that shipment (including the basis for CBP's belief) to FEMA for determination.

For exemptions (2), (3), (4), (8), and (9), below, FEMA will require a letter of attestation to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials. The letter should be submitted to CBP with other documentation related to the shipment, and contain the following information:

(1) A description of which exemption(s) the exporter is claiming.

(2) Details regarding the shipment that are sufficient for the CBP and FEMA officials to determine whether the shipment falls under the claimed exemption(s).

(3) A statement that the provided information is true and accurate to the best of the exporter's knowledge, and that the exporter is aware that false information is subject to prosecution under the DPA, as outlined in the allocation order.

Exporters who have concerns about how to file this letter of attestation should reach out to CBP to request additional details.

The exemptions are as follows.

(1) *Shipments to U.S. Commonwealths and Territories, Including Guam, American Samoa, Puerto Rico, U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands (Including Minor Outlying Islands).* The Administrator issues this exemption to clarify that shipments to U.S. territories are not

[1] *See* 85 FR 20195 (Apr. 10, 2020) (codified at 44 CFR part 328).

[2] *See* 44 CFR 328.101.

[3] 50 U.S.C. 4501 *et seq.*

[4] *See* 85 FR at 20196–20197.

[5] *See* Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use for the Secretary of Health and Human Services, the Secretary of Homeland Security, and the Administrator of the Federal Emergency Management Agency (Apr. 3, 2020), *https://www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/.*

[6] 44 CFR 328.102(a).

[7] 44 CFR 328.102(b).

[8] *Id.*

[9] 44 CFR 328.102(c).

[10] 44 CFR 328.102(d)(1).

[11] *Id.*

considered to be ''exports'' for purposes of the implementation of the allocation order. The Administrator believes that this exemption is necessary to clarify the scope of the original allocation order and to ensure that scarce or threatened items are allocated for the use of all Americans, including Americans living in U.S. territories. The Administrator believes that ensuring widespread access by Americans to covered materials is necessary and appropriate to promote the national defense and consistent with the purposes of the Presidential Memorandum and the subsequent allocation order to provide for the needs of all Americans.

(2) *Exports of Covered Materials by Non-profit or Non-governmental Organizations that are Solely for Donation to Foreign Charities or Governments for Free Distribution (Not Sale) at their Destination(s).* The Administrator believes that it is necessary and appropriate to promote the national defense to support the efforts of domestic and international non-profit and non-governmental organizations (NGOs) responding to COVID–19 around the world, in response to the humanitarian concerns that have arisen as a result of this global pandemic, and consistent with the position of the United States as a world leader. A key element of national defense is the ability of the United States to convey international leadership during times of crisis, including the COVID–19 pandemic. This includes our ability to exercise moral leadership, help those in need, and to remain stalwarts of the international community. Denying shipments of humanitarian goods would undermine U.S. diplomacy and messaging internationally, allowing strategic competitors to take advantage of our absence. The allocation order recognizes the importance of humanitarian considerations by specifying it as an explicit factor to be considered in making determinations about whether to allow an export to proceed or to utilize the purchase domestically. This exemption creates a limited definition of what constitutes a humanitarian shipment for purpose of the exemption by limiting the exemption both on the exporter side (by limiting it to non-profit organizations or NGOs) and on the recipient side (foreign governments or charities). Further, the exemption is limited by specifying that the goods must be shipped as donations in kind and cannot be sold upon receipt. This limited exemption will allow FEMA to meet the goals of the allocation order while prioritizing review of commercial shipments most likely to be needed for domestic use.

FEMA will require a letter of attestation to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials.

(3) *Intracompany Transfers of Covered Materials by U.S. Companies from Domestic Facilities to Company-owned or Affiliated Foreign Facilities.* The Administrator recognizes the international nature of many U.S. companies, and believes that allowing these companies to continue to produce at a high level is crucial to the functioning of the U.S. economy. One of the factors specifically identified in the allocation order as being critical for the national defense is minimization of disruption of the supply chain, both domestically and abroad. The Administrator believes that allowing this exemption would minimize disruption to the domestic supply chain, while not causing a detrimental shortage of covered materials to Americans.

FEMA will require a letter of attestation to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials.

(4) *Shipments of Covered Materials that are Exported Solely for Assembly in Medical Kits and Diagnostic Testing Kits Destined for U.S. Sale and Delivery.* The Administrator recognizes that, in many circumstances, materials destined for domestic use are assembled in other countries, prior to being returned to the United States for domestic distribution. One of the factors specifically identified in the allocation order as being critical for the national defense is the minimization of disruption of the supply chain, both domestic and abroad. The Administrator believes that allowing the shipments of these kits is important to allow for uninterrupted continuation of existing supply chains, and is the most expedient means to ensure timely delivery and allocation of these materials within the United States to respond to the national emergency. Relying on existing supply chains where available and efficient will maximize the ability for FEMA and CBP to focus limited resources on areas where the supplies are being shipped outside the United States for final disposition. As noted above, the Administrator believes that ensuring widespread access by Americans to covered materials is necessary and appropriate to promote the national defense and consistent with the purposes of the Presidential Memorandum, and the subsequent allocation order, to provide for the needs of Americans.

FEMA will require a letter of attestation to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials.

(5) *Sealed, Sterile Medical Kits and Diagnostic Testing Kits Where Only a Portion of the Kit is Made Up of One or More Covered Materials That Cannot be Easily Removed Without Damaging the Kits.* The Administrator believes that detaining shipments containing these kits, and subsequently attempting to separate the covered materials from the kits (potentially destroying the kits in the process), is an inefficient use of national defense resources. In addition, ready-to-use sealed, sterile medical kits are vital for the healthcare community globally to continue to meet broader urgent healthcare needs in the context of the pandemic. Addressing the related healthcare needs globally will enable other countries to best respond to and contain the pandemic, which will advance the ability of the United States Government to best contain the pandemic within the United States. The Administrator believes that refraining from needlessly dismantling valuable kits is necessary and appropriate to promote the national defense and consistent with the purposes of the Presidential Memorandum, and the subsequent allocation order, to provide for the needs of Americans.

(6) *Declared Diplomatic Shipments from Foreign Embassies and Consulates to their Home Countries. These May be Shipped via Intermediaries (Logistics Providers) but are Shipped from and Consigned to Foreign Governments.* Pursuant to the diplomatic interests of the United States, the Administrator believes that it is necessary and appropriate to promote the national defense to allow diplomatic shipments to proceed without interruption or delay. One of the factors specifically identified in the allocation order as being critical for the national defense is international relations and diplomatic concerns. The Administrator believes that stopping these types of shipments would cause significant international relations and domestic concerns, while not providing significantly enhanced access to covered materials for Americans. In order to continue to foster positive diplomatic relationships with our partners and allies, the Administrator has determined to exempt diplomatic shipments from the allocation order.

(7) *Shipments to Overseas U.S. Military Addresses, Foreign Service Posts (e.g., Diplomatic Post Offices), and Embassies.* The Administrator believes the intent of the Presidential Memorandum is to protect Americans by ensuring their access to covered materials. The Administrator believes this extends to all Americans, including those serving our country overseas. For this reason, the Administrator believes that it is necessary and appropriate to promote the national defense to allow shipments of covered materials to be shipped overseas to U.S. government employees working abroad.

(8) *In-Transit Merchandise: Shipments in Transit through the United States with a Foreign Shipper and Consignee, Including Shipments Temporarily Entered into a Warehouse or Temporarily Admitted to a Foreign Trade Zone.* The April 3 Presidential Memorandum states that ''To ensure that these scarce or threatened PPE materials *remain in the United States* for use in responding to the spread of COVID–19, it is the policy of the United States to prevent domestic brokers, distributors, and other intermediaries from diverting such material overseas'' (emphasis added).[12] The Administrator believes that merchandise merely passing through the United States is outside the scope of the Presidential Memorandum. In addition, the Administrator believes that diversion of these specific types of materials would cause significant impacts to international relations, diplomacy, and global supply chains, each of which is a factor that is specifically identified in the allocation order as being necessary and appropriate to promote the national defense. Therefore, the Administrator is explicitly exempting these shipments from the enforcement of the allocation order.

FEMA will require a letter of attestation to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials.

(9) *Shipments for Which the Final Destination is Canada or Mexico.* The Administrator recognizes the important role our closest neighbors play in the national defense interests of the United States. The integration of the economies and supply chains among the United States, Mexico, and Canada is robust. Many critical sectors—including, for example, food and agriculture; communications and energy; automotive and industrial; water and wastewater management; and law enforcement and first responders—cross national boundaries. Negative impacts to workers, including a lack of PPE, in these and other critical sectors in Canada and Mexico may cause significant interruptions to the corresponding supply chains in the United States, and in turn, may disrupt the large flow of cross-border trade with our neighbors. In addition, the United States maintains close economic and diplomatic ties with these nations, which would be negatively impacted by the restriction of exports of covered materials into these countries. In the allocation order, the Administrator specifically identified minimization of disruption to the supply chain, both domestically and abroad, and international relations and diplomatic considerations as key elements of promoting the national defense. Each would be negatively impacted by slowing or halting the transportation of covered materials across country lines to Canada and Mexico. For these reasons, the Administrator has determined that this exemption is necessary and appropriate to promote the national defense.

FEMA will require a letter of attestation stating that the items being shipped are for use in and not for transshipment through Canada or Mexico, to be submitted to FEMA via CBP's document imaging system and placed on file with CBP, certifying to FEMA the purpose of the shipment of covered materials.

(10) *Shipments by or on behalf of the U.S. Federal Government, including its Military.* The Administrator recognizes that any shipment of covered materials made by or on behalf of the Federal Government, including its military, are inherently necessary and appropriate to promote the national defense, and so should be exported without delay.

Peter T. Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2020–08542 Filed 4–17–20; 4:15 pm]

BILLING CODE 9111–19–P

[12] *See* Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use for the Secretary of Health and Human Services, the Secretary of Homeland Security, and the Administrator of the Federal Emergency Management Agency, sec. 1 (Apr. 3, 2020), *https://www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/.*

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 160 and 164

Notification of Enforcement Discretion for Telehealth Remote Communications During the COVID–19 Nationwide Public Health Emergency

AGENCY: Office of the Secretary, HHS.

ACTION: Notification of enforcement discretion.

SUMMARY: This notification is to inform the public that the Department of Health and Human Services (HHS) is exercising its discretion in how it applies the Privacy, Security, and Breach Notification Rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA). As a matter of enforcement discretion, the HHS Office for Civil Rights (OCR) will not impose penalties for noncompliance with the regulatory requirements under the HIPAA rules against covered health care providers in connection with the good faith provision of telehealth during the COVID–19 nationwide public health emergency.

DATES: The Notification of Enforcement Discretion went into effect on March 17, 2020, and will remain in effect until the Secretary of HHS declares that the public health emergency no longer exists, or upon the expiration date of the declared public health emergency, including any extensions, (as determined by 42 U.S.C. 247d),[1] whichever occurs first.

FOR FURTHER INFORMATION CONTACT: Rachel Seeger at (202) 619–0403 or (800) 537–7697 (TDD).

SUPPLEMENTARY INFORMATION:

I. Background

The Office for Civil Rights (OCR) at the Department of Health and Human Services (HHS) is responsible for enforcing certain regulations issued under the Health Insurance Portability and Accountability Act of 1996 (HIPAA),[2] as amended by the Health

[1] Public Health Emergency Declaration issued by HHS Secretary, pursuant to Section 319 of the Public Health Service Act, on January 31, 2020, with retroactive effective date of January 27, 2020. For more information, see *https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx.*

[2] Due to the public health emergency posed by COVID–19, the HHS Office for Civil Rights (OCR) is exercising its enforcement discretion under the conditions outlined herein. We believe that this guidance is a statement of agency policy not subject to the notice and comment requirements of the Administrative Procedure Act (APA). 5 U.S.C. 553(b)(3)(A). OCR additionally finds that, even if this guidance were subject to the public participation provisions of the APA, prior notice

Information Technology for Economic and Clinical Health (HITECH) Act, to protect the privacy and security of protected health information, namely the HIPAA Privacy, Security and Breach Notification Rules (the HIPAA Rules).

During the COVID–19 national emergency, which also constitutes a nationwide public health emergency, covered health care providers subject to the HIPAA Rules may seek to communicate with patients, and provide telehealth services, through remote communications technologies.

Some of these technologies, and the manner in which they are used by HIPAA covered health care providers, may not fully comply with the requirements of the HIPAA Rules. OCR will exercise its enforcement discretion and will not impose penalties for noncompliance with the regulatory requirements under the HIPAA Rules against covered health care providers in connection with the good faith provision of telehealth during the COVID–19 nationwide public health emergency.

A covered health care provider that wants to use audio or video communication technology to provide telehealth to patients during the COVID–19 nationwide public health emergency can use any non-public facing remote communication product that is available to communicate with patients. OCR is exercising its enforcement discretion to not impose penalties for noncompliance with the HIPAA Rules in connection with the good faith provision of telehealth using such non-public facing audio or video communication products during the COVID–19 nationwide public health emergency. This exercise of discretion applies to telehealth provided for any reason, regardless of whether the telehealth service is related to the diagnosis and treatment of health conditions related to COVID–19.

For example, a covered health care provider in the exercise of their professional judgement may request to examine a patient exhibiting COVID–19 symptoms, using a video chat application connecting the provider's or patient's phone or desktop computer in order to assess a greater number of patients while limiting the risk of infection of other persons who would be exposed from an in-person consultation. Likewise, a covered health care provider may provide similar telehealth services in the exercise of their professional judgment to assess or treat any other medical condition, even if not related to COVID–19, such as a sprained ankle, dental consultation or psychological evaluation, or other conditions.

Under this Notification, covered health care providers may use popular applications that allow for video chats, including Apple FaceTime, Facebook Messenger video chat, Google Hangouts video, Zoom, or Skype, to provide telehealth without risk that OCR might seek to impose a penalty for noncompliance with the HIPAA Rules related to the good faith provision of telehealth during the COVID–19 nationwide public health emergency. Providers are encouraged to notify patients that these third-party applications potentially introduce privacy risks, and providers should enable all available encryption and privacy modes when using such applications.

Under this notification, however, Facebook Live, Twitch, TikTok, and similar video communication applications are public facing, and should not be used in the provision of telehealth by covered health care providers.

Covered health care providers that seek additional privacy protections for telehealth while using video communication products should provide such services through technology vendors that are HIPAA compliant and will enter into HIPAA business associate agreements (BAAs) in connection with the provision of their video communication products. The list below includes some vendors that represent that they provide HIPAA-compliant video communication products and that they will enter into a HIPAA BAA.

- Skype for Business I Microsoft Teams
- Updox
- VSee
- Zoom for Healthcare
- Doxy.me
- Google G Suite Hangouts Meet
- Cisco Webex Meetings I Webex Teams
- Amazon Chime
- GoToMeeting
- Spruce Health Care Messenger

OCR has not reviewed the BAAs offered by these vendors, and this list does not constitute an endorsement, certification, or recommendation of specific technology, software, applications, or products. There may be other technology vendors that offer HIPAA-compliant video communication products that will enter into a HIPAA BAA with a covered entity. Further, OCR does not endorse any of the applications that allow for video chats listed above.

Under this noticfication, however, OCR will not impose penalties against covered health care providers for the lack of a BAA with video communication vendors or any other noncompliance with the HIPAA Rules that relates to the good faith provision of telehealth services during the COVID–19 nationwide public health emergency.

III. Collection of Information Requirements

This notice of enforcement discretion creates no legal obligations and no legal rights. Because this notice imposes no information collection requirements, it need not be reviewed by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Dated: April 2, 2020.

Roger T. Severino,

Director, Office for Civil Rights Department of Health and Human Services.

[FR Doc. 2020–08416 Filed 4–20–20; 8:45 am]

BILLING CODE 4153–01–P

and comment for this guidance is impracticable, and there is good cause to issue this guidance without prior public comment and without a delayed effective date. 5 U.S.C. 553(b)(3)(B) & (d)(3).

NATIONAL FOUNDATION ON THE ARTS AND HUMANITIES

National Endowment for the Humanities

45 CFR Part 1168

RIN 3136–AA39

Implementing the Federal Civil Penalties Adjustment Act Improvements Act of 2015

AGENCY: National Endowment for the Humanities; National Foundation on the Arts and the Humanities.

ACTION: Interim final rule; request for comments.

SUMMARY: The National Endowment for the Humanities (NEH) is adjusting the civil monetary penalties it imposes for violations of NEH's New Restrictions on Lobbying regulation, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Act). The 2015 Act, which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act), requires such adjustments to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

DATES: *Effective date:* This interim final rule is effective on April 21, 2020. Comments must be submitted on or

before May 21, 2020. *Applicability date:* The adjusted penalty amounts will apply to penalties assessed on or after January 15, 2020, if the associated violations occurred after November 2, 2015.

ADDRESSES: You may send comments by email to *gencounsel@neh.gov.*

Instructions: Include ''RIN 3136–AA39'' in the subject line of the email.

FOR FURTHER INFORMATION CONTACT: Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606–8322; *gencounsel@neh.gov.*

SUPPLEMENTARY INFORMATION:

1. Background

For each regulation that imposes a civil monetary penalty, the 2015 Act requires agencies to: (1) Adjust the level of civil monetary penalties with an initial ''catch-up'' inflation adjustment through an interim final rulemaking; and (2) make subsequent annual adjustments for inflation.

The Inflation Adjustment Act defines ''civil monetary penalty'' as a penalty, fine, or other sanction that is (1) for a specific monetary amount provided by Federal law, or has a maximum amount provided by Federal law; (2) assessed or enforced by an agency pursuant to Federal law; and (3) assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts.

The formula for the amount of a civil monetary penalty inflation adjustment is prescribed by law—as explained in Office of Management and Budget (OMB) Memorandum M–16–06 (February 24, 2016)—and is based on the percentage change in the Consumer Price Index for All Urban Consumers (CPI–U) published by the U.S. Department of Labor for the month of October preceding the date of the adjustment, relative to the October CPI–U in the year of the previous adjustment. Additionally, the 2015 Act eliminated the ten-percent cap on adjustments imposed by the Debt Collection Improvement Act of 1996. Instead, the 2015 Act imposes a cap on the amount of the adjustment, such that the amount of increase may not exceed 150 percent of the pre-adjustment penalty amount. Therefore, the total penalty amount resulting from adjustments under the 2015 Act may not exceed 250 percent of the pre-adjustment penalty amount.

NEH has only one regulation with civil monetary penalty provisions which requires adjustment under the 2015 Act: Its New Restrictions on Lobbying (45 CFR 1168).

2. Adjustments to Civil Monetary Penalties in NEH's New Restrictions on Lobbying Regulation

This interim final rule incorporates the initial ''catch up'' adjustment and the annual adjustment for 2020, and applies those adjustments cumulatively to the civil monetary penalties in 45 CFR 1168.400. The calculations for these adjustments are in accordance with the OMB memoranda providing guidance on implementing the initial ''catch up'' adjustment [1] and the 2020 adjustment [2] under the 2015 Act.

A. Initial ''Catch-Up'' Adjustment for Inflation

NEH determined the first ''catch up'' adjustment by calculating the percent change between the CPI–U for October of the last year in which Congress adjusted the penalties (not including any adjustment made pursuant to the Inflation Adjustment Act before November 2, 2015), and the CPI–U for October 2015, and then rounding to the nearest dollar.

Congress set the penalty amounts found in 31 U.S.C. 1352(c) in 1989, and has not adjusted them since. At that time, the range of civil penalties was a minimum of $10,000 and a maximum of $100,000. Between October 1989 and October 2015, the CPI–U increased by 189.361 percent.

Therefore, the post-adjustment minimum penalty under NEH's New Restrictions on Lobbying regulation is $10,000 × 1.89361 percent = $18,936.10, which rounds to $18,936. The post-adjustment maximum penalty under NEH's New Restrictions on Lobbying regulation is $100,000 × 1.89361 = $189,361. These post-adjustment penalties are less than 250 percent of the pre-adjustment penalties, so they do not implicate the post-adjustment amount limitation in the 2015 Act. Thus, the penalty range under NEH's New Restrictions on Lobbying regulation, for the purposes of the initial ''catch up'' adjustment, is a minimum of $18,936 and a maximum of $189,361.

B. 2020 Adjustment for Inflation

This interim final rule also incorporates the required subsequent annual adjustment for 2020. NEH determined the 2020 adjustment by calculating the percent increase between the CPI–U for the month of October preceding the date of the adjustment (October 2019) and the CPI–U for the October one year prior to the October immediately preceding the date of the adjustment (October 2018).

For 2019, the penalty range for violations under NEH's New Restrictions on Lobbying regulation was a minimum of $20,134 and a maximum of $201,340.[3] Between October 2018 and October 2019, the CPI–U increased by 101.764 percent.

Therefore, the new, post-adjustment minimum penalty for 2020 under NEH's New Restrictions on Lobbying regulation is $20,134 × 1.01764 = $20,489.16, which rounds to $20,489. The new, post-adjustment maximum penalty for 2020 under NEH's New Restrictions on Lobbying regulation is $201,340 × 1.01764 = $204,891.64, which rounds to $204,892. These post-adjustment penalties are less than 250 percent of the pre-adjustment penalties, so they do not implicate the post-adjustment amount limitation in the 2015 Act. Thus, the range of penalties under NEH's New Restrictions on Lobbying regulation, for the purposes of the 2020 annual adjustment, is a minimum of $20,489 and a maximum of $204,892.

[1] OMB Memorandum M–16–06 (February 24, 2016).

[2] OMB Memorandum M–20–05 (December 16, 2019).

[3] Table 1 details the annual adjustments to New Restrictions on Lobbying Civil Monetary Penalties for years 2016–2020.

TABLE 1—ANNUAL ADJUSTMENTS TO NEW RESTRICTIONS ON LOBBYING CIVIL MONETARY PENALTIES
[2016–2020]

Year	Baseline penalty range	Applicable multiplier based on percent increase in CPI–U	New baseline penalty range
2016	$10,000–$100,000	1.89361	$18,936–$189,361
2017	$18,936–$189,361	[4] 1.01636	$19,246–$192,459
2018	$19,246–$192,459	[5] 1.02041	$19,639–$196,387
2019	$19,639–$196,387	[6] 1.02522	$20,134–$201,340
2020	$20,134–$201,340	1.01764	$20,489–$204,892

[4] OMB Memorandum M–17–11 (December 16, 2016).
[5] OMB Memorandum M–18–03 (December 15, 2017).
[6] OMB Memorandum M–19–04 (December 14, 2018).

3. Subsequent Annual Adjustments

The 2015 Act requires agencies to make annual adjustments to civil penalty amounts no later than January 15 of each year following the initial adjustment. NEH will calculate the subsequent annual adjustments using the same method as the annual adjustment previously described herein. If the CPI–U does not increase, then the civil penalties remain the same. Therefore, if NEH adjusts penalties in January 2021, NEH will determine the adjustment by calculating the percent change between the CPI–U for October 2020 (the October immediately preceding the date of adjustment) and October 2019 (the October one year prior to October 2020).

NEH will publish a Notice in the **Federal Register** containing the amounts of these annual inflation adjustments no later than January 15 of each year.

4. Compliance

Administrative Procedure Act of 1946

NEH finds good cause to issue this interim final rule without prior notice and comment. The 2015 Act requires agencies to adjust their civil monetary penalties according to a statutory formula, and NEH does not have any discretion when determining the amount of its adjustments; it merely performs ministerial computations to determine those amounts. As such, prior notice and comment is unnecessary because NEH would be unable to change the substance of this rule in response to suggestions from commenters. NEH is accepting public comments up to thirty (30) days after publication of this interim final rule, and may address any comments received when it publishes a final rule adopting this interim final rule.

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 OMB for review.

Executive Order 13771, Reducing Regulation 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.

Executive Order 13132, Federalism

This rulemaking does not have federalism implications. 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.

Executive Order 12988, Civil Justice Reform

This rulemaking meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988. Specifically, this interim final rule is written in clear language designed to help reduce litigation.

Executive Order 13175, Indian Tribal Governments

Under the criteria in Executive Order 13175, NEH evaluated this interim final rule and determined that it will not have any potential effects on Federally recognized Indian Tribes.

Executive Order 12630, Takings

Under the criteria in Executive Order 12630, this rulemaking does not have significant takings implications. Therefore, a takings implication assessment is not required.

Regulatory Flexibility Act of 1980

This rulemaking will not have a significant adverse impact on a substantial number of small entities, including small businesses, small governmental jurisdictions, or certain small not-for-profit organizations.

Paperwork Reduction Act of 1995

This rulemaking does not impose an information collection burden under the Paperwork Reduction Act. This action contains no provisions constituting a collection of information pursuant to the Paperwork Reduction Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not contain a Federal mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector of $100 million or more in any one year.

National Environmental Policy Act of 1969

This interim final rule will not have a significant effect on the human environment.

Small Business Regulatory Enforcement Fairness Act of 1996

This interim final rule will not be a major rule as defined in section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

E-Government Act of 2002

All information about NEH required to be published in the **Federal Register**

may be accessed at *www.neh.gov.* The website *https://www.regulations.gov* contains electronic dockets for NEH's rulemakings under the Administrative Procedure Act of 1946.

Plain Writing Act of 2010

To ensure this final rule was written in plain and clear language so that it can be used and understood by the public, NEH modeled the language of this final rule on the Federal Plain Language Guidelines.

Lists of Subjects in 45 CFR 1168

Administrative practice and procedure, Lobbying, Penalties.

For the reasons stated in the preamble, the National Endowment for the Humanities amends 45 CFR part 1168 as follows:

PART 1168—NEW RESTRICTIONS ON LOBBYING

■ 1. The authority citation for part 1168 is revised to read as follows:

Authority: 20 U.S.C. 959(a)(1); 28 U.S.C. 2461 note; 31 U.S.C. 1352.

■ 2. Amend § 1168.400:
■ a. By removing ''$10,000'' and adding in its place ''$20,489'' and by removing ''$100,000'' and adding in its place ''$204,892'', respectively, each place they appear in paragraphs (a), (b), and (e); and
■ b. By adding paragraph (g).

The addition reads as follows:

§ 1168.400 Penalties.

* * * * *

(g) The penalty amounts listed under paragraphs (a), (b), and (e) of this section shall be adjusted annually for inflation. NEH will publish a document in the **Federal Register** containing the new penalty amounts no later than January 15 of each year.

■ 3. Amend appendix A to part 1168:
■ a. By removing ''$10,000'' and adding in its place ''$20,489'' and by removing ''$100,000'' and adding in its place ''$204,892'', respectively, each place they appear; and
■ b. By adding a section entitled ''Annual Adjustments for Inflation'' at the end.

The addition reads as follows:

Appendix A to Part 1168—Certification Regarding Lobbying

* * * * *

Annual Adjustments for Inflation

The penalty amounts listed in this appendix will be adjusted annually for inflation. NEH will publish a document in the **Federal Register** containing the new penalty amounts no later than January 15 of each year.

Dated: April 8, 2020.

Caitlin Cater,

Attorney-Advisor, National Endowment for the Humanities.

[FR Doc. 2020–07761 Filed 4–20–20; 8:45 am]

BILLING CODE 7536–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[MD Docket No. 20–58; FCC 20–15; FRS 16594]

Closure of FCC Lockbox 979088 Used To Collect Payment of Forfeiture Penalties Imposed by the Commission

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopts an Order that closes Lockbox 979088 and modifies the relevant rule provisions to require electronic payment of forfeiture penalties imposed by the Commission.

DATES: Effective May 21, 2020.

FOR FURTHER INFORMATION CONTACT: Warren Firschein, Office of Managing Director at (202) 418–2653 or Roland Helvajian, Office of Managing Director at (202) 418–0444.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Order, FCC 20–15, MD Docket No. 20–58, adopted on February 26, 2020 and released on February 28, 2020, which is the subject of this rulemaking. The full text of this document is available for public inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW, Washington, DC 20554, or by downloading the text from the Commission's website at *https://www.fcc.gov/document/closure-commission-lockbox-used-collect-forfeiture-payments.*

I. Administrative Matters

A. Final Regulatory Flexibility Analysis

1. Section 603 of the Regulatory Flexibility Act, as amended, requires a regulatory flexibility analysis in notice and comment rulemaking proceedings. See 5 U.S.C. 603(a). As we are adopting these rules without notice and comment, no regulatory flexibility analysis is required.

B. Final Paperwork Reduction Act of 1995 Analysis

2. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

C. Congressional Review Act

3. The Commission will not send a copy of the Order pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the adopted rules are rules of agency organization, procedure, or practice that do not ''substantially affect the rights or obligations of non-agency parties. See 5 U.S.C. 804(3)(C).

II. Introduction

4. In the Order, we reduce expenditures by the Commission and modernize procedures by modifying § 1.80(h) of our rules, 47 CFR 1.80(h), which sets forth the method for parties to remit forfeiture penalties imposed by the Commission. The rule amendment reflects the closure of the P.O. Box [1] used to collect forfeiture payments. We discontinue the option of manual fee payments and instead require the use of an electronic payment for forfeiture penalties.

5. The Commission has begun to reduce its reliance on P.O. Boxes for the collection of fees, instead encouraging the use of electronic payment systems for all application and regulatory fees and closing certain lockboxes. We find that electronic payment of forfeiture penalties imposed by the Commission reduces the agency's expenditures (including eliminating the annual fee for the bank's services) and the cost of manually processing each transaction, with little or no inconvenience to the Commission's regulatees, applicants, and the public.

6. As part of this effort, we are now closing P.O. Box 979088 and modifying the relevant rule provision that requires payment of forfeiture penalties via the closed P.O. Box. The rule change is contained in the Appendix of the Order. We make this change without notice and comment because it is a rule of agency organization, procedure, or practice exempt from the general notice-

[1] A P.O. Box used for the collection of fees is referred to as a ''lockbox'' in our rules and other Commission documents. The FCC collects application processing fees using a series of P.O. Boxes located at U.S. Bank in St. Louis, Missouri. *See* 47 CFR 1.1101–1.1109 (setting forth the fee schedule for each type of application remittable to the Commission along with the correct lockbox).

and-comment requirements of the Administrative Procedure Act, *see* 5 U.S.C. 553(b)(A).

7. *Implementation.* As a temporary transition measure, for 90 days after publication of this document in the **Federal Register**, U.S. Bank will continue to process payments to P.O. Box 979088. After that date, forfeiture payments must be made in accordance with the procedures set forth in each forfeiture order and on the Commission's website, *www.fcc.gov/licensing-databases/fees.* For now, such payments will be made through the Fee Filer Online System (Fee Filer), accessible at *https://www.fcc.gov/licensing-databases/fees/fee-filer.* As we assess and implement U.S. Treasury initiatives toward an all-electronic payment system, we may transition to other secure payment systems with appropriate public notice and guidance.

III. Ordering Clauses

8. *Accordingly, it is ordered,* that pursuant to sections 4(i), 4(j), 158, 208, and 224 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 158, 208, and 224, the Order is hereby *adopted* and the rules set forth in the Appendix of the Order are hereby *amended* effective May 21, 2020.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note, unless otherwise noted.

■ 2. Amend § 1.80 by revising paragraph (h) to read as follows:

§ 1.80 Forfeiture proceedings.

* * *

(h) *Payment.* The forfeiture should be paid electronically using the Commission's electronic payment system in accordance with the procedures set forth on the Commission's website, *www.fcc.gov/licensing-databases/fees.*

* * * * *

[FR Doc. 2020–07540 Filed 4–20–20; 8:45 am]

BILLING CODE 6712–12–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket Nos. 17–97, 20–67; FCC 20–42; FRS 16631]

Call Authentication Trust Anchor; Implementation of TRACED Act—Knowledge of Customers by Entities With Access to Numbering Resources

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts a rule that mandates that all originating and terminating voice service providers implement the STIR/SHAKEN caller ID authentication framework in the internet Protocol (IP) portions of their networks by June 30, 2021. In establishing this requirement, the Report and Order both acts on the Commission's proposal to require voice service providers to implement the STIR/SHAKEN caller ID authentication framework if major voice service providers did not voluntarily do so by the end of 2019, and implements Congress's direction in the recently enacted Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act to mandate STIR/SHAKEN not later than 18 months after the date of enactment of that Act. This action builds on the Commission's aggressive and multi-pronged approach to ending illegal caller ID spoofing.

DATES: Effective May 21, 2020.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Mason Shefa, Competition Policy Division, Wireline Competition Bureau, at *Mason.Shefa@fcc.gov.*

SUPPLEMENTARY INFORMATION: The full text of this document, WC Docket Nos. 17–97, 20–67; FCC 20–42, adopted and released on March 31, 2020, is available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street SW, Room CY–A257, Washington, DC 20554 or at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-20-42A1.pdf* . The Further Notice of Proposed Rulemaking WC Docket Nos. 17–97, 20–67; FCC 20–42, adopted concurrently with this document and available at the same internet address, is published elsewhere in this issue of the **Federal Register**.

Synopsis

I. Introduction

1. Each day, Americans receive millions of unwanted phone calls. One source indicates that Americans received over 58 billion such calls in 2019 alone. These include ''spoofed'' calls whereby the caller falsifies caller ID information that appears on a recipient's phone to deceive them into thinking the call is from someone they know or can trust. Spoofing has legal and illegal uses. For example, medical professionals calling patients from their mobile phones often legally spoof the outgoing phone number to be the office phone number for privacy reasons, and businesses often display a toll-free call-back number. Illegal spoofing, on the other hand, occurs when a caller transmits misleading or inaccurate caller ID information with the intent to defraud, cause harm, or wrongly obtain anything of value. And these spoofed calls are not simply an annoyance—they result in billions of dollars lost to fraud, degrade consumer confidence in the voice network, and harm our public safety. A 2019 survey estimated that spoofing fraud affected one in six Americans and cost approximately $10.5 billion in a single 12-month period.

2. The Commission, Congress, and state attorneys general all agree on the need to protect consumers and put an end to illegal caller ID spoofing. Over the past three years, the Commission has taken a multi-pronged approach to this problem—issuing hundreds of millions of dollars in fines for violations of our Truth in Caller ID rules; expanding those rules to reach foreign calls and text messages; enabling voice service providers to block certain clearly unlawful calls before they reach consumers' phones; and clarifying that voice service providers may offer call-blocking services by default. We have also called on industry to ''trace back'' illegal spoofed calls and text messages to their original sources and encouraged industry to develop and implement new caller ID authentication technology. That technology, known as STIR/SHAKEN, allows voice service providers to verify that the caller ID information transmitted with a particular call matches the caller's number. Entities variously refer to this technology as either ''SHAKEN/STIR'' or ''STIR/SHAKEN.'' In the past, the Commission has referred to the technology as ''SHAKEN/STIR.'' To ensure consistency with the TRACED Act, we use ''STIR/SHAKEN'' here. Its widespread implementation will reduce the effectiveness of illegal spoofing,

allow law enforcement to identify bad actors more easily, and help voice service providers identify calls with illegally spoofed caller ID information before those calls reach their subscribers.

3. Today, we build on our aggressive and multi-pronged approach to ending illegal caller ID spoofing. First, we mandate that all voice service providers implement the STIR/SHAKEN caller ID authentication framework in the internet Protocol (IP) portions of their networks by June 30, 2021. In recognition of the fact that it is caller ID information transmitted with a call that is authenticated, we use the term ''caller ID authentication'' in this Report and Order and Further Notice of Proposed Rulemaking. We understand this term to be interchangeable with the term ''call authentication'' as used in other contexts, including the TRACED Act. In establishing this requirement, we both act on our proposal to require voice service providers to implement the STIR/SHAKEN caller ID authentication framework if major voice service providers did not voluntarily do so by the end of 2019, and implement Congress's direction in the recently enacted Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act to mandate STIR/SHAKEN not later than 18 months after the date of enactment of that Act. Second, we propose and seek comment on additional measures to combat illegal spoofing, including further implementation of the TRACED Act.

II. Background

4. Technological advancements and marketplace developments in IP-based telephony have made caller ID spoofing easier and more affordable than ever before. Today, widely available Voice over internet Protocol (VoIP) software allows malicious callers to make spoofed calls with minimal experience and cost. Taking advantage of the ability to use spoofing to mask the true identity of an incoming call, these callers have turned to this technology as a quick and cheap way to defraud targets and avoid being discovered. Driven in part by the rise of VoIP, the telecommunications industry has transitioned from a limited number of carriers that all trusted each other to provide accurate caller origination information to a proliferation of different voice service providers and entities originating calls, which allows consumers to enjoy the benefits of far greater competition but also creates new ways for bad actors to undermine this trust.

5. To combat illegal spoofing, industry technologists from the internet Engineering Task Force (IETF) and the Alliance for Telecommunications Industry Solutions (ATIS) developed standards for the authentication and verification of caller ID information for calls carried over an IP network using the Session Initiation Protocol (SIP). The Session Initiation Protocol (SIP) is ''an application-layer control (signaling) protocol for creating, modifying, and terminating sessions'' such as internet Protocol (IP) telephony calls. The IETF formed the Secure Telephony Identity Revisited (STIR) working group, which has produced several protocols for authenticating caller ID information. ATIS, together with the SIP Forum, produced the Signature-based Handling of Asserted information using toKENs (SHAKEN) specification which standardizes how the protocols produced by STIR are implemented across the industry. The SIP Forum is ''an industry association with members from . . . IP communications companies,'' with a mission ''[t]o advance the adoption and interoperability of IP communications products and services based on SIP.'' Together, these technical standards comprise the ''STIR/SHAKEN'' framework for caller ID authentication. The STIR/SHAKEN framework consists of two high-level components: (1) The technical process of authenticating and verifying caller ID information; and (2) the certificate governance process that maintains trust in the caller ID authentication information transmitted along with a call.

6. *Authenticating and Verifying Caller ID Information Through STIR/SHAKEN.* The STIR/SHAKEN authentication and verification processes center on the transmission of encrypted information used to attest to the accuracy of caller ID information transmitted with a call. Specifically, an originating voice service provider adds a unique header to the network-level message used to initiate a SIP call (the SIP INVITE). This SIP INVITE contains a series of unencrypted headers which provides information about the message, such as a ''From'' header, giving information about the calling party; a ''To'' header, giving information about the called party; and a ''Via'' header, which ''indicates the path taken by the request so far and helps in routing the responses back along the same path.'' Both originating and downstream providers are technically capable of appending headers to the SIP INVITE. When a subscriber places a call, the originating voice service provider uses an authentication service to create this ''Identity'' header, which contains encrypted identifying information as well as the location of the public key that can be used to decode this information. The authentication service can be provided by the voice service provider itself, or by a third party acting under the voice service provider's direction. When the terminating voice service provider receives the call, it sends the SIP INVITE with the Identity header to a verification service, which uses the public key that corresponds uniquely to the originating voice service provider's private key to decode the encrypted information and verify that it is consistent with the information sent without encryption in the SIP INVITE. Like the corresponding authentication service on the originating voice service provider's end, the terminating voice service provider's verification service can be performed internally or by a trusted third-party service. The verification service then sends the results of the verification process—including whether the decoding process was successful and whether the encrypted information is consistent with the information sent without encryption—to the terminating voice service provider. STIR/SHAKEN thus establishes a chain of trust back to the originating voice service provider.

7. Because the STIR/SHAKEN framework relies on transmission of information in the Identity header of the SIP INVITE, it only operates on the IP portions of a voice service provider's network—that is, those portions served by network technology that is able to initiate, maintain, and terminate SIP calls. If a call terminates on a network or is routed at any point over an intermediate provider network that does not support the transmission of SIP calls, the Identity header will be lost. Because STIR/SHAKEN only operates on IP networks, some stakeholders have advocated for a solution referred to as ''out-of-band STIR,'' in which caller ID authentication information is sent across the internet, *out-of-band* from the call path, allowing STIR/SHAKEN to be implemented on networks that are not fully IP. Out-of-band STIR remains in the early stages of development.

8. The STIR/SHAKEN framework relies on the originating voice service provider attesting to the subscriber's identity. The SHAKEN specification allows an originating voice service provider to provide different ''levels'' of attestation. Specifically, the voice service provider can indicate that (i) it can confirm the identity of the subscriber making the call, and that the subscriber is using its associated

telephone number (''full'' or ''A'' attestation); (ii) it can confirm the identity of the subscriber but not the telephone number (''partial'' or ''B'' attestation); or merely that (iii) it is the point of entry to the IP network for a call that originated elsewhere, such as a call that originated abroad or on a domestic network that is not STIR/SHAKEN-enabled (''gateway'' or ''C'' attestation).

9. To maintain trust in the voice service providers that vouch for caller ID information, the STIR/SHAKEN framework uses digital ''certificates'' issued through a neutral governance system. The STIR/SHAKEN credentials are based on an X.509 credential system. X.509 is a specific standard for a type of public key infrastructure system that uses certificates to facilitate secure internet communications. The framework requires that each voice service provider receive its own certificate that contains, among other components, that voice service provider's public key, and states, in essence, that (i) the voice service provider is that which it claims to be; (ii) the voice service provider is authorized to authenticate the caller ID information; and (iii) the voice service provider's claims about the caller ID information it is authenticating can thus be trusted. Every time an originating voice service provider originates an authenticated call, it transmits the location of its certificate in the Identity header, allowing the verification service to acquire the public key and verify the caller ID information, and have certainty that the public key is truly associated with the voice service provider that originated the call. The ''location'' is sent unencrypted in the form of a Uniform Resource Locator (URL).

10. The STIR/SHAKEN governance model requires several roles in order to operate: (1) A *Governance Authority,* which defines the policies and procedures for which entities can issue or acquire certificates; (2) a *Policy Administrator,* which applies the rules set by the governance authority, confirms that certification authorities are authorized to issue certificates, and confirms that voice service providers are authorized to request and receive certificates; (3) *Certification Authorities,* which issue the certificates used to authenticate and verify calls; and (4) the *voice service providers* themselves, which, as call initiators, select an approved certification authority from which to request a certificate, and which, as call recipients, check with certification authorities to ensure that the certificates they receive were issued by the correct certification authority.

11. *Commission and North American Numbering Council Action to Promote STIR/SHAKEN Deployment.* In July 2017, the Commission released a *Notice of Inquiry,* launching a broad inquiry into caller ID authentication and how to expedite its development and implementation. In the *Notice of Inquiry,* the Commission recognized the potential of caller ID authentication to ''reduc[e] the risk of fraud and ensur[e] that callers be held accountable for their calls.'' Among other issues, the Commission sought comment on its role in promoting implementation of caller ID authentication technology; what involvement, if any, it should have in STIR/SHAKEN governance; and how to address caller ID authentication for networks that use non-IP technology.

12. In February 2018, the Commission directed the Call Authentication Trust Anchor Working Group of the North American Numbering Council (NANC) to recommend ''criteria by which a [Governance Authority] should be selected'' and a ''reasonable timeline or set of milestones for adoption and deployment of a SHAKEN/STIR call authentication system, including metrics by which the industry's progress can be measured.'' In its May 2018 report, the NANC recommended that representatives from various industry stakeholders comprise a board overseeing the Governance Authority, and that ''individual companies capable of signing and validating VoIP calls using SHAKEN/STIR should implement the standard within a period of approximately one year after completion of the NANC CATA report.'' Chairman Pai accepted these recommendations shortly after they were issued by the NANC.

13. In November 2018, drawing on the NANC's May 2018 recommendation that capable voice service providers rapidly implement STIR/SHAKEN, Chairman Pai sent letters to major voice service providers urging them to implement a robust caller ID authentication framework by the end of 2019. He asked these providers for specific details about their implementation plans, and encouraged those that did not appear to have established concrete plans to promptly protect their subscribers with STIR/SHAKEN. In response, the providers submitted letters detailing their implementation efforts. Since that time, Commission staff has closely tracked the progress of major voice service providers in implementation of the STIR/SHAKEN framework.

14. In June 2019, the Commission adopted a *Declaratory Ruling and Third Further Notice of Proposed Rulemaking* that proposed and sought comment on mandating implementation of STIR/SHAKEN in the event that major voice service providers did not voluntarily implement the framework by the end of 2019. We stressed that ''[i]mplementation of the SHAKEN/STIR framework across voice networks is important in the fight against unwanted, including illegal, robocalls'' and proposed to extend any mandate to ''wireline, wireless, and Voice over Internet Protocol (VoIP) providers''; sought comment on what we should require voice service providers to accomplish to meet an implementation mandate; and asked for comment on how long voice service providers should be given to comply with such a mandate. We further sought comment on whether we should establish requirements regarding the display of STIR/SHAKEN attestation information, what role the Commission should have in STIR/SHAKEN governance, and how we could encourage caller ID authentication on non-IP networks. The *Declaratory Ruling and Third Further Notice of Proposed Rulemaking* also affirmed that voice service providers may, by default, block unwanted calls based on reasonable call analytics, as long as their customers are informed and have the opportunity to opt out of the blocking; proposed to create a safe harbor for voice service providers that block calls which fail STIR/SHAKEN verification; and sought comment on whether we should create a safe harbor for voice service providers that block calls which do not have authenticated caller ID information.

15. In July 2019, the Commission held a summit focused on implementation of STIR/SHAKEN. Summit participants included representatives from large and small voice service providers, analytics companies, vendors, and members of the Governance Authority. The participants discussed implementation progress made by major voice service providers; using STIR/SHAKEN to improve the consumer experience; and implementation challenges faced by small voice service providers.

16. *Developments in STIR/SHAKEN Governance.* Currently, the Secure Telephone Identity Governance Authority (STI–GA), established by ATIS, fills the Governance Authority role. The STI–GA's membership was designed to provide a diverse representation of stakeholders from across the industry. The STI–GA selected the Policy Administrator, iconectiv, in May 2019. In December 2019, the Policy Administrator approved the first Certification Authorities, and announced that voice service providers are now able to

register with the Policy Administrator to obtain the credentials necessary to receive certificates from approved Certification Authorities.

17. *Implementation by Voice Service Providers.* We recognize that a number of providers have been working hard to implement caller ID authentication. Some voice service providers reported that, by the end of 2019, they had completed the necessary network upgrades to support the STIR/SHAKEN framework and that they were exchanging a limited amount of traffic with authenticated caller ID information with other voice service providers. Others, however, reported only that they had completed necessary network upgrades by the end of 2019, but had not begun exchanging authenticated traffic with other voice service providers. Still others have shown little to no progress in upgrading their networks to be STIR/SHAKEN-capable.

18. More specifically, as of the end of 2019, AT&T, Bandwidth, Charter, Comcast, Cox, T-Mobile, and Verizon announced that they had upgraded their networks to support STIR/SHAKEN. AT&T, for example, confirmed that it ''authenticates all calls on its network that originate from [Voice over LTE] and consumer VoIP customers'' and ''estimates that approximately 90 percent of its wireless customer base (prepaid and postpaid) and more than 50 percent of its consumer wireline customer base are SHAKEN/STIR capable.'' Charter stated that it ''fulfilled [its] commitment to complete the implementation of the STIR/SHAKEN framework by the end of [2019].'' Similarly, Comcast reported that ''virtually all calls originating from a Comcast residential subscriber and terminating with a Comcast residential subscriber are fully authenticated through the STIR/SHAKEN protocol.'' Cox reported that it ''has deployed SHAKEN/STIR to over 99% of [its] residential customers enabling Cox to sign originating and terminating calls.'' T-Mobile stated that it was ''the first wireless provider to fully implement STIR/SHAKEN standards on [its] network'' and is ''capable of signing and authenticating 100% of SIP traffic that both originates and then terminates on [its] network.'' According to Verizon, it ''finished deploying STIR/SHAKEN to its wireless customer base (which constitutes more than 95% of [its] total traffic) in March 2019,'' ''is devoting substantial resources to deploying STIR/SHAKEN to wireline customers that receive service on IP platforms capable of being upgraded with the STIR/SHAKEN protocol'' and expects ''to achieve deployment of STIR/SHAKEN to Fios Digital customers later this year.''

19. These voice service providers, however, were exchanging only a limited amount of authenticated traffic with other voice service providers as of the end of 2019. For instance, Comcast has begun to exchange authenticated calls with AT&T and T-Mobile, and explained that, as of December 2019, approximately 14.25% of all calls ''originating on other voice providers' networks and bound for Comcast residential subscribers had a STIR/SHAKEN-compliant header and were verified by Comcast.'' T-Mobile explained that it is also authenticating some traffic exchanged with AT&T, Comcast, and Inteliquent. According to AT&T, it ''exchanges approximately 40 percent of its SHAKEN/STIR consumer VoIP traffic with one terminating service provider.'' Verizon stated that it was signing ''under half of [its] outbound traffic'' with one provider as of the end of 2019, and that ''for the other three partners,'' its production levels were under 5%. Cox explained that it is ''exchanging authenticated traffic with four carriers resulting in over 14% of all calls on Cox' residential IP network being verified.'' Charter stated that it is ''exchanging signed and authenticated customer call traffic end-to-end with Comcast.'' Bandwidth is also in early stages of exchanging traffic and ''has designed, tested and deployed the capability to exchange some of its production traffic with Verizon Wireless directly utilizing 'self-signed' certifications that are in keeping with the STIR/SHAKEN framework.''

20. Other voice service providers—namely Frontier, Sprint, U.S. Cellular, and Vonage—stated that they have performed necessary network upgrades, but had only begun the negotiating and testing phase of exchanging authenticated traffic with other voice service providers as of the end of 2019. Frontier reported that it ''established the capability to authenticate and sign calls'' and is in the negotiating and testing phase regarding authenticating traffic exchanged with other voice service providers. Sprint reported that it ''deployed the core STIR/SHAKEN capability in its network'' and was testing the exchange of authenticated traffic with Comcast and T-Mobile. In 2019, U.S. Cellular ''successfully implemented the STIR/SHAKEN technology in its network'' and is currently ''in various stages of the [interconnection agreement] process with three of the four national wireless carriers . . . including, the successful exchange of traffic on a test basis with at least one of . . . those carriers.'' Vonage reported that it was testing with ''its two largest peering partners'' and had ''reached out to twenty additional carriers to implement outbound and inbound testing schedules.''

21. An additional category of voice service providers—namely CenturyLink, TDS, and Google—has indicated limited progress in making the necessary network upgrades. CenturyLink, for instance, stated that as of late 2019 it had ''taken the steps necessary to prepare its network for SHAKEN/STIR deployment'' and is currently conducting testing for wider deployment on its IP networks. TDS, meanwhile, reported that it had completed work in 2019 to evaluate, select, and lab test a vendor solution to allow it to integrate STIR/SHAKEN in the IP portions of its network. It is in the process of developing implementation plans, but because many of its interconnection points with other providers are not IP-enabled, it ''forecast[s] that only a small percentage of traffic will be exchanged in IP when SHAKEN/STIR is initially deployed in the TDS IP network.'' Google provided limited detail about the status of implementation but stated that it ''remains committed to implementing SHAKEN/STIR and . . . ha[s] taken considerable steps toward doing so.''

22. *Congressional Direction to Require STIR/SHAKEN Implementation.* On December 30, 2019, Congress enacted the TRACED Act, with the stated purpose of ''helping to reduce illegal and unwanted robocalls'' through numerous mechanisms. Along with other provisions directed at addressing robocalls, the TRACED Act directs the Commission to require, no later than 18 months from enactment, all voice service providers to implement STIR/SHAKEN in the IP portions of their networks and implement an effective caller ID authentication framework in the non-IP portions of their networks. The TRACED Act further creates processes by which voice service providers (1) may be exempt from this mandate if the Commission determines they have achieved certain implementation benchmarks, and (2) may be granted an extension for compliance based on a finding of undue hardship because of burdens or barriers to implementation or based on a delay in development of a caller ID authentication protocol for calls delivered over non-IP networks. The TRACED Act further directs us, not later than December 30, 2020, to submit a report to Congress that includes: (1) an analysis of the extent to which voice service providers have implemented caller ID authentication frameworks and

whether the availability of necessary equipment and equipment upgrades has impacted such implementation; and (2) an assessment of the efficacy of the call authentication frameworks.

23. This rulemaking is one of several steps we are taking to implement the TRACED Act. For instance, we recently proposed rules to establish a registration process for a ''single consortium that conducts private-led efforts to trace back the origin of suspected unlawful robocalls.'' Additionally, the Wireline Competition Bureau (Bureau) has charged the NANC Call Authentication Trust Anchor Working Group with providing recommendations regarding the TRACED Act's direction that the Commission ''issue best practices that providers of voice service may use as part of the implementation of effective call authentication frameworks . . . to take steps to ensure the calling party is accurately identified.'' We will continue to work swiftly and carefully to implement the TRACED Act and protect Americans from illegal robocalls.

III. Report and Order

24. In this Report and Order, we require all originating and terminating voice service providers to implement the STIR/SHAKEN framework in the IP portions of their networks by June 30, 2021. We adopt this mandate for several reasons, including that (1) Widespread implementation will result in significant benefits from American consumers; (2) the record overwhelmingly reflects support from a broad array of stakeholders for rapid STIR/SHAKEN implementation; (3) the state of industry-wide implementation at the end of 2019 demonstrates that further government action is necessary for timely, ubiquitous implementation; and (4) the TRACED Act expressly directs us to require timely STIR/SHAKEN implementation. Below, we discuss these reasons in more detail; describe the specific requirements that comprise our mandate; discuss our legal authority to adopt these requirements; respond to the limited record opposition to a mandate; and find that the benefits of STIR/SHAKEN implementation will far exceed the costs. USTelecom and CTIA ask us to adopt a broad call blocking safe harbor today. Transaction Network Services suggests that we require or recommend that providers pair STIR/SHAKEN with analytics. We intend to address call-blocking issues and the role of analytics in relation to call blocking in a separate item and thus decline to address these requests here.

A. Mandating the STIR/SHAKEN Framework

25. We require all originating and terminating voice service providers to implement the STIR/SHAKEN framework in the IP portions of their networks by June 30, 2021 for several compelling reasons. First, ubiquitous STIR/SHAKEN implementation will yield substantial benefits for American consumers. We estimate that the benefits of eliminating the wasted time and nuisances caused by illegal scam robocalls will exceed $3 billion annually. And more importantly, we expect STIR/SHAKEN paired with call analytics to serve as a tool to effectively protect American consumers from fraudulent robocall schemes that cost Americans approximately $10 billion annually. Further, we anticipate that implementation will increase consumer trust in caller ID information and encourage consumers to answer the phone, thereby benefitting businesses, healthcare providers, and non-profit charities. Widespread implementation also benefits public safety by decreasing disruptions to healthcare and emergency communications systems, and as a result, saving lives. Additional benefits include significantly reducing costs for voice service providers by eliminating unwanted network congestion and decreasing the number of consumer complaints about robocalls. Ultimately, we expect widespread STIR/SHAKEN implementation to reduce the scourge of illegal robocalls that plague Americans every day.

26. Second, the record overwhelmingly reflects support from a broad array of stakeholders for rapid STIR/SHAKEN deployment, and many commenters support a STIR/SHAKEN mandate. Commenters, including the attorneys general of all fifty states and the District of Columbia, consumer groups, and major voice service providers expressed support for Commission action if widespread voluntary implementation did not occur. The unified state attorneys general argue that a mandate is necessary ''in the absence of prompt voluntary implementation'' by the end of 2019 because without such action, ''[b]ad actors exploit inexpensive and ubiquitous technology to scam consumers and to intrude upon consumers' lives, and the problem shows no signs of abating.'' Consumer group commenters, including Consumer Reports, the National Consumer Law Center, Consumer Action, the Consumer Federation of America, the National Association of Consumer Advocates, and Public Knowledge, observe that ''cross-carrier implementation has been relatively limited'' and state that we ''should require phone companies to adopt effective call-authentication policies and technologies.'' AT&T explains that ''SHAKEN/STIR must be widely deployed to be effective.'' Verizon similarly explains that STIR/SHAKEN only works if all voice service providers have implemented the framework in the call path—increasing the utility of a mandate. Other providers, including Comcast and Transaction Network Services, support a ''measured'' STIR/SHAKEN requirement that accounts for existing implementation challenges. We find that our June 30, 2021 implementation date and application of the STIR/SHAKEN mandate to only the IP portions of originating and terminating voice service providers' networks satisfies these commenters' concerns. And even commenters who express hesitation about a mandate are receptive to one that accounts for the burdens and barriers confronted by rural and small voice service providers, which we proposed to address through the process established in the TRACED Act. For example, the Voice of America's Broadband Providers and Teliax are receptive to a mandate that ''focus[es] on implementation of . . . legislation Congress enacts'' and provides for a more flexible implementation timeframe for small and rural providers.

27. Third, although some major voice service providers have taken significant steps towards STIR/SHAKEN implementation, the level of implementation by the Commission's end of 2019 deadline shows that, absent further governmental action, we will not have timely ubiquitous implementation. As Verizon states, ''verifying [c]aller ID for consumers using STIR/SHAKEN presents a classic collectivity challenge that industry may not be able to overcome on its own.'' As we have explained, some voice service providers reported that, by the end of 2019, they completed the necessary network upgrades to support the STIR/SHAKEN framework and that they were exchanging a limited amount of traffic with authenticated caller ID information with other voice service providers. Others, however, reported only that they had completed necessary network upgrades by the end of 2019, but had not begun exchanging with other voice service providers. Still others have shown little to no progress in upgrading their networks to be STIR/SHAKEN-capable. We find that the lack of common exchange among these voice service providers—and the absence of

substantial progress by several of them—demonstrate that major voice service providers have failed to meet the goal of achieving full implementation by the end of 2019. We therefore must act to ensure faster progress to protect the public from the scourge of illegal robocalls.

28. Finally, confirming our decision is the recently-enacted TRACED Act, which provides additional support for the implementation mandate we set forth today. The TRACED Act directs the Commission to ''require a provider of voice service to implement the STIR/SHAKEN authentication framework in the [IP] networks of the provider of voice service.'' Congress's clear direction to require timely STIR/SHAKEN implementation further encourages us to adopt the mandate in this Report and Order.

29. *Limited Record Opposition to a STIR/SHAKEN Implementation Mandate.* We disagree with those commenters who argue that we should not move forward with a STIR/SHAKEN implementation mandate. First, we specifically disagree with the argument that we should delay a mandate while industry develops technical solutions to allow the STIR/SHAKEN framework to accommodate certain more challenging scenarios. According to some commenters, the standards for attestation do not fully account for the situation where an enterprise subscriber places outbound calls through a voice service provider other than the voice service provider that assigned the telephone number. In such scenarios, commenters claim, it would be difficult for an outbound call to receive ''full'' or ''A'' attestation because the outbound call ''will not pass through the authentication service of the voice service provider that controls the numbering resource.'' To provide ''full'' or ''A'' attestation, the voice service provider must be able to confirm the identity of the subscriber making the call, and that the subscriber is using its associated telephone number. We are optimistic that standards bodies, which remain engaged on the impact of STIR/SHAKEN on more challenging use cases and business models, will be able to resolve those issues—just as they have overcome numerous other barriers to caller ID authentication so far. We will continue to monitor industry progress towards solutions to these issues. For instance, the Internet Engineering Task Force (IETF) has proposed a ''certificate delegation'' solution that would allow ''the carrier who controls the numbering resource . . . to delegate a credential that could be used to sign calls regardless of which network or administrative domain handles the outbound routing for the call.'' Further, granting a delay until standards bodies address every possible issue would risk creating an incentive for some parties to draw out standards-setting processes, to the detriment of widespread STIR/SHAKEN implementation. To the contrary, by establishing a June 30, 2021 deadline for widespread STIR/SHAKEN implementation, we create an incentive for standards bodies to work quickly to issue actionable standards and solutions for enterprise calls. For this reason, we need not adopt a separate deadline for industry development of standards and solutions for enterprise calls, as requested by Cloud Communications Alliance. In any event, the TRACED Act requires that voice service providers implement the STIR/SHAKEN framework in their IP networks on this timetable, with only those extensions and exceptions specified by Congress. We decline USTelecom's request ''to remove the discussion surrounding enterprise signing from the *Draft S/S Mandate Order* and to move it to the *Draft S/S Mandate FNPRM* to seek further comment.'' We find this request inconsistent with the structure of the TRACED Act, which creates a general mandate and exceptions to that mandate, rather than limiting the scope of the mandate to non-enterprise calls in the first instance. We also note that USTelecom has emphasized that some enterprise signing will be ''possible in the near term'' and that ''some voice service providers with enterprise customers are already working on providing the ability for their enterprise customers to have certain enterprise calls signed (with A-level attestation) this year.'' We are confident that mandating, consistent with the TRACED Act, that voice service providers implement the STIR/SHAKEN framework in their IP networks—subject to the extensions and exceptions created by the TRACED Act—will create beneficial incentives for industry to continue to quickly develop standards to address enterprise calls.

30. Second, we disagree with Competitive Carriers Association's argument that adopting a STIR/SHAKEN mandate would ''risk impeding development of other potential new strategies to block robocalls.'' The STIR/SHAKEN framework is one important solution that should be part of an arsenal of effective remedies to combat robocalls, and its implementation does not preclude voice service providers from pursuing additional solutions. Further, consistent with Congress's direction in the TRACED Act, we will plan to revisit our caller ID authentication rules periodically to ensure that they remain up to date.

31. Finally, we disagree with ACA Connects' suggestion that we limit our implementation mandate to only those voice service providers that originate large volumes of illegal robocalls. ACA Connects fails to account for the importance of network-wide implementation to the effectiveness of STIR/SHAKEN in reducing spoofed robocalls. Moreover, it fails to explain how we would identify or define such carriers or how such a scheme would stop malicious callers from simply using a different voice service provider.

1. STIR/SHAKEN Implementation Requirements

32. We adopt our proposal in the *2019 Further Notice* to require voice service providers to implement the STIR/SHAKEN framework. Specifically, we require all originating and terminating voice service providers to fully implement STIR/SHAKEN on the portions of their voice networks that support the transmission of SIP calls and exchange calls with authenticated caller ID information with the providers with which they interconnect. This STIR/SHAKEN mandate will create the trust ecosystem necessary for effective caller ID authentication.

33. As part of today's mandate, we adopt the following three requirements: (i) A voice service provider that originates a call that exclusively transits its own network must authenticate and verify the caller ID information consistent with the STIR/SHAKEN authentication framework; (ii) a voice service provider originating a call that it will exchange with another voice service provider or intermediate provider must authenticate the caller ID information in accordance with the STIR/SHAKEN authentication framework and, to the extent technically feasible, transmit that caller ID information with authentication to the next provider in the call path; and (iii) a voice service provider terminating a call with authenticated caller ID information it receives from another provider must verify that caller ID information in accordance with the STIR/SHAKEN authentication framework. We discuss these requirements below. The TRACED Act states in § 4(b)(1)(A) that the Commission shall ''require a provider of voice service to implement the STIR/SHAKEN authentication framework'' in its IP networks. It goes on to create an exemption, stating that the Commission ''shall not take the action'' set forth in

§ 4(b)(1)(A) ''if the Commission determines [by December 30, 2020] that such provider of voice service'' in its Internet Protocol networks meets four criteria focused on achieving certain benchmarks prior to the full mandate going into effect. USTelecom has submitted proposed interpretations of those four criteria for our consideration. Among other things, USTelecom proposes requiring a showing that all consumer VoIP and VoLTE traffic originating on a voice service provider's network is capable of authentication, or will be capable of authentication, by June 30, 2021. CTIA and USTelecom argue that we should consider replacing the implementation criteria that we adopt with USTelecom's interpretations of the four criteria in § 4(b)(2)(A). We find this request inconsistent with the structure of the TRACED Act, which creates a general mandate to implement STIR/SHAKEN in § 4(b)(1)(A) and a separate exemption process in § 4(b)(2)(A). Further, USTelecom's suggested language would not adequately address the responsibilities of voice service providers to ''implement the STIR/SHAKEN authentication framework'' in accordance with § 4(b)(1)(A) because it would only require demonstration of testing and capability rather than the details of how authentication must actually be applied.

34. First, a voice service provider must authenticate and verify, consistent with the STIR/SHAKEN authentication framework, the caller ID information of those calls that it originates and terminates exclusively in the IP portions of its own network. The most effective caller ID authentication system requires the application of STIR/SHAKEN to all calls, including calls solely originating and terminating on the same voice service provider's network. We recognize that certain components of the STIR/SHAKEN framework are designed to promote trust across different voice service provider networks and so are not necessary for calls that a voice service provider originates and terminates solely on its own network. A provider satisfies its obligation under this requirement so long as it authenticates and verifies in a manner consistent with the STIR/SHAKEN framework, such as by including origination and attestation information in the SIP INVITE used to establish the call.

35. Our next two requirements relate to the exchange of caller ID authentication information. In the *2019 Further Notice,* we sought comment on whether we should ''require providers to sign calls on an intercarrier basis.'' The record demonstrated support for this approach, and we add specificity by outlining particular obligations on voice service providers for this requirement. More specifically, a voice service provider that originates a call which it will exchange with another voice service provider or intermediate provider must use an authentication service and insert the Identity header in the SIP INVITE and thus authenticate the caller ID information in accordance with the STIR/SHAKEN authentication framework; it further must transmit that call with authentication to the next voice service provider or intermediate provider in the call path, to the extent technically feasible. We recognize that the transmission of STIR/SHAKEN authentication information over a non-IP interconnection point is not technically feasible at this time. Additionally, a voice service provider that terminates a call with authenticated caller ID information it receives from another voice service provider or intermediate provider must use a verification service, which uses a public key to review the information stored in the Identity header to verify that caller ID information in accordance with the STIR/SHAKEN authentication framework. These actions are at the core of an effective STIR/SHAKEN ecosystem, and each action requires the other: A terminating voice service provider can only verify caller ID information that has been authenticated by the originating voice service provider and transmitted with authentication, while an originating voice service provider's authentication has little value if the terminating voice service provider fails to verify that caller ID information.

36. *Definitions and Scope.* For purposes of the rules we adopt today, and consistent with the TRACED Act, we define ''STIR/SHAKEN authentication framework'' as ''the secure telephone identity revisited and signature-based handling of asserted information using tokens standards.'' For purposes of compliance with this definition, we find that it would be sufficient to adhere to the three ATIS standards that are the foundation of STIR/SHAKEN—ATIS–1000074, ATIS–1000080, and ATIS–1000084—and all documents referenced therein. We recognize that industry is actively working to improve STIR/SHAKEN. Compliance with the most current versions of these three standards as of March 31, 2020, including any errata as of that date or earlier, represents the minimum requirement to satisfy our rules. ATIS and the SIP Forum conceptualized ATIS–1000074 as ''provid[ing] a baseline that can evolve over time, incorporating more comprehensive functionality and a broader scope in a backward compatible and forward looking manner.'' We intend for our rules to provide this same room for innovation, while maintaining an effective caller ID authentication ecosystem. Voice service providers may incorporate any improvements to these standards or additional standards into their respective STIR/SHAKEN authentication frameworks, so long as any changes or additions maintain the baseline call authentication functionality exemplified by ATIS–1000074, ATIS–1000080, and ATIS–1000084.

37. For purposes of our rules, we also adopt a definition of ''voice service'' that aligns with the TRACED Act. The TRACED Act employs a broad definition of ''voice service'' that includes ''without limitation, any service that enables real-time, two-way voice communications, including any service that requires [I]nternet [P]rotocol-compatible customer premises equipment . . . and permits out-bound calling, whether or not the service is one-way or two-way voice over [I]nternet [P]rotocol.'' The TRACED Act definition is limited, however, to service ''that is interconnected with the public switched telephone network and that furnishes voice communications *to an end user.*'' Thus, the rules we adopt today apply to originating and terminating voice service providers and exclude intermediate providers.

38. In recognition of the fact that STIR/SHAKEN is a SIP-based solution, we limit application of the rules we adopt today to only the IP portions of voice service providers' networks—those portions that are able to initiate, maintain, and terminate SIP calls. This approach is consistent with section 4(b)(1)(A) of the TRACED Act, which directs us to require implementation of STIR/SHAKEN ''in the [I]nternet [P]rotocol networks of the provider of voice service.'' We agree with commenters that it would be inappropriate to simply extend the mandate we adopt to non-IP networks.

39. We adopt the proposal from the *2019 Further Notice* that our implementation mandate apply to all types of ''voice service providers—wireline, wireless, and Voice over Internet Protocol (VoIP) providers.'' The Cloud Communications Alliance has raised concerns over whether all voice service providers are able to obtain the certificates used for the intercarrier exchange of authenticated caller ID information under the Governance Authority's current policies. We look forward to working with the Governance

Authority and the Cloud Communications Alliance and its members to determine how best to resolve these issues expeditiously going forward. This includes both two-way and one-way interconnected VoIP providers. For STIR/SHAKEN to be successful, all voice service providers capable of implementing the framework must participate. If a subset of voice service providers continue operating on IP networks without implementing STIR/SHAKEN, it will undercut the framework's effectiveness. Congress demonstrated its recognition of this fact when it adopted a broad definition of ''voice service'' in the TRACED Act, which includes ''any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan.'' This includes, ''without limitation, any service that enables real-time, two-way voice communications, including any service that requires [I]nternet [P]rotocol -compatible customer premises equipment (commonly known as 'CPE') and permits out-bound calling, whether or not the service is one-way or two-way voice over [I]nternet [P]rotocol.'' We find that our conclusion to apply the mandate to a broad category of voice service providers is consistent with Congress's language in the TRACED Act.

40. Finally, we clarify that the rules we adopt today do not apply to providers that lack control of the network infrastructure necessary to implement STIR/SHAKEN.

41. *Implementation Deadline.* We set the implementation deadline of June 30, 2021 for two reasons. First, it is consistent with the TRACED Act, which requires us to set a deadline for implementation of STIR/SHAKEN that is not later than 18 months after enactment of that Act, *i.e.,* no later than June 30, 2021. Second, this deadline will provide sufficient time for us to implement, and for voice service providers to gain, a meaningful benefit from the implementation exemption and extension mechanisms established by the TRACED Act. Because we find that this implementation deadline is necessary to accommodate the various exemption and extension mechanisms established by the TRACED Act, we decline to adopt the suggestion of some commenters that we mandate implementation by June 1, 2020. As we note in the accompanying Further Notice, the TRACED Act contemplates compliance extensions and exemptions for those providers that we determine meet certain criteria by December 30, 2020. We see no way to square this statutory requirement with imposition of a mandate six months before that date.

2. Legal Authority

42. We conclude that section 251(e) of the Communications Act of 1934, as amended (the Act), provides authority to mandate the adoption of the STIR/SHAKEN framework in the IP portions of voice service providers' networks. Section 251(e) provides us ''exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States.'' Pursuant to this provision, we retain ''authority to set policy with respect to all facets of numbering administration in the United States.'' Our exclusive jurisdiction over numbering policy enables us to act flexibly and expeditiously with regard to important numbering matters. When bad actors unlawfully falsify or spoof the caller ID that appears on a subscriber's phone, they are using numbering resources to advance an illegal scheme. Mandating that voice service providers deploy the STIR/SHAKEN framework will help to prevent the fraudulent exploitation of North American Numbering Plan (NANP) resources by permitting those providers and their subscribers to identify when caller ID information has been spoofed. Section 251(e) thus grants us authority to mandate that voice service providers implement the STIR/SHAKEN caller ID authentication framework in order to prevent the fraudulent exploitation of numbering resources. The Commission has previously concluded that its numbering authority allows it to extend numbering-related requirements to interconnected VoIP providers that use telephone numbers. As the Commission has explained, ''the obligation to ensure that numbers are available on an equitable basis is reasonably understood to include not only how numbers are made available but to whom, and on what terms and conditions. Thus, we conclude that the Commission has authority under section 251(e)(1) to extend to interconnected VoIP providers both the rights and obligations associated with using telephone numbers.'' Moreover, as the Commission has previously found, section 251(e) extends to ''the use of . . . unallocated and unused numbers''; it thus gives us authority to mandate that voice service providers implement the STIR/SHAKEN framework to address the spoofing of unallocated and unused numbers. The Commission previously relied on this authority to make clear that voice service providers may block calls that spoof invalid, unallocated, or unused numbers, none of which can actually be used to originate a call. In the *2019 Further Notice,* we proposed to rely on section 251(e) of the Act for authority to mandate implementation of caller ID authentication technology and, specifically, the STIR/SHAKEN framework; no commenter challenged that proposal. We note, however, that because STIR/SHAKEN implementation is not a ''numbering administration arrangement,'' section 251(e)(2), which provides that ''[t]he cost of establishing telecommunications numbering administration arrangements . . . shall be borne by all telecommunications carriers on a competitively neutral basis,'' does not apply here. Even if section 251(e)(2) did apply, we find that it is satisfied by our requirement that each carrier bear its own costs, since each carrier's costs will be proportional to the size and quality of its network.

43. The TRACED Act confirms our authority to mandate the adoption of the STIR/SHAKEN framework in the IP portions of voice service providers' networks. Indeed, the TRACED Act expressly directs us to require voice service providers to implement the STIR/SHAKEN framework in the IP portions of their networks no later than 18 months after the date of that Act's enactment. The TRACED Act thus provides a second clear source of authority for the rules we adopt today.

44. Finally, we note that Congress charged us with prescribing regulations to implement the Truth in Caller ID Act, which made unlawful the spoofing of caller ID information ''in connection with any telecommunications service or IP-enabled voice service . . . with the intent to defraud, cause harm, or wrongfully obtain anything of value.'' Given the constantly evolving tactics by malicious callers to use spoofed caller ID information to commit fraud, we find that the rules we adopt today are necessary to enable voice service providers to help prevent these unlawful acts and to protect voice service subscribers from scammers and bad actors. Thus, section 227(e) provides additional independent authority for these rules. While we sought comment in the *2019 Robocall Declaratory Ruling and Further Notice* on the applicability of sections 201(b) and 202(a) as sources of authority, we did so in the context of adopting rules to create a safe harbor for certain call-blocking programs and requiring voice service providers that offer call-blocking programs to maintain a Critical Calls List. Because we did not seek comment in that item on whether these provisions grant the Commission authority to

mandate caller ID authentication, and specifically STIR/SHAKEN, we do not rely on them here as sources of authority.

B. Summary of Costs and Benefits

45. We are convinced that the benefits of requiring STIR/SHAKEN implementation far outweigh the costs, even if adoption of the TRACED Act makes a comprehensive cost-benefit analysis of a STIR/SHAKEN implementation mandate unnecessary. Because STIR/SHAKEN is a part of a broader set of technological and regulatory efforts necessary to address illegal calls, and its limited deployment makes it difficult to measure its full effects at this time, we compare the estimated costs of implementing STIR/SHAKEN to the overall foreseeable range of quantifiable and non-quantifiable benefits of eliminating illegal calls, recognizing that STIR/SHAKEN is necessary but not, alone, a solution to the problem. These benefits include reduction in nuisance calls, increased protection from illegally spoofed calls restoration of consumer confidence in incoming calls, fewer robocall-generated disruptions of healthcare and emergency communications, reduction in regulatory enforcement costs, and reduction in provider costs. We conclude that, based on any plausible assumption about the scope of illegal calls deterred by STIR/SHAKEN, the foreseeable benefits of STIR/SHAKEN implementation—including reduction in calls that cost Americans billions of dollars each year—will far exceed estimated costs, including both recurring operating costs of between roughly $39 million and $780 million annually and estimated up-front costs, which may be in the tens of millions of dollars for the largest voice service providers. It is implausible that total implementation costs will come close to the expected benefits of our actions. For example, broad industry support for deploying STIR/SHAKEN strongly indicates that the benefits to industry alone outweigh implementation costs, even before considering the benefits to consumers of implementation.

1. Expected Benefits

46. We supplement our estimate of the benefits of eliminating illegal and unwanted robocalls in the *2019 Further Notice* with additional data. Consistent with our earlier conclusion, we find that the deployment requirements set forth in this Report and Order will be integral to solving illegal robocall spoofing specifically and illegal robocalling generally.

47. *Eliminating Nuisance.* In the *2019 Further Notice,* we estimated benefits of at least $3 billion from eliminating illegal scam robocalls. That estimate assumed a benefit of ten cents per call and multiplied it across a figure of 30 billion illegal scam robocalls per year, derived from third-party data. We also sought comment on this $3 billion estimate and concluded that ''most of these benefits can be achieved . . . primarily because SHAKEN/STIR will inform providers of the call's true origination.'' We received no comment on this conclusion. In its comments, Smithville Telephone Company states that a $3 billion benefit amounts to 55 cents per voice line per month (calculated by dividing the $3 billion benefit by 455 million retail voice telephone service connections based on the FCC's Voice Telephone Services Status as of June 30, 2017), and questions whether such benefit is enough to drive this decision. The estimate of 30 billion scam calls consists of an estimated 47% of all robocalls. If the average line receives approximately 5 to 6 scam calls per month, Smithville's calculation is consistent with our previous estimate. Our burden is to determine that benefits exceed costs, and we find that the benefits of implementing STIR/SHAKEN far exceed the costs. We agree with commenters that STIR/SHAKEN is one important part of a broader set of tools to solve illegal robocalls. We thus reaffirm our finding that the potential benefits resulting from eliminating the wasted time and nuisances caused by illegal scam robocalls will exceed $3 billion annually.

48. *Reducing Fraud.* Fraudulent robocall schemes cost Americans an estimated $10.5 billion annually, according to a third-party survey. To reach $10.5 billion, Truecaller multiplied the 17% of survey respondents who reported losing money in a scam during the past 12 months by the 2018 U.S. Census adult population estimate of 253 million. The estimated 43 million phone scam victims was then multiplied by the average loss of $244. A recent civil action filed by the U.S. Department of Justice against five VoIP carriers identifies several examples of fraud where consumers individually lost between $700 and $9,800 in a single instance. To reach $10.5 billion, Truecaller multiplied the 17% of survey respondents who reported losing money in a scam during the past 12 months by the 2018 U.S. Census adult population estimate of 253 million. The estimated 43 million phone scam victims was then multiplied by the average loss of $244. While STIR/SHAKEN will not itself stop a malicious party from using the voice network to commit fraud, it will inform a call recipient that the caller has used deceptive caller ID information to try to convince the called party to answer the phone. Many commenters noted value in pairing STIR/SHAKEN with call analytics, and we expect this will significantly reduce the effectiveness of spoofing fraud that costs Americans billions of dollars each year, and similarly reduce the incidence of such fraud.

49. *Restoring Confidence in Caller ID Information.* STIR/SHAKEN implementation and other efforts to minimize illegal robocalls will begin to restore trust in caller ID information and make call recipients more likely to answer the phone. Declines in willingness to answer incoming calls in recent years have harmed businesses, healthcare providers, and non-profit charities. For example, utility companies often call to confirm installation appointments, ''[b]ut if the customer doesn't answer the phone for the appointment reminder and the truck shows up when they're not there, by one estimate, that's a $150 cost.'' Similarly, medical providers have indicated that patients often fail to answer scheduling calls from specialists' offices and eventually the office will give up after repeated attempts. Donations to charities have also declined as a result of the decreased likelihood of answering the phone. Such organizations likely will benefit because recipients should be more likely to answer their phones if caller ID information is authenticated. Furthermore, while we do not adopt any display mandates in this item, we anticipate that voice service providers will implement voluntary efforts to restore confidence in caller ID information. Studies conducted by Cequint indicate that including additional caller ID information (*e.g.,* showing a business logo along with caller ID information on a smartphone display to convey legitimacy) increased pick up rates from 21% to 71%. Such information will enhance the benefits achieved by STIR/SHAKEN implementation.

50. *Ensuring Reliable Access to Emergency and Healthcare Communications.* Implementing STIR/SHAKEN will lead to fewer disruptions of healthcare and emergency communication systems that needlessly put lives at risk. Hospitals and 911 dispatch centers have reported that robocall surges have disabled or disrupted their communications network, and such disruptions have the potential to impede communications in

life-or-death emergency situations. In one instance, Tufts Medical Center in Boston received more than 4,500 robocalls in a two-hour period. In another, the phone lines of several 911 dispatch centers in Tarrant County, Texas, were disabled because of an hour long surge in robocalls. In 2018, the Commission imposed a $120 million penalty for an illegal robocall campaign that disrupted an emergency medical paging service. Enabling voice service providers to more effectively identify illegal calls, including spoofed calls, to healthcare and emergency communication systems should reduce the risk of such situations. The benefit to public safety will be considerable.

51. *Reducing Costs to Voice Service Providers.* An overall reduction in robocalls will ''greatly lower network costs by eliminating unwanted traffic and by eliminating the labor costs of handling numerous customer complaints.'' We treat these anticipated reductions in cost as a benefit to providers in order to limit our analysis of expected costs to those for implementation and operation. Illegal robocalls have led to unnecessary network congestion with broader possible impacts than the targeted disruption of healthcare and emergency operations described above. We agree with Comcast's assessment that ''the ability to identify and address illegally spoofed robocalls using STIR/SHAKEN will help reduce network costs for voice service providers.'' One commenter argues that this benefit may be realized by larger providers more than smaller providers and we acknowledge that the benefits of changes in network capacity will vary by provider. Voice service providers should also realize cost savings through the reduced need for customer service regarding illegal calls. We find that the overall benefit of these anticipated cost savings will be substantial and represent a long-term reduction in provider costs attributable to STIR/SHAKEN. Voice service providers may pass on the cost savings to subscribers in the form of lower prices, resulting in additional benefit to their subscribers.

52. *Reducing Spending on Enforcement Actions.* Broad STIR/SHAKEN implementation will both reduce the need for enforcement against illegally spoofed robocalls and make continued enforcement less resource intensive. The Commission has brought at least six enforcement actions against apparently liable actors for illegally spoofing caller ID, and issued 38 warning citations for violations of the Telephone Consumer Protection Act. The Federal Trade Commission has taken 145 enforcement actions against companies for Do Not Call Registry violations, and 25 other federal, state, and local agencies brought 87 enforcement actions as part of a single 2019 initiative. By reducing overall numbers of robocalls and providing additional information for enforcement, industry-wide implementation of STIR/SHAKEN will save resources at federal, state, and local agencies. While we do not quantify these savings, we believe they add to the benefits of STIR/SHAKEN implementation that will accrue.

2. Expected Costs

53. Implementation costs for STIR/SHAKEN will vary depending on a voice service provider's existing network configuration. Commenters indicated that voice service providers will incur ongoing costs in addition to one-time implementation costs. Estimated one-time costs include, among others, software licensing for authentication and verification services; hardware upgrades to network elements such as session border controllers and hardware upgrades required for software compatibility; as well as connectivity and network configuration changes, depending on current network configuration, and related testing. One of the largest voice service providers estimates that it will face one-time implementation costs ''in the tens of millions of dollars.'' We expect that implementation costs are likely to vary significantly based on voice service provider size and choices as to implementation solutions. For example, voice service providers choosing to directly implement STIR/SHAKEN will likely face larger one-time costs than voice service providers choosing a hosted solution, which are likely to have larger recurring costs. Recurring annual costs will include fees associated with authenticating and verifying calls, plus certificate fees. Estimates for recurring annual operating costs discussed by panelists at the Commission's July 2019 SHAKEN/STIR Robocall Summit range anywhere from approximately $15,000 to $300,000. Our estimate regarding recurring annual operating costs reflects a range because of variation in provider costs and the uncertainty of costs given the ongoing nature of STIR/SHAKEN implementation. One commenter asserts that recurring annual operating costs are ''likely to be on the lower end of th[is] range.'' On the other hand, USTelecom points out that fees paid by voice service providers to the Governance Authority and Policy Administrator range from $825 to $240,000 per year and states that a number of its members pay the highest annual fee. Based on the record, we estimate that the approximately 2,600 voice service providers together would spend between roughly $39 million and $780 million annually in operating costs, with up-front costs for the largest voice service providers in the tens of millions of dollars. Approximately 2,600 companies offered mobile voice or fixed voice service in December 2018. We anticipate that voice service providers may be able to streamline their costs over time. Moreover, we recognize that smaller voice service providers may have different costs and challenges than larger providers, but we are confident that benefits to all Americans far exceed one-time implementation and recurring annual operating costs. One small, rural provider, using estimates from the Commission's 2019 SHAKEN/STIR Robocall Summit, concludes that an annual recurring cost of $100,000 will result in a cost of $26 per line for its 319 customers. Additionally, in the Further Notice, we propose to extend the compliance deadline for smaller voice service providers and anticipate that increased competition between vendors may result in lower prices and higher quality solutions. One small, rural provider, using estimates from the Commission's 2019 SHAKEN/STIR Robocall Summit, concludes that an annual recurring cost of $100,000 will result in a cost of $26 per line for its 319 customers. Additionally, in the Further Notice, we propose to extend the compliance deadline for smaller voice service providers and anticipate that increased competition between vendors may result in lower prices and higher quality solutions.

C. Other Issues

54. *Display.* We are pleased by voice service providers' efforts to incorporate STIR/SHAKEN verification results in the information that they display to their customers. Voice service providers so far are taking a variety of approaches to leveraging STIR/SHAKEN verification result information to protect their subscribers from fraudulently spoofed calls, including through display of that information. For instance, AT&T announced that it would display a green checkmark and the words ''Valid Number'' to subscribers if the call has been authenticated and passed through screening. T-Mobile announced that it would display the words ''Caller Verified,'' on the end user's device when it has verified that the call is authentic. Other voice service providers have not yet announced plans to display STIR/SHAKEN authentication

information. Because we expect voice service providers to have marketplace incentives to make the best possible use of STIR/SHAKEN information once it is available, and because industry practices regarding display of STIR/SHAKEN verification results are in their early stages of development, we decline at this time to require voice service providers to display STIR/SHAKEN verification results to their subscribers or mandate the specifications voice service providers must use if they choose to display. AARP and CUNA advocate for a display requirement but do not identify a reason for a mandate beyond merely pointing to the value of displaying verification information. While display of verification information may be valuable, we decline to adopt a mandate on that basis because we expect the marketplace to drive display efforts, and because we anticipate that marketplace solutions will be superior to a static regulatory mandate. In December 2019, the Consumer Advisory Committee recommended that stakeholders ''conduct studies and solicit input on what factors voice service providers should consider for displaying caller ID information to consumers, including . . . SHAKEN/STIR verification.'' We do not seek to prevent the market from determining which form of display, if any, is most useful; instead, we seek to encourage voice service providers to find the solutions that work best for their subscribers.

55. *Governance.* Several commenters advocate changing the governance structure. These commenters suggest we play an adjudicatory role in disputes that may arise between voice service providers, or direct the Governance Authority to take action on specific use cases, or change the membership requirements of the Governance Authority.

56. We decline to impose new regulations on the STIR/SHAKEN governance structure. Stakeholders met the aggressive timeline laid out in the report issued by the North American Numbering Council (NANC), establishing a collaborative Governance Authority and selecting the Policy Administrator by May 2019. By December 2019, the Policy Administrator approved the first Certification Authorities, and voice service providers were able to register with the Policy Administrator to obtain credentials necessary to receive certificates from approved Certificate Authorities. We agree with T-Mobile that, at this time, it ''is not necessary for the Commission to have a role in STIR/SHAKEN governance.'' STIR/SHAKEN is a flexible solution with an industry-led governance system that can adapt and respond to new developments. We do not think that our intervention in the governance structure is appropriate at this stage given that we do not know the nature and scope of the problems that may arise and industry is already working to address specific use cases. Additionally, because the Governance Authority is made up of a variety of stakeholders representing many perspectives, we have no reason to believe it will not operate on a neutral basis. The current STI–GA Leadership and Board of Directors is available at *https://www.atis.org/sti-ga/leadership.*

IV. Procedural Matters

57. *Paperwork Reduction Act.* This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198.

58. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is non-major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Report & Order and Further Notice of Proposed Rulemaking to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

59. *Ex Parte Rules.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) List all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

60. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980 (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *2019 Robocall Declaratory Ruling and Further Notice.* The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *2019 Robocall Declaratory Ruling and Further Notice,* including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Appendix C. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this *Report and Order,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

A. Need for, and Objectives of, the Rules

61. Nefarious schemes that manipulate caller ID information to deceive consumers about the name and phone number of the party that is calling them, in order to facilitate fraudulent and other harmful activities, continue to plague American consumers. In this *Report and Order* (*Order*), we both act on our proposal to require voice service providers to implement the STIR/SHAKEN caller ID authentication framework if major voice service providers did not voluntarily do so by the end of 2019, and implement the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, which directs the Commission to require all voice service providers to implement

STIR/SHAKEN in the IP portions of their networks.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

62. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the SBA

63. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

64. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

65. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the final rules adopted pursuant to the *Order.* The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''A ''small-business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

1. Wireline Carriers

66. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. The largest category provided by the census data is ''1000 employees or more'' and a more precise estimate for firms with fewer than 1,500 employees is not provided. Thus, under this size standard, the majority of firms in this industry can be considered small.

67. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year. Of that total, 3,083 operated with fewer than 1,000 employees. The largest category provided by the census data is ''1000 employees or more'' and a more precise estimate for firms with fewer than 1,500 employees is not provided. Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

68. *Incumbent Local Exchange Carriers (incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

69. *Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers and under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. The largest category provided by the census data is ''1000 employees or more'' and a more precise estimate for firms with fewer than 1,500 employees is not provided. Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

70. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small-business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees) and ''is not dominant in its field of operation.'' The

SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. The largest category provided by the census data is ''1000 employees or more'' and a more precise estimate for firms with fewer than 1,500 employees is not provided.

71. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

72. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' As of 2018, there were approximately 50,504,624 cable video subscribers in the United States. Accordingly, an operator serving fewer than 505,046 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Based on available data, we find that all but six incumbent cable operators are small entities under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. Therefore we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

2. Wireless Carriers

73. *Wireless Telecommunications Carriers (Except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed of 1000 employees or more. Available census data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with ''1000 employees or more.'' Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

74. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

75. *Satellite Telecommunications.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard of annual receipts of $35 million or less. Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

3. Resellers

76. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICs code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data from 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Available census data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with ''1000 employees or more.'' Thus, under this category and the associated small business size standard, the majority of

these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities.

77. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. MVNOs are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 2012 Census Bureau data show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Available census data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''1000 employees or more.'' Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

78. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business definition specifically for prepaid calling card providers. The most appropriate NAICS code-based category for defining prepaid calling card providers is Telecommunications Resellers. This industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual networks operators (MVNOs) are included in this industry. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Available census data does not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees. The largest category provided is for firms with ''1000 employees or more.'' Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards. All 193 carriers have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by these rules.

4. Other Entities

79. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications,'' which consists of all such firms with annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49,999,999. Thus, the Commission estimates that the majority of ''All Other Telecommunications'' firms potentially affected by our action can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

80. This Order modifies the Commission's rules in accordance with our proposal to require voice service providers to implement the STIR/SHAKEN caller ID authentication framework if major voice service providers did not voluntarily do so by the end of 2019, and implements Congress's direction in the TRACED Act to mandate STIR/SHAKEN. The amended rules adopted in the Order do not contain reporting or recordkeeping requirements.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

81. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its approach. This document does not distinguish between small entities and other entities and individuals.

G. Report to Congress

82. The Commission will send a copy of the Order, including this FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Order,* including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the **Federal Register**.

V. Ordering Clauses

83. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 227(e), 227b, 251(e), and 303(r), of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 154(i), 154(j), 227(e), 227b, 251(e), and 303(r), that this Report and Order IS ADOPTED.

84. IT IS FURTHER ORDERED that Part 64 of the Commission's rules IS AMENDED as set forth in the following.

85. IT IS FURTHER ORDERED that, pursuant to §§ 1.4(b)(1) and 1.103(a) of the Commission's rules, 47 CFR 1.4(b)(1), 1.103(a), this Report and Order SHALL BE EFFECTIVE 30 days after publication in the **Federal Register**.

86. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 64

Communications common carriers, Carrier equipment, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 64 follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 403(b)(2)(B), (c), 616, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

■ 2. Add Subpart HH, consisting of §§ 64.6300 and 64.6301, to read as follows:

Subpart HH—Caller ID Authentication

§ 64.6300 Definitions.

(a) *Authenticate caller identification information.* The term ''authenticate caller identification information'' refers to the process by which a voice service provider attests to the accuracy of caller identification information transmitted with a call it originates.

(b) *Caller identification information.* The term ''caller identification information'' has the same meaning given the term ''caller identification information'' in 47 CFR 64.1600(c) as it currently exists or may hereafter be amended.

(c) *Intermediate provider.* The term ''intermediate provider'' means any entity that carriers or processes traffic that traverses or will traverse the PSTN at any point insofar as that entity neither originates nor terminates that traffic.

(d) *SIP call.* The term ''SIP call'' refers to calls initiated, maintained, and terminated using the Session Initiation Protocol signaling protocol.

(e) *STIR/SHAKEN authentication framework.* The term ''STIR/SHAKEN authentication framework'' means the secure telephone identity revisited and signature-based handling of asserted information using tokens standards.

(f) *Verify caller identification information.* The term ''verify caller identification information'' refers to the process by which a voice service provider confirms that the caller identification information transmitted with a call it terminates was properly authenticated.

(g) *Voice service.* The term ''voice service''—

(1) Means any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of the Communications Act of 1934, as amended; and

(2) Includes—

(i) Transmissions from a telephone facsimile machine, computer, or other device to a telephone facsimile machine; and

(ii) Without limitation, any service that enables real-time, two-way voice communications, including any service that requires internet Protocol-compatible customer premises equipment and permits out-bound calling, whether or not the service is one-way or two-way voice over internet Protocol.

§ 64.6301 Caller ID authentication.

(a) *STIR/SHAKEN Implementation by Voice Service Providers.* Not later than June 30, 2021, a voice service provider shall fully implement the STIR/SHAKEN authentication framework in its internet Protocol networks. To fulfill this obligation, a voice service provider shall:

(1) Authenticate and verify caller identification information for all SIP calls that exclusively transit its own network;

(2) Authenticate caller identification information for all SIP calls it originates and that will exchange with another voice service provider or intermediate provider and, to the extent technically feasible, transmit that call with caller ID authentication information to the next voice service provider or intermediate provider in the call path; and

(3) Verify caller identification information for all SIP calls it receives from another voice service provider or intermediate provider which it will terminate and for which the caller identification information has been authenticated.

(b) [Reserved].

[FR Doc. 2020–07585 Filed 4–20–20; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 200408–0106]

RIN 0648–BI12

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Historical Captain Permits Conversions

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement management measures as described in an abbreviated framework action to the Fishery Management Plans (FMPs) for the Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP) and Coastal Migratory Pelagic Resources of the Gulf of Mexico and Atlantic Region (CMP FMP). This final rule enables eligible permit holders to replace historical captain endorsements in the reef fish and CMP fisheries in the Gulf of Mexico (Gulf) with standard Federal charter vessel/headboat permits to reduce the regulatory and economic burden on historical captains. In addition, NMFS is correcting an inadvertent error in the final rule for Amendment 20A to the CMP FMP regarding commercial king mackerel permit requirements.

DATES: This final rule is effective on May 21, 2020.

ADDRESSES: Electronic copies of the abbreviated framework document that contains an environmental assessment and a Regulatory Flexibility Act (RFA) analysis may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/framework-action-replacement-historical-captain-permits-standard-federal-charter-headboat.*

FOR FURTHER INFORMATION CONTACT: Rich Malinowski, NMFS Southeast Regional Office, telephone: 727–824–5305, email: *rich.malinowski@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS and the Gulf of Mexico Fishery Management Council (Gulf Council) manage reef fish in Gulf Federal waters under the Reef Fish FMP. The CMP fishery in Gulf and Atlantic Federal waters is managed jointly by the Gulf Council and South Atlantic Fishery Management Council (Councils). The Gulf Council prepared the Reef Fish FMP and the Councils jointly prepared the CMP FMP. NMFS

implements the FMPs through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*).

On January 23, 2020, NMFS published a proposed rule in the **Federal Register** for the abbreviated framework action and requested public comment (85 FR 3885, January 23, 2020). The proposed rule and the abbreviated framework action outline the rationale for the action contained in this final rule. A summary of the management measure described in the abbreviated framework action and implemented by this final rule is provided below.

Management Measure Contained in This Final Rule

This final rule enables a permit holder with an eligible historical captain endorsement to convert that endorsement to a standard Federal Gulf reef fish or Gulf CMP charter vessel/headboat permit, as applicable, and extends the same rights and responsibilities of these standard for-hire permits to eligible individuals who choose to convert their historical captain permits to standard permits. An eligible historical captain endorsement, referred to hereafter as a historical captain permit, is one that was valid, non-expired, or renewable as of October 25, 2018, the qualifying date determined by the Gulf Council.

If an individual who held an eligible historical captain permit wishes to retain a historical captain permit, the individual can renew the permit as done in previous years. This will include filling out all sections of the permit application specifically related to the historical captain permit renewal process and providing the appropriate supporting documents and fees to the NMFS Southeast Region Permits Office.

If an individual with an eligible historical captain permit wishes to convert the permit to a standard reef fish or CMP charter vessel/headboat permit, the individual must submit a permit application to NMFS along with their current historical captain permit (original document, not a copy) and supporting documents and fees, including documentation for the vessel to which the standard for-hire permit will be attached. Unlike a historical captain permit, which is issued to an individual, a standard permit must be issued to a vessel with a valid U.S. Coast Guard (USCG) certificate of documentation (COD) or state registration certificate (50 CFR 622.4(a)). If the permit applicant is the owner of the vessel, NMFS Permits Office staff will verify that the vessel for which the new for-hire permit will be issued is owned by the applicant and does not have an existing Gulf reef fish or CMP charter vessel/headboat permit associated with it, as vessels are not allowed to have multiple charter vessel/headboat permits of the same type associated with them.

If the vessel to which the permit will be attached is to be leased, a fully executed lease agreement of at least 7 months, between the vessel owner and permit holder, will need to be included with the application. Note that vessel owners and lessees cannot independently hold permits for the same vessel at the same time. NMFS Permits Office staff will then verify the vessel does not have any other Federal permit(s) associated with it in another permit holder's name.

Once NMFS verifies that the information provided with the application allows for the conversion, the historical captain permit will then be converted to a standard reef fish or CMP charter vessel/headboat permit. Historical captain permit numbers are unique, and the new permit will keep the existing permit number (*e.g.,* HRCG–9999 will convert to RCG–9999). A standard for-hire permit issued as a result of this final rule will have the same passenger capacity limitation as the historical captain permit that it will replace.

Any application to convert from a historical captain permit to a standard permit must be submitted to NMFS within 2 years of the effective date of this final rule. Any application submitted more than 2 years after the effective date of this final rule will not be accepted by NMFS, and the individual will instead retain their historical captain permit. In addition, if an individual redeems an outstanding letter of eligibility for a historical captain permit before the effective date of this final rule, they will receive a historical captain permit, but they will not be eligible to convert that historical captain permit into a standard for-hire permit. Any letters of eligibility not redeemed will no longer be valid as of the effective date of this final rule.

Comments and Responses

NMFS received seven comments on the proposed rule for the abbreviated framework action. All of the comments that addressed the actions considered by the Gulf Council and included in the proposed rule were supportive of having the conversion. However, one comment disagreed with some aspects of the proposal. This comment is summarized below, followed by NMFS' response. NMFS made no changes to the final rule resulting from public comments.

Comment 1: All historical captain permits that are active as of the effective date of this final rule should be converted to standard permits, including those permits obtained after the October 2018 Gulf Council meeting.

Response: NMFS disagrees. Some individuals expressed an interest in maintaining the historical captain permit. Therefore, the Gulf Council decided to allow individuals to choose whether to convert their historical captain permit to a standard for-hire permit or retain their historical captain permit.

The Council also determined that it was appropriate to limit this choice to individuals who have relied on the historical captain's permit for their livelihood and may be negatively impacted by the permit's restrictions. Therefore, the Council decided that only the 32 CMP historical captain permits and 31 Gulf reef fish historical captain permits that were valid (non-expired) or renewable when the Council considered this action in October 2018 are eligible for replacement with corresponding standard charter vessel/headboat permits. NMFS agrees that this appropriate because those individuals have shown reliance on, and an interest in remaining in, the fishery by obtaining and renewing their permits.

Changes to Codified Text Not in the Abbreviated Framework Action

In June 2014, NMFS published the final rule for Amendment 20A to the CMP FMP in the **Federal Register** (79 FR 34246, June 16, 2014). Amendment 20A removed the income qualification requirements for Spanish and king mackerel in the Gulf and Atlantic and restricted the sale of these species caught under the recreational bag limit. However, in the final rule for Amendment 20A, a regulation regarding the transfer requirements of limited access commercial vessel permits for king mackerel (50 CFR 622.371(b)), was inadvertently removed. As a result, current regulations unnecessarily restrict the transfer of Gulf commercial king mackerel permits to another vessel owned by the same entity. NMFS has only recently become aware of this error.

Changes From the Proposed Rule

In the proposed rule, the regulatory text in paragraphs 622.20(b)(1)(v) and 622.373(f) stated that the deadline for the permit holder to submit a permit application to the NMFS Regional Administrator (RA) to convert an

eligible charter vessel/headboat permit with a historical captain endorsement would be ''25 months after the effective date'' of the final rule (85 FR 3885, January 23, 2020). That text should have stated that the deadline is ''25 months after the date of publication'' of the final rule, which is 2 years (24 months) after the effective date. This was correctly stated in the preamble to the proposed rule and is consistent with the Gulf Council's intent.

Classification

The RA for the NMFS Southeast Region determined that this final rule is consistent with the abbreviated framework action, the FMPs, the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866. This final rule is considered an Executive Order 13771 deregulatory action.

The Magnuson-Stevens Act provides the statutory basis for this rule. No duplicative, overlapping, or conflicting Federal rules have been identified. A description of this final rule, why it is being implemented, and the purpose of this final rule are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The factual basis for this determination was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. As a result, a final regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fish, Fisheries, Gulf of Mexico, Historical captain, Permits, Transfer.

Dated: April 8, 2020.

Samuel D. Rauch, III,

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

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.20, revise paragraph (b)(1) introductory text and add paragraph (b)(1)(v) to read as follows:

§ 622.20 Permits and endorsements.

* * * * *

(b) * * *

(1) *Limited access system for charter vessel/headboat permits for Gulf reef fish.* No applications for additional charter vessel/headboat permits for Gulf reef fish will be accepted. Existing permits may be renewed, are subject to the restrictions on transfer in paragraph (b)(1)(i) of this section, and are subject to the renewal requirements in paragraph (b)(1)(ii) of this section. An eligible charter vessel/headboat permit with a historical captain endorsement may be converted to a charter vessel/headboat permit without a historical captain endorsement, per the procedure in paragraph (b)(1)(v) of this section.

* * * * *

(v) *Procedure for conversion of permit with historical captain endorsement.* A charter vessel/headboat permit with a historical captain endorsement that was valid or renewable on October 25, 2018, may be converted to a charter vessel/headboat permit for Gulf reef fish without a historical captain endorsement. A charter vessel/headboat permit with a historical captain endorsement that is converted to a charter vessel/headboat permit without a historical captain endorsement will retain the same vessel permit maximum passenger capacity as the permit it replaces. To convert an eligible charter vessel/headboat permit with a historical captain endorsement, the permit holder must submit a permit application to the RA by May 23, 2022. If no application to convert an eligible charter vessel/headboat permit with a historical captain endorsement is submitted by May 23, 2022, the permit holder will retain a charter vessel/headboat permit with the historical captain endorsement that is subject to the restrictions described in paragraph (b)(1)(i)(B) of this section.

* * * * *

■ 3. In § 622.371, revise paragraph (b) to read as follows:

§ 622.371 Limited access system for commercial vessel permits for king mackerel.

* * * * *

(b) An owner of a permitted vessel may transfer the commercial vessel permit for king mackerel issued under this limited access system to another vessel owned by the same entity. A permit holder may also transfer the commercial vessel permit for king mackerel to the owner of another vessel or to a new vessel owner when he or she transfers ownership of the permitted vessel.

* * * * *

■ 4. In § 622.373, revise paragraph (a) and add paragraph (f) to read as follows:

§ 622.373 Limited access system for charter vessel/headboat permits for Gulf coastal migratory pelagic fish.

(a) *General.* No applications for additional charter vessel/headboat permits for Gulf coastal migratory pelagic fish will be accepted. Existing permits may be renewed, are subject to the restrictions on transfer in paragraph (b) of this section, and are subject to the renewal requirements in paragraph (c) of this section. An eligible charter vessel/headboat permit with a historical captain endorsement may be converted to a charter vessel/headboat permit without a historical captain endorsement, per procedures at paragraph (f) of this section.

* * * * *

(f) *Procedure for conversion of permit with historical captain endorsement.* A charter vessel headboat permit with a historical captain endorsement that was valid or renewable on October 25, 2018, may be converted to a charter vessel/headboat permit for Gulf coastal migratory pelagic fish without a historical captain endorsement as described in paragraph (b)(1) of this section. A charter vessel/headboat permit with a historical captain endorsement that is converted to a charter vessel/headboat permit without a historical captain endorsement will retain the same vessel permit maximum passenger capacity as the permit it replaces. To convert an eligible charter vessel/headboat permit with a historical captain endorsement, the permit holder must submit a permit application to the RA by May 23, 2022. If no application to convert an eligible charter vessel/headboat permit with a historical captain endorsement is submitted by May 23, 2022, the permit holder will retain a charter vessel/headboat permit with the historical captain endorsement that is subject to the restrictions described in paragraph(b)(2) of this section.

[FR Doc. 2020–07762 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 191002–0052; RTID 0648–XX052]

Fisheries of the Northeastern United States; Summer Flounder Fishery; Quota Transfer From NC to VA

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

ACTION: Notification of quota transfer.

SUMMARY: NMFS announces that the State of North Carolina is transferring a portion of its 2020 commercial summer flounder quota to the Commonwealth of Virginia. This quota adjustment is necessary to comply with the Summer Flounder, Scup, and Black Sea Bass Fishery Management Plan quota transfer provisions. This announcement informs the public of the revised 2020 commercial quotas for North Carolina and Virginia.

DATES: Effective April 20, 2020, through December 31, 2020.

FOR FURTHER INFORMATION CONTACT: Laura Hansen, Fishery Management Specialist, (978) 281–9225.

SUPPLEMENTARY INFORMATION: Regulations governing the summer flounder fishery are found in 50 CFR 648.100 through 648.110. These regulations require annual specification of a commercial quota that is apportioned among the coastal states from Maine through North Carolina. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.102 and final 2020 allocations were published on October 9, 2019 (84 FR 54041).

The final rule implementing Amendment 5 to the Summer Flounder Fishery Management Plan (FMP), as published in the **Federal Register** on December 17, 1993 (58 FR 65936), provided a mechanism for transferring summer flounder commercial quota from one state to another. Two or more states, under mutual agreement and with the concurrence of the NMFS Greater Atlantic Regional Administrator, can transfer or combine summer flounder commercial quota under § 648.102(c)(2). The Regional Administrator is required to consider three criteria in the evaluation of requests for quota transfers or combinations: The transfer or combinations would not preclude the overall annual quota from being fully harvested; the transfer addresses an unforeseen variation or contingency in the fishery; and, the transfer is consistent with the objectives of the FMP and the Magnuson-Stevens Act. The Regional Administrator has determined these three criteria have been met for the transfer approved in this notification.

North Carolina is transferring 12,500 lb (5,670 kg) of summer flounder commercial quota to Virginia. This transfer was requested to repay landings made by a North Carolina-permitted vessel in Virginia under a safe harbor agreement. Based on the revised summer flounder, scup, and black sea bass specifications, the summer flounder quotas for 2020 are now: North Carolina, 3,141,729 lb (1,425,064 kg); and, Virginia, 2,480,598 lb (1,125,180 kg).

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 16, 2020.

Hélène M.N. Scalliet,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–08437 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 85, No. 77
Tuesday, April 21, 2020

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.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2020–0294; Airspace Docket No. 20–AGL–8]

RIN 2120–AA66

Proposed Amendment of Area Navigation (RNAV) Routes T–325 and T–354; Northcentral United States

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to modify low altitude RNAV routes T–325 and T–354 in the northcentral United States. The proposal would expand the availability of RNAV routing in support of transitioning the National Airspace System (NAS) from ground-based to satellite-based navigation.

DATES: Comments must be received on or before June 5, 2020.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590; telephone: (800) 647–5527, or (202) 366–9826. You must identify FAA Docket No. FAA–2020–0294; Airspace Docket No. 20–AGL–8 at the beginning of your comments. You may also submit comments through the internet at *https://www.regulations.gov.*

FAA Order 7400.11D, Airspace Designations and Reporting Points, and subsequent amendments can be viewed online at *https://www.faa.gov/air_traffic/publications/.* For further information, you can contact the Rules and Regulations 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 7400.11D at NARA, email: *fedreg.legal@nara.gov* or go to *https://www.archives.gov/federal-register/cfr/ibr-locations.html.*

FOR FURTHER INFORMATION CONTACT: Colby Abbott, Rules and Regulations Group, Office of Policy, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone: (202) 267–8783.

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 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 the 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 expand the availability of RNAV in the northcentral United States and improve the efficient flow of air traffic within the NAS by lessening the dependency on ground-based navigation.

Comments Invited

Interested parties are invited to participate in this proposed rulemaking 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–2020–0294; Airspace Docket No. 20–AGL–8) and be submitted in triplicate to the Docket Management Facility (see **ADDRESSES** section for address and phone number). You may also submit comments through the internet at *https://www.regulations.gov.*

Commenters 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 FAA Docket No. FAA–2020–0294; Airspace Docket No. 20–AGL–8.'' The postcard will be date/time stamped and returned to the commenter.

All communications received on or before the specified comment closing date will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the public docket both before and after the comment closing date. 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 *https://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's web page at *https://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 **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 during normal business hours at the office of the Operations Support Group, Central Service Center, Federal Aviation Administration, 10101 Hillwood Blvd., Fort Worth, TX 76177.

Availability and Summary of Documents for Incorporation by Reference

This document proposes to amend FAA Order 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019, and effective September 15, 2019. FAA Order 7400.11D is publicly available as listed in the **ADDRESSES** section of this document. FAA Order 7400.11D lists Class A, B, C, D, and E airspace areas, air traffic service routes, and reporting points.

Background

In 2003, Congress enacted the Vision 100—Century of Aviation Reauthorization Act (Pub. L., 108–176), which established a joint planning and development office in the FAA to manage the work related to the Next Generation Air Transportation System (NextGen). Today, NextGen is an ongoing FAA-led modernization of the nation's air transportation system to make flying safer, more efficient, and more predictable.

In support of NextGen efforts to improve the safety and efficiency of the NAS, as well as transition the NAS from a ground-based to a satellite-based Performance Based Navigation (PBN) system, the FAA is proposing to amend RNAV routes T–325 and T–354 by extending them to provide additional PBN enroute structure. This action would reduce air traffic control (ATC) sector workload and complexity, reduce pilot-to-controller communication, and increase NAS capacity in the areas of the extensions. Additionally, the extensions of these RNAV routes would assist ATC when non-radar procedures are required.

The Proposal

The FAA is proposing an amendment to Title 14 Code of Federal Regulations (14 CFR) part 71 to amend RNAV routes T–325 and T–354. The proposed route changes are described below.

T–325: T–325 currently extends between the Bowling Green, KY, VHF Omnidirectional Range (VOR)/Tactical Air Navigation (VORTAC) navigation aid and the Terre Haute, IN, VORTAC. The proposed change would remove the Terre Haute VORTAC and replace it with the JIBKA, IN, waypoint (WP) (located near the Terre Haute VORTAC), and extend the route northward from the JIBKA, IN, WP to the Oshkosh, WI, VORTAC. The following points would be added between the JIBKA WP and the Oshkosh VORTAC: CAPPY, IL, WP; SMARS, IL, WP; TRENM, IL, WP; START, IL, WP; GRIFT, IL, WP; DEBOW, WI, WP; LUNGS, WI, WP; and the HOMNY, WI, WP. Additional changes to other portions of the airway have been proposed in a separate NPRM. The unaffected segments of the existing route would remain as charted.

T–354: T–354 currently extends between the Park Rapids, MN, VOR/Distance Measuring Equipment (VOR/DME) navigation aid and the Siren, WI, VOR/DME. The proposed change would remove the Siren VOR/DME and replace it with the SSKYY, WI, WP (located over the Siren VOR/DME), and extend the route southeastward from the SSKYY, WI, WP to the Cunningham, KY, VOR/DME. The following points would be added between the SSKYY WP and the Cunningham VOR/DME: TONOC, WI, FIX; KOETZ, WI, WP; HRMNN, WI, WP; FOMAG, WI, WP; MAYSE, WI, WP; HOMRC, IL, WP; CPTON, IL, WP; BLLUE, IL, WP; BOSTN, IL, WP; and the Bible Grove, IL, VORTAC. Additional changes to other portions of the airway have been proposed in a separate NPRM. The unaffected segments of the existing route would remain as charted.

The existing latitude/longitude coordinates in the descriptions of T–325 and T–354 would be adjusted to the hundredths of a second place to provide greater accuracy for RNAV navigation.

Low altitude RNAV routes are published in paragraph 6011 of FAA Order 7400.11D, dated August 8, 2019, and effective September 15, 2019, which is incorporated by reference in 14 CFR 71.1. The RNAV routes listed in this document would be subsequently published in the Order.

FAA Order 7400.11, Airspace Designations and Reporting Points, is published yearly and effective on September 15.

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 Department of Transportation (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 will 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.

List 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 7400.11D, Airspace Designations and Reporting Points, dated August 8, 2019 and effective September 15, 2019, is amended as follows:

Paragraph 6011 United States Area Navigation Routes.

* * * * *

T–325 Bowling Green, KY (BWG) to Oshkosh, WI (OSH) [Amended]

Bowling Green, KY (BWG)	VORTAC	(Lat. 36°55′43.47″ N, long. 086°26′36.36″ W)
RENRO, KY	FIX	(Lat. 37°28′50.53″ N, long. 086°39′19.25″ W)
LOONE, KY	WP	(Lat. 37°44′14.43″ N, long. 086°45′18.02″ W)
APALO, IN	FIX	(Lat. 38°00′20.59″ N, long. 086°51′35.27″ W)
BUNKA, IN	FIX	(Lat. 39°04′57.32″ N, long. 087°09′06.58″ W)
JIBKA, IN	WP	(Lat. 39°30′08.93″ N, long. 087°16′26.74″ W)
CAPPY, IL	WP	(Lat. 40°00′06.00″ N, long. 087°44′31.22″ W)
SMARS, IL	WP	(Lat. 41°07′38.18″ N, long. 088°51′38.22″ W)
TRENM, IL	WP	(Lat. 41°17′24.93″ N, long. 089°00′27.53″ W)
START, IL	WP	(Lat. 41°45′24.83″ N, long. 089°00′21.81″ W)
GRIFT, IL	WP	(Lat. 42°17′28.14″ N, long. 088°53′41.42″ W)
DEBOW, WI	WP	(Lat. 42°44′08.30″ N, long. 088°50′48.92″ W)
LUNGS, WI	WP	(Lat. 43°02′43.66″ N, long. 088°56′54.86″ W)
HOMNY, WI	WP	(Lat. 43°31′02.22″ N, long. 088°39′40.15″ W)
Oshkosh, WI (OSH)	VORTAC	(Lat. 43°59′25.56″ N, long. 088°33′21.36″ W)

* * * * *

T–354 Park Rapids, MN (PKD) to Cunningham, KY (CNG) [Amended]

Park Rapids, MN (PKD)	VOR/DME	(Lat. 46°53′53.34″ N, long. 095°04′15.21″ W)
BRNRD, MN	WP	(Lat. 46°20′53.81″ N, long. 094°01′33.54″ W)
SSKYY, WI	WP	(Lat. 45°49′13.60″ N, long. 092°22′28.26″ W)
TONOC, WI	FIX	(Lat. 45°03′47.56″ N, long. 091°38′11.87″ W)
KOETZ, WI	WP	(Lat. 44°13′15.00″ N, long. 091°28′14.00″ W)
HRMNN, WI	WP	(Lat. 43°55′32.51″ N, long. 090°58′04.07″ W)
FOMAG, WI	WP	(Lat. 43°29′38.44″ N, long. 089°46′09.53″ W)
MAYSE, WI	WP	(Lat. 43°10′14.18″ N, long. 089°42′46.52″ W)
HOMRC, IL	WP	(Lat. 41°34′04.67″ N, long. 089°30′20.55″ W)
CPTON, IL	WP	(Lat. 41°06′51.57″ N, long. 089°11′58.93″ W)
BLLUE, IL	WP	(Lat. 40°07′09.20″ N, long. 088°32′45.48″ W)
BOSTN, IL	WP	(Lat. 39°53′46.57″ N, long. 088°26′18.96″ W)
Bible Grove, IL (BIB)	VORTAC	(Lat. 38°55′13.24″ N, long. 088°28′54.50″ W)
Cunningham, KY (CNG)	VOR/DME	(Lat. 37°00′30.99″ N, long. 088°50′12.89″ W)

* * * * *

Issued in Washington, DC, on April 15, 2020.

Scott M. Rosenbloom,

Acting Manager, Rules and Regulations Group.

[FR Doc. 2020–08289 Filed 4–20–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–100814–19]

RIN 1545–BP23

Meals and Entertainment Expenses Under Section 274; Hearing Cancellation

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Cancellation of notice of public hearing on proposed rulemaking.

SUMMARY: This document cancels a public hearing on proposed regulations that provide guidance under section 274 of the Internal Revenue Code (Code) regarding certain statutory amendments made to section 274 by 2017 legislation.

DATES: The public hearing, originally scheduled for April 29, 2020 at 10:00 a.m. is cancelled.

FOR FURTHER INFORMATION CONTACT: Regina Johnson of the Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel (Procedure and Administration) at (202) 317–5177 (not a toll-free number) or at *fdms.database@irscounsel.treas.gov.*

SUPPLEMENTARY INFORMATION: A notice of proposed rulemaking and notice of public hearing that appeared in the **Federal Register** on Friday, March 6, 2020 (85 FR 13118) announced that a public hearing was scheduled for April 29, 2020 at 10:00 a.m. in the IRS Auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW, Washington, DC. The subject of the public hearing is under section 274 of the Internal Revenue Code.

The public comment period for these regulations expired on April 13, 2020. The notice of proposed rulemaking and notice of hearing instructed those interested in testifying at the public hearing to submit an outline of the topics to be discussed. The outline of topics to be discussed was due by April 13, 2020. As of April 13, 2020, no one has requested to speak. Therefore, the public hearing scheduled for April 29, 2020 at 10:00 a.m. is cancelled.

Martin V. Franks,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel.

[FR Doc. 2020–08200 Filed 4–20–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR 100 and 165

[Docket Number USCG–2020–0082]

RIN 1625–AA08; AA00

Special Local Regulations and Safety Zones; Recurring Marine Events and Fireworks Displays and Swim Events Held in the Coast Guard Sector Long Island Sound Zone

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to modify special local regulations and annual recurring marine events and safety zones regulations for firework displays and swim events in Coast Guard Sector Long Island Sound Captain of the Port Zone. When enforced, these special local regulations and safety zones will restrict vessels from transiting regulated areas during certain annually recurring events. The proposed amendments to the special local regulations and safety zones are intended to expedite public notification and ensure the protection of the maritime public and event participants from the hazards associated with certain marine events. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before May 21, 2020.

ADDRESSES: You may submit comments identified by docket number USCG–2020–0082 using the Federal eRulemaking Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Marine Science Technician 2nd Class Joshua Stewart, Waterways Management Division, Sector Long Island Sound; telephone (203) 468–4469; email *joshua.f.stewart@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
FR Federal Register
LNM Local Notice to Mariners
NAD 83 North American Datum of 1983
NOE Notice of Enforcement
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Swim events, fireworks displays, and marine events are held on an annual recurring basis on the navigable waters within the Coast Guard Sector Long Island Sound COTP Zone. The Coast Guard has established special local regulations and safety zones for some of these annually recurring events on a

case by case basis to ensure the protection of the maritime public and event participants from potential hazards.

The COTP Sector Long Island Sound proposes to amend 33 CFR 100.100 Special Local Regulations; Regattas and Boat Races in the Coast Guard Sector Long Island Sound Captain of the Port Zone, Table to § 100.100 and 33 CFR 165.151 Safety Zones; Fireworks Displays, Air Shows, and Swim Events in the Captain of the Port Long Island Sound Zone, Table 1 to § 165.151.

The marine events listed therein include air shows, fireworks displays, and other marine related events requiring a limited access area restricting vessel traffic for safety purposes. The proposed amendments to the tables will more accurately reflect the dates of marine events based on historical occurences.

Issuing individual regulations for each new safety zone, amendment, or removal of an existing safety zone due to minor date fluctuations creates unnecessary administrative costs and burdens. This single proposed rulemaking will considerably reduce administrative overhead and provide the public with notice through publication in the **Federal Register** of the upcoming recurring safety zone regulations. Event sponsors desiring to hold an event not listed in the table for the Sector Long Island Sound area of responsibility may seek permission for a regulated area for their event through a request to the phone number or email listed in the above **FOR FURTHER INFORMATION CONTACT** section.

The purpose of this rulemaking is to ensure the safety of vessels and the navigable waters before, during, and after a scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231).

The Coast Guard encourages the public to participate in this proposed rulemaking through the comment process so that any necessary changes can be identified and implemented in a timely and efficient manner. The Coast Guard will address all public comments accordingly, whether through response, additional revision to the regulation, or otherwise.

III. Discussion of Proposed Rule

Parts 100 and 165 of 33 CFR contain regulations establishing special local regulations and safety zones to restrict vessel traffic for the safety of persons and property. Section 100.100 establishes Special Local Regulations to ensure the safety and security of marine related events, participants, and spectators in the Sector Long Island Sound AOR. From time to time, these sections require amendment to properly advertise the recurring safety zones in the Sector Long Island Sound AOR.

The Coast Guard proposes to revise regulations in 33 CFR 100.100 Special Local Regulations; Regattas and Boat Races in the Coast Guard Sector Long Island Sound Captain of the Port Zone, Table to § 100.100 as indicated below. The amendments would involve changes to the cited dates of seven events listed in the table. The amendments are as follows:

Event name	Date
5.1 Harvard-Yale Regatta	• Date: A single day event in May or June. • Time: 8 a.m. until 5 p.m. • Location: All waters of the Thames River at New London, Connecticut between the Penn Central Draw Bridge at position 41°21′46.94″ N 072°05′14.46″ W to Bartlett Cove at position 41°25′35.9″ N 072°05′42.89″ W (NAD 83). All positions are approximate.
7.2 Dolan Family Fourth Fireworks	• Date: A single day event in July. • Time: To be determined annually. • Locations: (1) "No Entry Area": All waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY within a 1000 foot radius of the launch platform in approximate position 40°53′42.50″ N, 073°30′04.30″ W (NAD 83). (2) "Slow/No Wake Area": All waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY contained within the following area; beginning at a point on land in position at 40°53′12.43″ N, 073°31′13.05″ W near Moses Point; then east across Oyster Bay Harbor to a point on land in position at 40°53′15.12″ N, 073°30′38.45″ W; then north along the shoreline to a point on land in position at 40°53′34.43″ N, 073°30′33.42″ W near Cove Point; then east along the shoreline to a point on land in position at 40°53′41.67″ N, 073°29′40.74″ W near Cooper Bluff; then south along the shoreline to a point on land in position 40°53′05.09″ N, 073°29′23.32″ W near Eel Creek; then east across Cold Spring Harbor to a point on land in position 40°53′06.69″ N, 073°28′19.9″ W; then north along the shoreline to a point on land in position 40°55′24.09″ N, 073°29′49.09″ W near Whitewood Point; then west across Oyster Bay to a point on land in position 40°55′5.29″ N, 073°31′19.47″ W near Rocky Point; then south along the shoreline to a point on land in position 40°54′04.11″ N, 073°30′29.18″ W near Plum Point; then northwest along the shoreline to a point on land in position 40°54′09.06″ N, 073°30′45.71″ W; then southwest along the shoreline to a point on land in position 40°54′03.2″ N, 073°31′01.29″ W; and then south along the shoreline back to point of origin (NAD 83). All positions are approximate.
7.4 Jones Beach State Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m.

Event name	Date
	• Locations: (1) "No Entry Area": All waters off of Jones Beach State Park, Wantagh, NY within a 1000 foot radius of the launch platform in approximate position 40°34′ 56.68″ N, 073°30′31.19″ W (NAD 83). (2) "Slow/No Wake Area": All navigable waters between Meadowbrook State Parkway and Wantagh State Parkway and contained within the following area. Beginning in position at 40°35′49.01″ N, 073°32′33.63″ W; then north along the Meadowbrook State Parkway to its intersection with Merrick Road in position at 40°39′14″ N, 073°34′0.76″ W; then east along Merrick Road to its intersection with Wantagh State Parkway in position at 40°39′51.32″ N, 073°30′43.36″ W; then south along the Wantagh State Parkway to its intersection with Ocean Parkway in position at 40°35′47.30″ N, 073°30′29.17″ W; then west along Ocean Parkway to its intersection with Meadowbrook State Parkway at the point of origin (NAD 83). All positions are approximate. (3) "No Southbound Traffic Area": All navigable waters of Zach's Bay south of the line connecting a point near the western entrance to Zach's Bay in position at 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay in position at 40°36′16.53″ N, 073°28′57.26″ W (NAD 83). All positions are approximate.
8.1 Riverfront Dragon Boat and Asian Festival	• Dates: A two day event in August. • Time: 8 a.m. until 4:30 p.m. each day. • Regulated area: All waters of the Connecticut River in Hartford, CT between the Bulkeley Bridge at 41°46′10.10″ N, 072°39′56.13″ W and the Wilbur Cross Bridge at 41°45′11.67″ N, 072°39′13.64″ W (NAD 83). All positions are approximate.
8.3 Stonewall Swim	• Date: A single day event in August. • Time: 8:30 a.m. until 12:30 p.m. • Location: All navigable waters of the Great South Bay within a three miles long and half mile wide box connecting Snedecor Avenue in Bayport, NY to Porgie Walk in Fire Island, NY. Formed by connecting the following points. Beginning at 40°43′40.24″ N, 073°03′41.50″ W; then to 40°43′40.00″ N, 073°03′13.40″ W; then to 40°40′04.13″ N, 073°03′43.81″ W; then to 40°40′08.30″ N, 073°03′17.70″ W; and then back to point of origin (NAD 83).
8.6 Smith Point Triathlon	• Date: A single day event in August. • Time: To be determined annually. • Location: All waters of Narrow Bay near Smith Point Park in Mastic Beach, NY within the area bounded by land along its southern edge and points in position at 40°44′14.28″ N, 072°51′40.68″ W; then north to a point at position 40°44′20.83″ N, 072°51′40.68″ W; then east to a point at position 40°44′20.83″ N, 072°51′19.73″ W; then south to a point at position 40°44′14.85″ N, 072°51′19.73″ W; and then southwest along the shoreline back to the point of origin (NAD 83). All positions are approximate.
10.1 Head of the Riverfront Rowing Regatta	Date: A single day event in October. Time: 5:30 a.m. to 5:30 p.m. Location: All water of the Connecticut River, Hartford, CT between at point North of Wethersfield Cove at 41°43′52.17″ N, 072°38′40.38″ W and the Riverside Boat House 41°46′30.98″ N, 072°39′54.35″ W (NAD 83).

Section 165.151, Table 1, establishes recurring safety zones to restrict vessel transit into and through specified areas to protect spectators, mariners, and other persons and property from potential hazards presented during certain events taking place in Sector Long Island Sound's AOR. From time to time, this section requires amendment to properly reflect the recurring safety zones in the AOR.

The Coast Guard proposes to revise regulations in 33 CFR 165.151 Safety Zones; Fireworks Displays, Air Shows, and Swim Events in the Captain of the Port Long Island Sound Zone, Table 1 to § 165.151 as indicated below. The revisions include updating the dates of events listed in the table and removing five events from the table. The amendments are as follows:

Event name	Date
2.1 Sag Harbor COC Winter Harbor Frost Fireworks	• Date: A single day event in February.

Event name	Date
	• Location: Waters of Sag Harbor off Long Wharf St. Pier, Sag Harbor, NY in approximate position 41°00′16.82″ N, 072°17′43.78″ W (NAD 83).
5.2 Greenport Spring Fireworks	• Date: A single day event in the month of May or June • Location: Waters of Greenport Harbor off Mitchell Park and Marina, Greenport, NY in approximate position 41°05′59.09″ N, 072°21′31.44″ W (NAD 83).
6.1 Barnum Festival Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Bridgeport Harbor, Bridgeport, CT in approximate position 41°9′04″ N, 073°12′49″ W (NAD 83).
6.4 Salute to Veterans Fireworks	• Date: A single day event in June. • Location: Waters of Reynolds Channel off Hempstead, NY in approximate position 40°35′36.62″ N, 073°35′20.72″ W (NAD 83).
6.5 Cherry Grove Arts Project Fireworks	• Date: A single day event in June. • Location: Waters of the Great South Bay off Cherry Grove, NY in approximate position 40°39′49.06″ N, 073°05′27.99″ W (NAD 83).
7.9 City of Middletown Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Middletown Harbor, Middletown, CT in approximate position 41°33′44.47″ N, 072°38′37.88″ W (NAD 83).
7.10 City of New Haven Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of New Haven Harbor, off Long Warf Park, New Haven, CT in approximate position 41°17′24″ N, 072°54′55.8″ W (NAD 83).
7.11 City of Norwich Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Thames River, Norwich, CT in approximate position, 41°31′16.835″ N, 072°04′43.327″ W (NAD 83).
7.12 City of Stamford Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Fisher's Westcott Cove, Stamford, CT in approximate position 41°02′09.56″ N, 073°30′57.76″ W (NAD 83).
7.13 City of West Haven Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of New Haven Harbor, off Bradley Point, West Haven, CT in approximate position 41°15′07″ N, 072°57′26″ W (NAD 83).
7.15 Davis Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay, Davis Park, NY in approximate position, 40°41′17″ N, 073°00′20″ W (NAD 83).
7.16 Fairfield Aerial Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Jennings Beach, Fairfield, CT in approximate position 41°08′22″ N, 073°14′02″ W (NAD 83).
7.17 Fund in the Sun	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay off The Pines, East Fire Island, NY in approximate position 40°40′07.43″ N, 073°04′13.88″ W (NAD 83).
7.18 Independence Day Celebration Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Umbrella Beach, Montauk, NY in approximate position 41°01′44″ N, 071°57′13″ W (NAD 83).
7.19 Jones Beach State Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m.

Event name	Date
	• Location: Waters off Jones Beach State Park, Wantagh, NY in approximate position 40°34′56.676″ N, 073°30′31.186″ W (NAD 83).
7.20 Madison Cultural Arts Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Long Island Sound off Madison, CT in approximate position 41°16′10″ N, 072°36′30″ W (NAD 83).
7.21 Mason's Island Yacht Club Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Fisher's Island Sound, Noank, CT in approximate position 41°19′30.61″ N, 071°57′48.22″ W (NAD 83).
7.22 Patchogue Chamber of Commerce Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay, Patchogue, NY in approximate position, 40°44′38″ N, 073°00′33″ W (NAD 83).
7.23 Riverfest Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Hartford, CT in approximate position, 41°45′39.93″ N, 072°39′49.14″ W (NAD 83).
7.24 Village of Asharoken Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Northport Bay, Asharoken, NY in approximate position, 41°55′54.04″ N, 073°21′27.97″ W (NAD 83).
7.25 Village of Port Jefferson Fourth of July Celebration Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Port Jefferson Harbor, Port Jefferson, NY in approximate position 40°57′10.11″ N, 073°04′28.01″ W (NAD 83).
7.26 Village of Quoque Foundering Anniversary Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Quantuck Bay, Quoque, NY in approximate position 40°48′42.99″ N, 072°37′20.20″ W (NAD 83).
7.34 Devon Yacht Club Fireworks	• Date: A single day event in July. • Location: Waters of Napeague Bay, in Block Island Sound off Amagansett, NY in approximate position 40°59′41.40″ N, 072°06′08.70″ W (NAD 83).
7.35 Dolan Family Fourth Fireworks	• Date: A single day event in July. • Location: Waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY in approximate position 40°53′42.50″ N, 073°30′04.30″ W (NAD 83).
7.38 Madison Fireworks	• Date: A single day event in July. • Location: Waters of Long Island Sound off Madison Beach, Madison, CT in approximate position 41°16′03.93″ N, 072°36′15.97″ W (NAD 83).
7.39 Stratford Fireworks	• Date: A single day event in June or July. • Location: Waters of Long Island Sound surrounding Short Beach Park, Stratford, CT in approximate position 41°09′50.82″ N, 073°06′47.13″ W (NAD 83).
7.40 Rowayton Fireworks	• Date: A single day event in July. • Location: Waters of Long Island Sound south of Bayley Beach Park, Rowayton, CT in approximate position 41°03′11″ N, 073°26′41″ W (NAD 83).
7.42 Connetquot River Summer Fireworks	• Date: A single day event in July. • Location: Waters of the Connetquot River off Snapper Inn Restaurant, Oakdale, NY in approximate position 40°43′32.38″ N, 073°09′02.64″ W (NAD 83).
7.43 North Bay Fourth of July Fireworks	• Date: A single day event in July. • Location: Waters of the Great South Bay in Patchogue Bay 4,000 feet southeast of Blue Point, NY in approximate position 40°44′6.28″ N, 073°01′02.50″ W (NAD 83).
7.44 Sebonak Golf Club Fireworks	• Date: A single day event in July or August.

Event name	Date
	• Location: Waters of the Great Peconic Bay ¾ of a mile northwest of Bullhead Bay, Shinnecock, NY in approximate position 40°55′11.79″ N, 072°28′04.34″ W (NAD 83).
7.45 Xirinachs Family Foundation Fireworks	• Date: A single day event in July. • Location: Waters of Hunting Bay off Beach Avenue, Huntington Bay, NY in approximate position 40°54′23.27″ N, 73°25′08.04″ W (NAD 83).
7.46 Irwin Family 4th of July	• Date: A single day event in June or July. • Location: Waters of the Great South Bay off The Helm Road, East Islip, NY in approximate position 40°42′12.28″ N, 73°12′00.08″ W (NAD 83).
7.47 Westbrook July Celebration	• Date: A single day event in July or August. • Location: Waters of Long Island Sound Westbrook Harbor, West Brook, CT in approximate position 41°16′10″ N, 72°26′14″ W (NAD 83).
8.5 Shelter Island Yacht Club Fireworks	• Date: A single day event in August. • Location: Waters of Dering Harbor north of Shelter Island Yacht Club, Shelter Island, NY in approximate position 41°05′23.47″ N, 072°21′11.18″ W (NAD 83).
8.6 Stamford Fireworks	• Date: A single day event in August. • Location: Waters of Stamford Harbor, off Kosciuszco Park, Stamford, CT in approximate position 41°01′48.46″ N, 073°32′15.32″ W (NAD 83).
8.7 Nikon Theater at Jones Beach Fireworks	• Date: A single day event in August. • Location: Waters of Zacks Bay off the Nikon Theater, Jones Beach, NY in approximate position 40°36′02.12″ N, 073°30′05.65″ W (NAD 83).
8.8 Ascension Fireworks	• Date: A single day event in August. • Location: Waters of the Great South Bay off The Pines, East Fire Island, NY in approximate position 40°40′07.43″ N, 073°04′13.88″ W (NAD 83).
9.4 The Creek Fireworks (The Creek Club)	• Date: A single day event in September. • Location: Waters of Long Island Sound off the Creek Golf Course, Lattingtown, NY in approximate position 40°54′13″ N, 073°35′58″ W (NAD 83).
9.5 Archangel Michaek Greek Orthodox Church Fireworks	• Date: A single day event in September or October. • Location: Waters of Hempstead Harbor off Bar Beach Town Park, Port Washington, NY in approximate position 40°49′42″ N, 073°39′07″ W (NAD 83).

The following events will be removed from the table:

Event name	Date
4.1 Bridgeport Bluefish April Fireworks	Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).
6.6 Bridgeport Bluefish June Fireworks	Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).
7.48 Bridgeport Bluefish July Fireworks	Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).
8.9 Bridgeport Bluefish August Fireworks	Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).

Event name	Date
9.7 Bridgeport Bluefish September Fireworks	Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).

The effect of this proposed rule would be to restrict general navigation in the safety zones during these events. Vessels intending to transit the designated waterway through the safety zones will only be allowed to transit the area when COTP or a designated representative has deemed it safe to do so or at the completion of the events. The proposed annually recurring safety zones are necessary to provide for the safety of life on navigable waters of the U.S. during the events.

IV. Regulatory Analyses

We developed this proposed 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 NPRM has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, the NPRM 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 duration of the safety zones. These safety zones are limited in size and duration, and are usually positioned away from high vessel traffic areas. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the zones and the rule would allow vessels to seek permission to enter the zones. Vessel traffic would also be able to request permission from the COTP or a designated representative to enter the restricted area.

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 proposed rule would not have a significant economic impact on a substantial number of small entities.

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

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

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 proposed 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 call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would 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 proposed 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 proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would 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 proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

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 proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f) and have made a preliminary determination 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 proposed rule involves amending the dates of events that are already listed in 33 CFR 100.100 and 33 CFR 165.151 and removing listed events from 33 CFR 165.151. Normally such actions are categorically excluded from further review under paragraph L60b and L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. We seek any comments or

information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email 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.

V. 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 *https://www.regulations.gov.* If your material cannot be submitted using *https://www.regulations.gov,* call or email 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 *https://www.regulations.gov* and will include any personal information you have provided. For more about privacy and submissions in response to this document, see DHS's Correspondence System of Records notice (84 FR 48645, September 26, 2018).

Documents mentioned in this NPRM as being available in the docket, and all public comments, will be in our online docket at *https://www.regulations.gov* and can be viewed by following that website'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.

List of Subjects

33 CFR Part 100

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

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 is proposing to amend 33 CFR parts 100 and 165 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

§ 100.100 [Amended]

■ 2. Amend § 100.100 by revising Table to § 100.100 to read as follows:

* * * * *

TABLE TO § 100.100

5	May
5.1 Harvard-Yale Regatta, Thames River, New London, CT	• Date: A single day event in May or June. • Time: 8 a.m. until 5 p.m. • Location: All waters of the Thames River at New London, Connecticut between the Penn Central Draw Bridge at position 41°21′46.94″ N 072°05′14.46″ W to Bartlett Cove at position 41°25′35.9″ N 072°05′42.89″ W (NAD 83). All positions are approximate.
5.2 Jones Beach Air Show	• Date: The Thursday through Sunday before Memorial Day each May. • Time: (1) The ''No Entry Area'' will be enforced each day from the start of the air show until 30 minutes after it concludes. Exact time will be determined annually. (2) The ''Slow/No Wake Area'' and the ''No Southbound Traffic Area'' will be enforced each day for six hours after the air show concludes. Exact time will be determined annually. • Location: (1) ''No Entry Area'': Waters of the Atlantic Ocean off Jones Beach State Park, Wantagh, NY contained within the following described area; beginning at a point on land at position 40°34′54″ N, 073°33′21″ W; then east along the shoreline of Jones Beach State Park to a point on land at position 40°35′53″ N, 073°28′48″ W; then south to a point in the Atlantic Ocean off of Jones Beach at position 40°35′05″ N, 073°28′34″ W; then west to position 40°33′15″ N, 073°33′09″ W; then north to the point of origin (NAD 83). All positions are approximate.

TABLE TO § 100.100—Continued

	(2) "Slow/No Wake Area": All navigable waters between Meadowbrook State Parkway and Wantagh State Parkway and contained within the following area. Beginning in position 40°35′49.01″ N, 73°32′33.63″ W; then north along the Meadowbrook State Parkway to its intersection with Merrick Road in position 40°39′14″ N, 73°34′0.76″ W; then east along Merrick Road to its intersection with Wantagh State Parkway in position 40°39′51.32″ N, 73°30′43.36″ W; then south along the Wantagh State Parkway to its intersection with Ocean Parkway in position 40°35′47.30″ N, 073°30′29.17″ W; then west along Ocean Parkway to its intersection with Meadowbrook State Parkway at the point of origin (NAD 83). All positions are approximate. (3) "No Southbound Traffic Area": All navigable waters of Zach's Bay south of the line connecting a point near the western entrance to Zach's Bay at position 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay at position 40°36′16.53″ N, 073°28′57.26″ W (NAD 83). All positions are approximate.
6	June
6.1 Swim Across America Greenwich	• Date: A single day event during June. • Time: 5:30 a.m. until noon. • Location: All navigable waters of Stamford Harbor within an area starting at a point in position 41°01′32.03″ N, 073°33′8.93″ W, then southeast to a point in position 41°01′15.01″ N, 073°32′55.58″ W; then southwest to a point in position 41°0′49.25″ N, 073°33′20.36″ W; then northwest to a point in position 41°0′58″ N, 073°33′27″ W; then northeast to a point in position 41°1′15.8″ N, 073°33′9.85″ W, then heading north and ending at point of origin (NAD 83). All positions are approximate.
7	July
7.1 Connecticut River Raft Race, Middletown, CT	• Date: A single day between the last Saturday in July through first Saturday of August. • Time: 10 a.m. until 2 p.m. • Location: All waters of the Connecticut River near Middletown, CT between Gildersleeve Island (Marker no. 99) at position 41°36′02.13″ N, 072°37′22.71″ W; and Portland Riverside Marina (Marker no. 88) at position 41°33′38.3″ N, 072°37′36.53″ W (NAD 83). All positions are approximate. • Additional Stipulations: Spectators or other vessels shall not anchor, block, loiter, or impede the transit of event participants or official patrol vessels in the regulated areas unless authorized by COTP or designated representative.
7.2 Dolan Family Fourth Fireworks	• Date: A single day event in July. • Time: To be determined annually. • Locations: (1) "No Entry Area": All waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY within a 1000 foot radius of the launch platform in approximate position 40°53′42.50″ N, 073°30′04.30″ W (NAD 83).

TABLE TO § 100.100—Continued

	(2) "Slow/No Wake Area": All waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY contained within the following area; beginning at a point on land in position at 40°53′12.43″ N, 073°31′13.05″ W near Moses Point; then east across Oyster Bay Harbor to a point on land in position at 40°53′15.12″ N, 073°30′38.45″ W; then north along the shoreline to a point on land in position at 40°53′34.43″ N, 073°30′33.42″ W near Cove Point; then east along the shoreline to a point on land in position at 40°53′41.67″ N, 073°29′40.74″ W near Cooper Bluff; then south along the shoreline to a point on land in position 40°53′05.09″ N, 073°29′23.32″ W near Eel Creek; then east across Cold Spring Harbor to a point on land in position 40°53′06.69″ N, 073°28′19.9″ W; then north along the shoreline to a point on land in position 40°55′24.09″ N, 073°29′49.09″ W near Whitewood Point; then west across Oyster Bay to a point on land in position 40°55′5.29″ N, 073°31′19.47″ W near Rocky Point; then south along the shoreline to a point on land in position 40°54′04.11″ N, 073°30′29.18″ W near Plum Point; then northwest along the shoreline to a point on land in position 40°54′09.06″ N, 073°30′45.71″ W; then southwest along the shoreline to a point on land in position 40°54′03.2″ N, 073°31′01.29″ W; and then south along the shoreline back to point of origin (NAD 83). All positions are approximate.
7.3 Clam Shell Foundation Fireworks	• Date: A single day during July. • Time: To be determined annually. • Locations: (1) "No Entry Area": All waters of Three Mile Harbor, East Hampton, NY within a 1000 foot radius of the launch platform in approximate position 41°01′15.49″ N, 072°11′27.5″ W (NAD 83). (2) "Northbound Traffic Only Area": All waters of Three Mile Harbor, East Hampton, NY contained within the following area; beginning at a point in position at 41°02′5.05″ N, 072°11′19.52″ W; then southeast to a point on land in position at 41°02′2.67″ N, 072°11′17.97″ W; then south along shoreline to a point on land in position at 41°01′35.26″ N, 072°11′9.56″ W; then southeast across channel to a point on land in position at 41°01′30.28″ N, 072°10″52.77″ W; then north along the shoreline to a point on land in position at 41°01′41.35″ N, 072° 10′52.57″ W; then north across channel to a point on land in position at 41°01′44.41″ N, 072° 10′52.23″ W near the southern end of Sedge Island; then north along shoreline of Sedge Island to a point on land in position at 41°01′56.3″ N, 072°10′59.37″ W, near the northern end of Sedge Island; then northwest across the channel to a point on land in position 41°01′56.76″ N, 072°11′0.66″ W; then northwest along shoreline to a point on land in position 41°01′41.35″ N, 072°10′52.57″ W; then northwest to position at 41°02′5.92″ N, 072°11′16.73″ W; and then southwest to point of origin (NAD 83). All positions are approximate.
7.4 Jones Beach State Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Locations: (1) "No Entry Area": All waters off of Jones Beach State Park, Wantagh, NY within a 1000 foot radius of the launch platform in approximate position 40°34′56.68″ N, 073°30′31.19″ W (NAD 83). (2) "Slow/No Wake Area": All navigable waters between Meadowbrook State Parkway and Wantagh State Parkway and contained within the following area. Beginning in position at 40°35′49.01″ N, 073°32′33.63″ W; then north along the Meadowbrook State Parkway to its intersection with Merrick Road in position at 40°39′14″ N, 073°34′0.76″ W; then east along Merrick Road to its intersection with Wantagh State Parkway in position at 40°39′51.32″ N, 073°30′43.36″ W; then south along the Wantagh State Parkway to its intersection with Ocean Parkway in position at 40°35′47.30″ N, 073°30′29.17″ W; then west along Ocean Parkway to its intersection with Meadowbrook State Parkway at the point of origin (NAD 83). All positions are approximate.

TABLE TO § 100.100—Continued

	(3) "No Southbound Traffic Area": All navigable waters of Zach's Bay south of the line connecting a point near the western entrance to Zach's Bay in position at 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay in position at 40°36′16.53″ N, 073°28′57.26″ W (NAD 83). All positions are approximate.
7.5 Maggie Fischer Memorial Great South Bay Cross Bay Swim	• Date: A single day during July. • Time: To be determined annually. • Location: Waters of the Great South Bay, NY within 100 yards of the race course. Starting Point at the Fire Island Lighthouse Dock in position at 40°38′01″ N, 073°13′07″ W; then north-by-northwest to a point in position at 40°38′52″ N, 073°13′09″ W; then north-by-northwest to a point in position at 40°39′40″ N, 073°13′30″ W; then north-by-northwest to a point in position at 40°40′30″ N, 073°14′00″ W; and then north-by-northwest, finishing at Gilbert Park, Brightwaters, NY at position 40°42′25″ N, 073°14′52″ W (NAD 83). All positions are approximate.
7.6 Aquapalooza, Zach's Bay	• Date: A single day during July. • Time: 11:30 a.m. to 8 p.m. • Location: All navigable waters of Zach's Bay, Wantagh, NY south of the line connecting a point near the western entrance to Zach's Bay in approximate position 40°36′29.20″ N, 073°29′22.88″ W and a point near the eastern entrance of Zach's Bay in approximate position 40°36′16.53″ N, 073°28′57.26″ W. • Additional stipulations: During the enforcement period vessel speed in the regulated area is restricted to no wake speed or 6 knots, whichever is slower. On the day of the event from 3 p.m. to 5:30 p.m. vessels may only transit the regulated area in the northbound direction or outbound direction.
7.7 Fran Schnarr Open Water Championship Swim	• Date: A single day during July. • Time: To be determined annually. • Location: Waters of Huntington Bay, NY within 100 yards of the race course. Starting in position at 40°54′25.3″ N, 073°24′27.9″ W; then northeast to a position at 40°54′32″ N, 73°23′57.7″ W; then northwest to a position at 40°54′37.9″ N, 073°23′57.2″ W; then southwest to a position at 40°54′33.2″ N, 073°25′28.1″ W; then southeast to a position at 40°54′25.5″ N, 073°25′25.7″ W; and then southeast to point of origin (NAD 83). All positions are approximate.
8	August
8.1 Riverfront Dragon Boat and Asian Festival	• Dates: A two day event in August. • Time: 8 a.m. until 4:30 p.m. each day. • Regulated area: All waters of the Connecticut River in Hartford, CT between the Bulkeley Bridge at 41°46′10.10″ N, 072°39′56.13″ W and the Wilbur Cross Bridge at 41°45′11.67″ N, 072°39′13.64″ W (NAD 83). All positions are approximate.
8.2 Swim Across the Sound	• Date: A single day during August. • Time: To be determined annually. • Location: Waters of Long Island Sound from Port Jefferson, NY in approximate position 40°58′11.71″ N, 073°05′51.12″ W; then northwest to Captain's Cove Seaport, Bridgeport, CT in approximate position 41°09′25.07″ N, 073°12′47.82″ W (NAD 83).
8.3 Stonewall Swim	• Date: A single day event in August. • Time: 8:30 a.m. until 12:30 p.m. • Location: All navigable waters of the Great South Bay within a three miles long and half mile wide box connecting Snedecor Avenue in Bayport, NY to Porgie Walk in Fire Island, NY. Formed by connecting the following points. Beginning at 40°43′40.24″ N, 073°03′41.50″ W; then to 40°43′40.00″ N, 073°03′13.40″ W; then to 40°40′04.13″ N, 073°03′43.81″ W; then to 40°40′08.30″ N, 073°03′17.70″ W; and then back to point of origin (NAD 83).
8.4 Island Beach Two Mile Swim	• Date: A single day during August. • Time: To be determined annually.

TABLE TO § 100.100—Continued

	• Location: All waters of Captain Harbor between Little Captain's Island and Bower's Island that are located within the box formed by connecting four points in the following positions. Beginning at 40°59′23.35″ N 073°36′42.05″ W; then northwest to 40°59′51.04″ N 073°37′57.32″ W; then southwest to 40°59′45.17″ N 073°38′01.18″ W; then southeast to 40°59′17.38″ N 073°36′45.9″ W; then northeast to the point of origin (NAD 83). All positions are approximate.
8.5 Waves of Hope Swim	• Date: A single day during August. • Time: To be determined annually. • Location: All waters of the Great South Bay off Amityville, NY shoreward of a line created by connecting the following points. Beginning at a point at 40°39′22.38″ N, 073°25′31.63″ W; then south to a point at 40°39′2.18″ N, 073°25′31.63″ W; then east to a point at 40°39′2.18″ N, 073°24′3.81″ W; then north to a point at 40°39′18.27″ N, 073°24′3.81″ W; and then west back to point of origin (NAD 83). All positions are approximate.
8.6 Smith Point Triathlon	• Date: A single day event in August. • Time: To be determined annually. • Location: All waters of Narrow Bay near Smith Point Park in Mastic Beach, NY within the area bounded by land along its southern edge and points in position at 40°44′14.28″ N, 072°51′40.68″ W; then north to a point at position 40°44′20.83″ N, 072°51′40.68″ W; then east to a point at position 40°44′20.83″ N, 072°51′19.73″ W; then south to a point at position 40°44′14.85″ N, 072°51′19.73″ W; and then southwest along the shoreline back to the point of origin (NAD 83). All positions are approximate.
9	September
9.1 Head of the Tomahawk	• Date: A single day during September. • Time: To be determined annually. • Location: All navigable waters of the Connecticut River off South Glastonbury, CT. Beginning at position 41°41′18.88″ N; 072°37′16.26″ W; then downriver along the west bank to a point at position 41°38′49.12″ N, 072°37′32.73″ W; then across the Connecticut River to a point at position 41°38′49.5″ N, 072°37′19.55″ W; then upriver along the east bank to a point at position 41°41′25.82″ N, 072°37′9.08″ W; then across the Connecticut River to the point of origin (NAD 83). • Additional Stipulations: Non-event vessels transiting through the area during the enforcement period are to travel at no wake speeds or 6 knots, whichever is slower and that non-event vessels shall not block or impede the transit of event participants, event safety vessels or official patrol vessels in the regulated area unless authorized by COTP or designated representatives.
10	October
10.1 Head of the Riverfront Rowing Regatta, Hartford, CT	• Date: A single day event in October. • Time: 5:30 a.m. until 5:30 p.m. • Location: All water of the Connecticut River, Hartford, CT, between at point North of Wethersfield Cove at 41°43′52.17″ N, 072°38′40.38″ W and the Riverside Boat House 41°46′30.98″ N, 072° 39′54.35″ W (NAD 83).

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

§ 165.151 [Amended]

■ 2. Amend § 165.151 by revising Table 1 to § 165.151 to read as follows:

* * * * *

TABLE 1 TO § 165.151

2	February
2.1 Sag Harbor COC Winter Harbor Frost Fireworks	Date: A single day event in February. Location: Waters of Sag Harbor off Long Wharf St. Pier, Sag Harbor, NY in approximate position 41°00′16.82″ N, 072°17′43.78″ W (NAD 83).
4	April
4.1 Bridgeport Bluefish April Fireworks	• Location: Waters of the Pequannock River's Lower Reach surrounding Steel Point, Bridgeport, CT in approximate position 41°10′35″ N, 073°10′58″ W (NAD 83).
5	May
5.1 Jones Beach Air Show	• Date: The Thursday through Sunday before Memorial Day each May from 9:30 a.m. until 3:30 p.m. each day. • Location: Waters of the Atlantic Ocean off Jones Beach State Park, Wantagh, NY contained within the following described area; beginning in approximate position 40°34′54″ N, 073°33′21″ W, then running east along the shoreline of Jones Beach State Park to approximate position 40°35′53″ N, 073°28′47″ W; then running south to a position in the Atlantic Ocean off of Jones Beach at approximate position 40°35′05″ N, 073°28′34″ W; then running West to approximate position 40°33′15″ N, 073°33′09″ W; then running North to the point of origin.
5.2 Greenport Spring Fireworks	• Date: A single day event in the month of May or June. • Location: Waters of Greenport Harbor off Mitchell Park and Marina, Greenport, NY in approximate position 41°05′59.09″ N, 072°21′31.44″ W (NAD 83).
6	June
6.1 Barnum Festival Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Bridgeport Harbor, Bridgeport, CT in approximate position 41°9′04″ N, 073°12′49″ W (NAD 83).
6.2 Town of Branford Fireworks	• Location: Waters of Branford Harbor, Branford, CT in approximate position, 41°15′30″ N, 072°49′22″ W (NAD 83).
6.3 Vietnam Veterans/Town of East Haven Fireworks	• Location: Waters off Cosey Beach, East Haven, CT in approximate position, 41°14′19″ N, 072°52′9.8″ W (NAD 83).
6.4 Salute to Veterans Fireworks	• Date: A single day event in June. • Location: Waters of Reynolds Channel off Hempstead, NY in approximate position 40°35′36.62″ N, 073°35′20.72″ W (NAD 83).
6.5 Cherry Grove Arts Project Fireworks	• Date: A single day event in June. • Location: Waters of the Great South Bay off Cherry Grove, NY in approximate position 40°39′49.06″ N, 073°05′27.99″ W (NAD 83).
7	July
7.1 Point O'Woods Fire Company Summer Fireworks	• Location: Waters of the Great South Bay, Point O'Woods, NY in approximate position 40°39′18.57″ N, 073°08′5.73″ W (NAD 83).
7.2 Cancer Center for Kids Fireworks	• Location: Waters off of Bayville, NY in approximate position 40°54′38.20″ N, 073°34′56.88″ W (NAD 83).
7.3 City of Westbrook, CT July Celebration Fireworks	• Location: Waters of Westbrook Harbor, Westbrook, CT in approximate position, 41°16′10.50″ N, 072°26′14″ W (NAD 83).
7.4 Norwalk Fireworks	• Location: Waters off Calf Pasture Beach, Norwalk, CT in approximate position, 41°04′50″ N, 073°23′22″ W (NAD 83).
7.5 Lawrence Beach Club Fireworks	• Location: Waters of the Atlantic Ocean off Lawrence Beach Club, Atlantic Beach, NY in approximate position 40°34′42.65″ N, 073°42′56.02″ W (NAD 83).
7.6 Sag Harbor Fireworks	• Location: Waters of Sag Harbor Bay off Havens Beach, Sag Harbor, NY in approximate position 41°00′26″ N, 072°17′9″ W (NAD 83).
7.7 South Hampton Fresh Air Home Fireworks	• Location: Waters of Shinnecock Bay, Southampton, NY in approximate position, 40°51′48″ N, 072°26′30″ W (NAD 83).
7.8 Westport Police Athletic League Fireworks	• Location: Waters off Compo Beach, Westport, CT in approximate position, 41°06′15″ N, 073°20′57″ W (NAD 83).
7.9 City of Middletown Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Middletown Harbor, Middletown, CT in approximate position 41°33′44.47″ N, 072°38′37.88″ W (NAD 83).
7.10 City of New Haven Fireworks	• Date: A single day event in July.

TABLE 1 TO § 165.151—Continued

	• Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of New Haven Harbor, off Long Warf Park, New Haven, CT in approximate position 41°17′24″ N, 072°54′55.8″ W (NAD 83).
7.11 City of Norwich July Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Thames River, Norwich, CT in approximate position, 41°31′16.835″ N, 072°04′43.327″ W (NAD 83).
7.12 City of Stamford Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Fisher's Westcott Cove, Stamford, CT in approximate position 41°02′09.56″ N, 073°30′57.76″ W (NAD 83).
7.13 City of West Haven Fireworks	• Date: A single day event in June or July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of New Haven Harbor, off Bradley Point, West Haven, CT in approximate position 41°15′07″ N, 072°57′26″ W (NAD 83).
7.14 CDM Chamber of Commerce Annual Music Fest Fireworks	• Date: July 4. • Rain date: July 5. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Cedar Beach Town Park, Mount Sinai, NY in approximate position 40°57′59.58″ N, 073°01′57.87″ W (NAD 83).
7.15 Davis Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay, Davis Park, NY in approximate position, 40°41′17″ N, 073°00′20″ W (NAD 83).
7.16 Fairfield Aerial Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Jennings Beach, Fairfield, CT in approximate position 41°08′22″ N, 073°14′02″ W (NAD 83).
7.17 Fund in the Sun Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay off The Pines, East Fire Island, NY in approximate position 40°40′07.43″ N, 073°04′13.88″ W (NAD 83).
7.18 Independence Day Celebration Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Umbrella Beach, Montauk, NY in approximate position 41°01′44″ N, 071°57′13″ W (NAD 83).
7.19 Jones Beach State Park Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters off Jones Beach State Park, Wantagh, NY in approximate position 40°34′56.676″ N, 073°30′31.186″ W (NAD 83).
7.20 Madison Cultural Arts Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Long Island Sound off Madison, CT in approximate position 41°16′10″ N, 072°36′30″ W (NAD 83).
7.21 Mason's Island Yacht Club Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Fisher's Island Sound, Noank, CT in approximate position 41°19′30.61″ N, 071°57′48.22″ W (NAD 83).
7.22 Patchogue Chamber of Commerce Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Great South Bay, Patchogue, NY in approximate position, 40°44′38″ N, 073°00′33″ W (NAD 83).
7.23 Riverfest Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of the Connecticut River, Hartford, CT in approximate positions, 41°45′39.93″ N, 072°39′49.14″ W (NAD 83).
7.24 Village of Asharoken Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Northport Bay, Asharoken, NY in approximate position, 41°55′54.04″ N, 073°21′27.97″ W (NAD 83).
7.25 Village of Port Jefferson Fourth of July Celebration Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m. • Location: Waters of Port Jefferson Harbor, Port Jefferson, NY in approximate position 40°57′10.11″ N, 073°04′28.01″ W (NAD 83).
7.26 Village of Quoque Foundering Anniversary Fireworks	• Date: A single day event in July. • Time: 8:30 p.m. to 10:30 p.m.

TABLE 1 TO § 165.151—Continued

	• Location: Waters of Quantuck Bay, Quoque, NY in approximate position 40°48′ 42.99″ N, 072°37′20.20″ W (NAD 83).
7.27 City of Long Beach Fireworks	• Location: Waters off Riverside Blvd., City of Long Beach, NY in approximate position 40°34′38.77″ N, 073°39′41.32″ W (NAD 83).
7.28 Great South Bay Music Festival Fireworks	• Location: Waters of Great South Bay, off Bay Avenue, Patchogue, NY in approximate position 40°44′45″ N, 073°00′25″ W (NAD 83).
7.29 Mashantucket Pequot Fireworks	• Location: Waters of the Thames River, New London, CT in approximate positions Barge 1, 41°21′03.03″ N, 072°5′24.5″ W Barge 2, 41°20′51.75″ N, 072°5′ 18.90″ W (NAD 83).
7.30 Shelter Island Fireworks	• Location: Waters of Gardiner Bay, Shelter Island, NY in approximate position 41°04′39.11″ N, 072°22′01.07″ W (NAD 83).
7.31 Clam Shell Foundation Fireworks	• Location: Waters of Three Mile Harbor, East Hampton, NY in approximate position 41°1′15.49″ N, 072°11′27.50″ W (NAD 83).
7.32 Town of North Hempstead Bar Beach Fireworks	• Location: Waters of Hempstead Harbor, North Hempstead, NY in approximate position 40°49′54″ N, 073°39′14″ W (NAD 83).
7.33 Groton Long Point Yacht Club Fireworks	• Location: Waters of Long Island Sound, Groton, CT in approximate position 41°18′05″ N, 072°02′08″ W (NAD 83).
7.34 Devon Yacht Club Fireworks	• Date: A single day event in July. • Location: Waters of Napeague Bay, in Block Island Sound off Amagansett, NY in approximate position 40°59′41.40″ N, 072°06′08.70″ W (NAD 83).
7.35 Dolan Family Fourth Fireworks	• Date: A single day event in July. • Location: Waters of Oyster Bay Harbor in Long Island Sound off Oyster Bay, NY in approximate position 40°53′42.50″ N, 073°30′04.30″ W (NAD 83).
7.36 Friar's Head Golf Club Fireworks	• Date: A day during the first two weeks of July. • Location: Waters of Long Island Sound off Baiting Hollow, NY in approximate position, 40°58′19.53″ N, 072°43′45.65″ W (NAD 83).
7.37 Islip Fireworks	• Date: July 4. • Rain date: July 5. • Location: Waters of the Great South Bay off Bay Shore Manor Park, Islip, NY in approximate position 40°42′24″ N, 073°14′24″ W (NAD 83).
7.38 Madison Fireworks	• Date: A single day event in July. • Location: Waters of Long Island Sound off Madison Beach, Madison, CT in approximate position 41°16′03.93″ N, 072°36′15.97″ W (NAD 83).
7.39 Stratford Fireworks	• Date: A single day event in June or July. • Location: Waters of Long Island Sound surrounding Short Beach Park, Stratford, CT in approximate position 41°09′50.82″ N, 073°06′47.13″ W (NAD 83).
7.40 Rowayton Fireworks	• Date: A single day event in July. • Location: Waters of Long Island Sound south of Bayley Beach Park, Rowayton, CT in approximate position 41°03′11″ N, 073°26′41″ W (NAD 83).
7.41 Niantic Bay Fireworks	• Date: A day during the first three weeks of July. • Location: Waters of Niantic Bay 1,500 feet west of the Niantic River Railroad Bridge, Niantic, CT in approximate position 41°19′22.59″ N, 072°11′03.47″ W (NAD 83).
7.42 Connetquot River Summer Fireworks	• Date: A single day event in July. • Location: Waters of the Connetquot River off Snapper Inn Restaurant, Oakdale, NY in approximate position 40°43′32.38″ N, 073°9′02.64″ W (NAD 83).
7.43 North Bay Fourth of July Fireworks	• Date: A single day event in July. • Location: Waters of the Great South Bay in Patchogue Bay 4,000 feet southeast of Blue Point, NY in approximate position 40°44′6.28″ N, 073°01′02.50″ W (NAD 83).
7.44 Sebonak Golf Club Fireworks	• Date: A single day event in July or August. • Location: Waters of the Great Peconic Bay 3 4 of a mile northwest of Bullhead Bay, Shinnecock, NY in approximate position 40°55′11.79″ N, 072°28′04.34″ W (NAD 83).
7.45 Xirinachs Family Foundation Fireworks	• Date: A single day event in July. • Location: Waters of Hunting Bay off Beach Avenue, Huntington Bay, NY in approximate position 40°54′23.27″ N, 73°25′08.04″ W (NAD 83).
7.46 Irwin Family 4th of July	• Date: A single day event in June or July. • Location: Waters of the Great South Bay off The Helm Road, East Islip, NY in approximate position 40°42′12.28″ N, 73°12′00.08″ W (NAD 83).
7.47 Westbrook July Celebration	• Date: A single day event in July.

TABLE 1 TO § 165.151—Continued

	• Location: Waters of Long Island Sound Westbrook Harbor, West Brook, CT in approximate position 41°16′10″ N, 72°26′14″ W (NAD 83).
8	August
8.1 Village of Bellport Fireworks	• Location: Waters of Bellport Bay, off Bellport Dock, Bellport, NY in approximate position 40°45′01.83″ N, 072°55′50.43″ W (NAD 83).
8.2 Taste of Italy Fireworks	• Location: Waters of Norwich Harbor, off Norwich Marina, Norwich, CT in approximate position 41°31′17.72″ N, 072°04′43.41″ W (NAD 83).
8.3 Old Black Point Beach Association Fireworks	• Location: Waters off Old Black Point Beach, East Lyme, CT in approximate position, 41°17′34.9″ N, 072°12′55″ W (NAD 83).
8.4 Town of Babylon Fireworks	• Location: Waters off of Cedar Beach Town Park, Babylon, NY in approximate position 40°37′53″ N, 073°20′12″ W (NAD 83).
8.5 Shelter Island Yacht Club Fireworks	• Date: A single day event in August.
8.6 Stamford Fireworks	• Location: Waters of Dering Harbor north of Shelter Island Yacht Club, Shelter Island, NY in approximate position 41°05′23.47″ N, 072°21′11.18″ W (NAD 83). • Date: A single day event in August. • Location: Waters of Stamford Harbor, off Kosciuszco Park, Stamford, CT in approximate position 41°01′48.46″ N, 073°32′15.32″ W (NAD 83).
8.7 Nikon Theater at Jones Beach Fireworks	• Date: A single day event in August. • Location: Waters of Zacks Bay off the Nikon Theater, Jones Beach, NY in approximate position 40°36′02.12″ N, 073°30′05.65″ W (NAD 83).
8.8 Ascension Fireworks	• Date: A single day event in August. • Location: Waters of the Great South Bay off The Pines, East Fire Island, NY in approximate position 40°40′07.43″ N, 073°04′13.88″ W (NAD 83).
9	September
9.1 East Hampton Fire Department Fireworks	• Location: Waters off Main Beach, East Hampton, NY in approximate position 40°56′40.28″ N, 072°11′21.26″ W (NAD 83).
9.2 Town of Islip Labor Day Fireworks	• Location: Waters of Great South Bay off Bay Shore Marina, Islip, NY in approximate position 40°42′24″ N, 073°14′24″ W (NAD 83).
9.3 Village of Island Park Labor Day Celebration Fireworks	• Location: Waters off Village of Island Park Fishing Pier, Village Beach, NY in approximate position 40°36′30.95″ N, 073°39′22.23″ W (NAD 83).
9.4 The Creek Fireworks	• Date: A single day event in September. • Location: Waters of Long Island Sound off the Creek Golf Course, Lattingtown, NY in approximate position 40°54′13″ N, 073°35′58″ W (NAD 83).
9.5 Archangel Michael Greek Orthodox Church Fireworks	• Date: A single day event in September or October. • Location: Waters of Hempstead Harbor off Bar Beach Town Park, Port Washington, NY in approximate position 40°49′42″ N, 073°39′07″ W (NAD 83).
9.6 Port Washington Sons of Italy Fireworks	• Location: Waters of Hempstead Harbor off Bar Beach, North Hempstead, NY in approximate position 40°49′48.04″ N, 073°39′24.32″ W (NAD 83).
11	November
11.1 Charles W Morgan Anniversary Fireworks	• Date: A day during the first or second weekend of November. • Location: Waters of the Mystic River, north of the Mystic Seaport Light, Mystic, CT in approximate position 41°21′56.455″ N, 071°57′58.32″ W (NAD 83).
11.2 Christmas Boat Parade Fireworks	• Location: Waters of Patchogue Bay off Lombardi's on the Bay Restaurant, Patchogue, NY in approximate position 40°44′39.18″ N, 073°00′37.80″ W (NAD 83).
11.3 Connetquot River Fall Fireworks	• Location: Waters of the Connetquot River off Snapper Inn Restaurant, Oakdale, NY in approximate position 40°43′32.38″ N, 073°09′02.64″ W (NAD 83).
12	December
12.1 Greenport Winter Fireworks	• Date: From 11:45 p.m. December 31 until 12:30 a.m. January 1. • Location: Waters of Greenport Harbor off Mitchell Park and Marina, Greenport, NY, in approximate position 41°05′59.09″ N, 072°21′31.44″ W (NAD 83).

* * * * *

Dated: April 10, 2020.

K.B. Reed,

Captain, U.S. Coast Guard, Captain of the Port Sector Long Island Sound.

[FR Doc. 2020–08107 Filed 4–20–20; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2015–0230; FRL–10007–81]

RIN 2070–ZA16

Banda de Lupinus Albus Doce (BLAD); Proposal To Revoke Exemption and Establish Pesticide Tolerances; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of comment period.

SUMMARY: EPA issued a proposed rule in the **Federal Register** of February 11, 2020, concerning the revocation of an existing tolerance exemption and establishment of pesticide tolerances for residues of the fungicide BLAD. This document reopens and extends the comment period to July 12, 2020. Consumo Em Verde S.A., Biotecnologia De Plantas, Parque Technologico de Cantanhede (CEV) formally requested a 90-day extension of the public comment period to permit it reasonable time to respond to the proposed rule.

DATES: Comments, identified by docket identification number EPA–HQ–OPP–2015–0230, must be received on or before July 12, 2020.

ADDRESSES: Follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of February 11, 2020 (85 FR 7698) (FRL–9998–74).

FOR FURTHER INFORMATION CONTACT: Anne Overstreet, Deputy Director, Biopesticides and Pollution Prevention Division (7511P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (703) 305–7090; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION: This document reopens the public comment period established in the **Federal Register** document of February 11, 2020 (85 FR 7698) (FRL–9998–74). In that document, EPA is proposing to revoke the existing exemption from the requirement of a tolerance for residues of the fungicide BLAD in or on all food commodities that was established in the **Federal Register** of March 22, 2013 (78 FR 17600) (FRL–9380–6). In place of the exemption, EPA is proposing to establish tolerances for residues of the fungicide BLAD at the level of quantitation, *i.e.,* 0.02 parts per million (ppm), in or on the following commodities: Almond; almond, hulls; fruit, pome, group 11–10; fruit, stone, group 12–12; grape; hops, dried cones; strawberry; vegetable, cucurbit, group 9; and vegetable, fruiting, group 8–10. In order to provide additional time for comments, EPA is hereby reopening the comment period that ended on April 13, 2020, such that it now ends on July 12, 2020.

To submit comments, or access the docket, please follow the detailed instructions provided under **ADDRESSES** in the **Federal Register** document of February 11, 2020. If you have questions, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: April 14, 2020.

Richard Keigwin,

Director, Office of Pesticide Programs.

[FR Doc. 2020–08192 Filed 4–20–20; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 412

[CMS–1729–P]

RIN 0938–AU05

Medicare Program; Inpatient Rehabilitation Facility Prospective Payment System for Federal Fiscal Year 2021

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Proposed rule.

SUMMARY: This proposed rule would update the prospective payment rates for inpatient rehabilitation facilities (IRFs) for Federal fiscal year (FY) 2021. As required by statute, this proposed rule includes the classification and weighting factors for the IRF prospective payment system's case-mix groups and a description of the methodologies and data used in computing the prospective payment rates for FY 2021. We are proposing to adopt the most recent Office of Management and Budget statistical area delineations and apply a 5 percent cap on any wage index decreases compared to FY 2020 in a budget neutral manner. We are also proposing to amend the IRF coverage requirements to remove the post-admission physician evaluation requirement and codify existing documentation instructions and guidance. Additionally, we are proposing to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently required to be performed by a rehabilitation physician.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, no later than 5 p.m. on June 15, 2020.

ADDRESSES: In commenting, please refer to file code CMS–1729–P. Because of staff and resource limitations, we cannot accept comments by facsimile (FAX) transmission.

Comments, including mass comment submissions, must be submitted in one of the following three 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–1729–P, P.O. Box 8016, Baltimore, MD 21244–8016.

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–1729–P, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Gwendolyn Johnson, (410) 786–6954, for general information.

Catie Cooksey, (410) 786–0179, for information about the IRF payment policies and payment rates.

Kadie Derby, (410) 786–0468, for information about the IRF coverage policies.

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 as soon as possible after they have been received at *http://www.regulations.gov.* Follow the search instructions on that website to view public comments.

Availability of Certain Information Through the Internet on the CMS website

The IRF PPS Addenda along with other supporting documents and tables referenced in this proposed rule are available through the internet on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS.*

We note that in previous years, each rule or notice issued under the IRF PPS has included a detailed reiteration of the various regulatory provisions that have affected the IRF PPS over the years. That discussion, along with detailed background information for various other aspects of the IRF PPS, is now available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS.*

I. Executive Summary

A. Purpose

This proposed rule would update the prospective payment rates for IRFs for FY 2021 (that is, for discharges occurring on or after October 1, 2020, and on or before September 30, 2021) as required under section 1886(j)(3)(C) of the Social Security Act (the Act). As required by section 1886(j)(5) of the Act, this proposed rule includes the classification and weighting factors for the IRF PPS's case-mix groups (CMGs) and a description of the methodologies and data used in computing the prospective payment rates for FY 2021. We are proposing to adopt the most recent Office of Management and Budget (OMB) statistical area delineations and apply a 5 percent cap on any wage index decreases compared to FY 2020 in a budget neutral manner. We are also proposing to amend the IRF coverage requirements to remove the post-admission physician evaluation requirement and codify existing documentation instructions and guidance. Additionally, we are proposing to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently required be performed by a rehabilitation physician. There are no proposals or updates in this proposed rule to the IRF Quality Reporting Program (QRP).

B. Summary of Major Provisions

In this proposed rule, we use the methods described in the FY 2020 IRF PPS final rule (84 FR 39054) to update the prospective payment rates for FY 2021 using updated FY 2019 IRF claims and the most recent available IRF cost report data, which is FY 2018 IRF cost report data. We are proposing to adopt the most recent OMB statistical area delineations and apply a 5 percent cap on any wage index decreases compared to FY 2020 in a budget neutral manner. We are also proposing to amend the IRF coverage requirements to remove the post-admission physician evaluation requirement and codify existing documentation instructions and guidance. Additionally, we are proposing to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently required to be performed by a rehabilitation physician.

C. Summary of Impact

TABLE 1—COST AND BENEFIT

Provision description	Transfers
FY 2021 IRF PPS payment rate update.	The overall economic impact of this proposed rule is an estimated $270 million in increased payments from the Federal Government to IRFs during FY 2021.

II. Background

A. Statutory Basis and Scope

Section 1886(j) of the Act provides for the implementation of a per-discharge PPS for inpatient rehabilitation hospitals and inpatient rehabilitation units of a hospital (collectively, hereinafter referred to as IRFs). Payments under the IRF PPS encompass inpatient operating and capital costs of furnishing covered rehabilitation services (that is, routine, ancillary, and capital costs), but not direct graduate medical education costs, costs of approved nursing and allied health education activities, bad debts, and other services or items outside the scope of the IRF PPS. A complete discussion of the IRF PPS provisions appears in the original FY 2002 IRF PPS final rule (66 FR 41316) and the FY 2006 IRF PPS final rule (70 FR 47880), and we provided a general description of the IRF PPS for FYs 2007 through 2019 in the FY 2020 IRF PPS final rule (84 FR 39055 through 39057).

Under the IRF PPS from FY 2002 through FY 2005, the prospective payment rates were computed across 100 distinct CMGs, as described in the FY 2002 IRF PPS final rule (66 FR 41316). We constructed 95 CMGs using rehabilitation impairment categories (RICs), functional status (both motor and cognitive), and age (in some cases, cognitive status and age may not be a factor in defining a CMG). In addition, we constructed five special CMGs to account for very short stays and for patients who expire in the IRF.

For each of the CMGs, we developed relative weighting factors to account for a patient's clinical characteristics and expected resource needs. Thus, the weighting factors accounted for the relative difference in resource use across all CMGs. Within each CMG, we created tiers based on the estimated effects that certain comorbidities would have on resource use.

We established the Federal PPS rates using a standardized payment conversion factor (formerly referred to as the budget-neutral conversion factor). For a detailed discussion of the budget-neutral conversion factor, please refer to our FY 2004 IRF PPS final rule (68 FR 45684 through 45685). In the FY 2006 IRF PPS final rule (70 FR 47880), we discussed in detail the methodology for determining the standard payment conversion factor.

We applied the relative weighting factors to the standard payment conversion factor to compute the unadjusted prospective payment rates under the IRF PPS from FYs 2002 through 2005. Within the structure of the payment system, we then made adjustments to account for interrupted stays, transfers, short stays, and deaths. Finally, we applied the applicable adjustments to account for geographic variations in wages (wage index), the percentage of low-income patients, location in a rural area (if applicable), and outlier payments (if applicable) to the IRFs' unadjusted prospective payment rates.

For cost reporting periods that began on or after January 1, 2002, and before October 1, 2002, we determined the final prospective payment amounts using the transition methodology prescribed in section 1886(j)(1) of the Act. Under this provision, IRFs transitioning into the PPS were paid a blend of the Federal IRF PPS rate and the payment that the IRFs would have received had the IRF PPS not been implemented. This provision also

allowed IRFs to elect to bypass this blended payment and immediately be paid 100 percent of the Federal IRF PPS rate. The transition methodology expired as of cost reporting periods beginning on or after October 1, 2002 (FY 2003), and payments for all IRFs now consist of 100 percent of the Federal IRF PPS rate.

Section 1886(j) of the Act confers broad statutory authority upon the Secretary to propose refinements to the IRF PPS. In the FY 2006 IRF PPS final rule (70 FR 47880) and in correcting amendments to the FY 2006 IRF PPS final rule (70 FR 57166), we finalized a number of refinements to the IRF PPS case-mix classification system (the CMGs and the corresponding relative weights) and the case-level and facility-level adjustments. These refinements included the adoption of the OMB's Core-Based Statistical Area (CBSA) market definitions; modifications to the CMGs, tier comorbidities; and CMG relative weights, implementation of a new teaching status adjustment for IRFs; rebasing and revising the market basket index used to update IRF payments, and updates to the rural, low-income percentage (LIP), and high-cost outlier adjustments. Beginning with the FY 2006 IRF PPS final rule (70 FR 47908 through 47917), the market basket index used to update IRF payments was a market basket reflecting the operating and capital cost structures for freestanding IRFs, freestanding inpatient psychiatric facilities (IPFs), and long-term care hospitals (LTCHs) (hereinafter referred to as the rehabilitation, psychiatric, and long-term care (RPL) market basket). Any reference to the FY 2006 IRF PPS final rule in this proposed rule also includes the provisions effective in the correcting amendments. For a detailed discussion of the final key policy changes for FY 2006, please refer to the FY 2006 IRF PPS final rule.

The regulatory history previously included in each rule or notice issued under the IRF PPS is available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index?redirect=/InpatientRehabFacPPS/.*

B. Provisions of the PPACA Affecting the IRF PPS in FY 2012 and Beyond

The Patient Protection and Affordable Care Act (PPACA) (Pub. L. 111–148) was enacted on March 23, 2010. The Health Care and Education Reconciliation Act of 2010 (Pub. L. 111–152), which amended and revised several provisions of the PPACA, was enacted on March 30, 2010. In this proposed rule, we refer to the two statutes collectively as the ''Patient Protection and Affordable Care Act'' or ''PPACA''.

The PPACA included several provisions that affect the IRF PPS in FYs 2012 and beyond. In addition to what was previously discussed, section 3401(d) of the PPACA also added section 1886(j)(3)(C)(ii)(I) of the Act (providing for a ''productivity adjustment'' for fiscal year (FY) 2012 and each subsequent FY). The productivity adjustment for FY 2021 is discussed in section V.B. of this proposed rule. Section 1886(j)(3)(C)(ii)(II) of the Act provides that the application of the productivity adjustment to the market basket update may result in an update that is less than 0.0 for a FY and in payment rates for a FY being less than such payment rates for the preceding FY.

Sections 3004(b) of the PPACA and section 411(b) of the Medicare Access and CHIP Reauthorization Act of 2015 (Pub. L. 114–10, enacted April 16, 2015) (MACRA) also addressed the IRF PPS. Section 3004(b) of PPACA reassigned the previously designated section 1886(j)(7) of the Act to section 1886(j)(8) of the Act and inserted a new section 1886(j)(7) of the Act, which contains requirements for the Secretary to establish a quality reporting program (QRP) for IRFs. Under that program, data must be submitted in a form and manner and at a time specified by the Secretary. Beginning in FY 2014, section 1886(j)(7)(A)(i) of the Act requires the application of a 2 percentage point reduction to the market basket increase factor otherwise applicable to an IRF (after application of paragraphs (C)(iii) and (D) of section 1886(j)(3) of the Act) for a FY if the IRF does not comply with the requirements of the IRF QRP for that FY. Application of the 2 percentage point reduction may result in an update that is less than 0.0 for a FY and in payment rates for a FY being less than such payment rates for the preceding FY. Reporting-based reductions to the market basket increase factor are not cumulative; they only apply for the FY involved. Section 411(b) of the MACRA amended section 1886(j)(3)(C) of the Act by adding paragraph (iii), which required us to apply for FY 2018, after the application of section 1886(j)(3)(C)(ii) of the Act, an increase factor of 1.0 percent to update the IRF prospective payment rates.

C. Operational Overview of the Current IRF PPS

As described in the FY 2002 IRF PPS final rule (66 FR 41316), upon the admission and discharge of a Medicare Part A fee-for-service (FFS) patient, the IRF is required to complete the appropriate sections of a Patient Assessment Instrument (PAI), designated as the IRF–PAI. In addition, beginning with IRF discharges occurring on or after October 1, 2009, the IRF is also required to complete the appropriate sections of the IRF–PAI upon the admission and discharge of each Medicare Advantage (MA) patient, as described in the FY 2010 IRF PPS final rule (74 FR 39762 and 74 FR 50712). All required data must be electronically encoded into the IRF–PAI software product. Generally, the software product includes patient classification programming called the Grouper software. The Grouper software uses specific IRF–PAI data elements to classify (or group) patients into distinct CMGs and account for the existence of any relevant comorbidities.

The Grouper software produces a five-character CMG number. The first character is an alphabetic character that indicates the comorbidity tier. The last four characters are numeric characters that represent the distinct CMG number. A free download of the Grouper software is available on the CMS website at *http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/Software.html.* The Grouper software is also embedded in the iQIES User tool available in iQIES at *https://www.cms.gov/medicare/quality-safety-oversight-general-information/iqies.*

Once a Medicare Part A FFS patient is discharged, the IRF submits a Medicare claim as a Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191, enacted August 21, 1996) -compliant electronic claim or, if the Administrative Simplification Compliance Act of 2002 (ASCA) (Pub. L. 107–105, enacted December 27, 2002) permits, a paper claim (a UB–04 or a CMS–1450 as appropriate) using the five-character CMG number and sends it to the appropriate Medicare Administrative Contractor (MAC). In addition, once a MA patient is discharged, in accordance with the Medicare Claims Processing Manual, chapter 3, section 20.3 (Pub. 100–04), hospitals (including IRFs) must submit an informational-only bill (type of bill (TOB) 111), which includes Condition Code 04 to their MAC. This will ensure that the MA days are included in the hospital's Supplemental Security Income (SSI) ratio (used in calculating the IRF LIP adjustment) for FY 2007 and beyond. Claims submitted to Medicare must comply with both ASCA and HIPAA.

Section 3 of the ASCA amended section 1862(a) of the Act by adding

paragraph (22), which requires the Medicare program, subject to section 1862(h) of the Act, to deny payment under Part A or Part B for any expenses for items or services for which a claim is submitted other than in an electronic form specified by the Secretary. Section 1862(h) of the Act, in turn, provides that the Secretary shall waive such denial in situations in which there is no method available for the submission of claims in an electronic form or the entity submitting the claim is a small provider. In addition, the Secretary also has the authority to waive such denial in such unusual cases as the Secretary finds appropriate. For more information, see the ''Medicare Program; Electronic Submission of Medicare Claims'' final rule (70 FR 71008). Our instructions for the limited number of Medicare claims submitted on paper are available at *http://www.cms.gov/manuals/downloads/clm104c25.pdf.*

Section 3 of the ASCA operates in the context of the administrative simplification provisions of HIPAA, which include, among others, the requirements for transaction standards and code sets codified in 45 CFR part 160 and part 162, subparts A and I through R (generally known as the Transactions Rule). The Transactions Rule requires covered entities, including covered health care providers, to conduct covered electronic transactions according to the applicable transaction standards. (See the CMS program claim memoranda at *http://www.cms.gov/ElectronicBillingEDITrans/* and listed in the addenda to the Medicare Intermediary Manual, Part 3, section 3600).

The MAC processes the claim through its software system. This software system includes pricing programming called the ''Pricer'' software. The Pricer software uses the CMG number, along with other specific claim data elements and provider-specific data, to adjust the IRF's prospective payment for interrupted stays, transfers, short stays, and deaths, and then applies the applicable adjustments to account for the IRF's wage index, percentage of low-income patients, rural location, and outlier payments. For discharges occurring on or after October 1, 2005, the IRF PPS payment also reflects the teaching status adjustment that became effective as of FY 2006, as discussed in the FY 2006 IRF PPS final rule (70 FR 47880).

D. Advancing Health Information Exchange

The Department of Health and Human Services (HHS) has a number of initiatives designed to encourage and support the adoption of interoperable health information technology and to promote nationwide health information exchange to improve health care and patient access to their health information. The Office of the National Coordinator for Health Information Technology (ONC) and CMS work collaboratively to advance interoperability across settings of care, including post-acute care.

To further interoperability in post-acute care settings, CMS continues to explore opportunities to advance electronic exchange of patient information across payers, providers and with patients, including developing systems that use nationally recognized health IT standards such as the Logical Observation Identifiers Names and Codes (LOINC), the Systematized Nomenclature of Medicine (SNOMED), and the Fast Healthcare Interoperability Resources (FHIR). In addition, CMS and ONC established the Post-Acute Care Interoperability Workgroup (PACIO) to facilitate collaboration with industry stakeholders to develop FHIR standards that could support the exchange and reuse of patient assessment data derived from the minimum data set (MDS), inpatient rehabilitation facility patient assessment instrument (IRF–PAI), long term care hospital continuity assessment record and evaluation (LCDS), outcome and assessment information set (OASIS) and other sources.

The Data Element Library (DEL) continues to be updated and serves as the authoritative resource for PAC assessment data elements and their associated mappings to health IT standards. The DEL furthers CMS' goal of data standardization and interoperability. These interoperable data elements can reduce provider burden by allowing the use and exchange of healthcare data, support provider exchange of electronic health information for care coordination, person-centered care, and support real-time, data driven, clinical decision making. Standards in the Data Element Library (*https://del.cms.gov/DELWeb/pubHome*) can be referenced on the CMS website and in the ONC Interoperability Standards Advisory (ISA). The 2020 ISA is available at *https://www.healthit.gov/isa.*

In the September 30, 2019 **Federal Register**, CMS published a final rule, ''Medicare and Medicaid Programs; Revisions to Requirements for Discharge Planning'' (84 FR 51836) (''Discharge Planning final rule''), that revises the discharge planning requirements that hospitals (including psychiatric hospitals, long-term care hospitals, and inpatient rehabilitation facilities), critical access hospitals (CAHs), and home health agencies, must meet to participate in Medicare and Medicaid programs. The rule supports CMS' interoperability efforts by promoting the exchange of patient information between health care settings, and by ensuring that a patient's necessary medical information is transferred with the patient after discharge from a hospital, CAH, or post-acute care services provider. For more information on the Discharge planning requirements, please visit the final rule at *https://www.federalregister.gov/documents/2019/09/30/2019-20732/medicare-and-medicaid-programs-revisions-to-requirements-for-discharge-planning-for-hospitals.*

III. Summary of Provisions of the Proposed Rule

The proposed policy changes and updates to the IRF prospective payment rates for FY 2021 are as follows:

- Update the CMG relative weights and average length of stay values for FY 2021, in a budget neutral manner, as discussed in section IV. of this proposed rule.
- Update the IRF PPS payment rates for FY 2021 by the proposed market basket increase factor, based upon the most current data available, with a proposed productivity adjustment required by section 1886(j)(3)(C)(ii)(I) of the Act, as described in section V. of this proposed rule.
- Describe the proposed adoption of the revised OMB delineations, the proposed IRF wage index transition, and the proposed update to the labor-related share for FY 2021 in a budget-neutral manner, as described in section V. of this proposed rule.
- Describe the calculation of the IRF standard payment conversion factor for FY 2021, as discussed in section V. of this proposed rule.
- Update the outlier threshold amount for FY 2021, as discussed in section VI. of this proposed rule.
- Update the cost-to-charge ratio (CCR) ceiling and urban/rural average CCRs for FY 2021, as discussed in section VI. of this proposed rule.
- Amend the IRF coverage requirements to remove the post-admission physician evaluation requirement as discussed in section VII. of this proposed rule.
- Amend the IRF coverage requirements to codify existing documentation instructions and guidance as discussed in section VIII. of this proposed rule.
- Amend the IRF coverage requirements to allow non-physician

practitioners to perform certain requirements that are currently required to be performed by a rehabilitation physician as discussed in section IX. of this proposed rule.

- Describe the method for applying the reduction to the FY 2021 IRF increase factor for IRFs that fail to meet the quality reporting requirements as discussed in section X. of this proposed rule.

IV. Proposed Update to the Case-Mix Group (CMG) Relative Weights and Average Length of Stay Values for FY 2021

As specified in § 412.620(b)(1), we calculate a relative weight for each CMG that is proportional to the resources needed by an average inpatient rehabilitation case in that CMG. For example, cases in a CMG with a relative weight of 2, on average, will cost twice as much as cases in a CMG with a relative weight of 1. Relative weights account for the variance in cost per discharge due to the variance in resource utilization among the payment groups, and their use helps to ensure that IRF PPS payments support beneficiary access to care, as well as provider efficiency.

In this proposed rule, we propose to update the CMG relative weights and average length of stay values for FY 2021. As required by statute, we always use the most recent available data to update the CMG relative weights and average lengths of stay. For FY 2021, we propose to use the FY 2019 IRF claims and FY 2018 IRF cost report data. These data are the most current and complete data available at this time. Currently, only a small portion of the FY 2019 IRF cost report data are available for analysis, but the majority of the FY 2019 IRF claims data are available for analysis. We are also proposing that if more recent data become available after the publication of this proposed rule and before the publication of the final rule, we would use such data to determine the FY 2021 CMG relative weights and average length of stay values in the final rule.

We are proposing to apply these data using the same methodologies that we have used to update the CMG relative weights and average length of stay values each FY since we implemented an update to the methodology to use the more detailed CCR data from the cost reports of IRF provider units of primary acute care hospitals, instead of CCR data from the associated primary care hospitals, to calculate IRFs' average costs per case, as discussed in the FY 2009 IRF PPS final rule (73 FR 46372). In calculating the CMG relative weights, we use a hospital-specific relative value method to estimate operating (routine and ancillary services) and capital costs of IRFs. The process used to calculate the CMG relative weights for this proposed rule is as follows:

Step 1. We estimate the effects that comorbidities have on costs.

Step 2. We adjust the cost of each Medicare discharge (case) to reflect the effects found in the first step.

Step 3. We use the adjusted costs from the second step to calculate CMG relative weights, using the hospital-specific relative value method.

Step 4. We normalize the FY 2021 CMG relative weights to the same average CMG relative weight from the CMG relative weights implemented in the FY 2020 IRF PPS final rule (84 FR 39054).

Consistent with the methodology that we have used to update the IRF classification system in each instance in the past, we propose to update the CMG relative weights for FY 2021 in such a way that total estimated aggregate payments to IRFs for FY 2021 are the same with or without the changes (that is, in a budget-neutral manner) by applying a budget neutrality factor to the standard payment amount. To calculate the appropriate budget neutrality factor for use in updating the FY 2021 CMG relative weights, we use the following steps:

Step 1. Calculate the estimated total amount of IRF PPS payments for FY 2021 (with no changes to the CMG relative weights).

Step 2. Calculate the estimated total amount of IRF PPS payments for FY 2021 by applying the proposed changes to the CMG relative weights (as discussed in this proposed rule).

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2 to determine the budget neutrality factor of 0.9969 that would maintain the same total estimated aggregate payments in FY 2021 with and without the proposed changes to the CMG relative weights.

Step 4. Apply the budget neutrality factor from step 3 to the FY 2021 IRF PPS standard payment amount after the application of the budget-neutral wage adjustment factor.

In section V.D. of this proposed rule, we discuss the proposed use of the existing methodology to calculate the proposed standard payment conversion factor for FY 2021.

In Table 2, ''Proposed Relative Weights and Average Length of Stay Values for Case-Mix Groups,'' we present the CMGs, the comorbidity tiers, the corresponding relative weights, and the average length of stay values for each CMG and tier for FY 2021. The average length of stay for each CMG is used to determine when an IRF discharge meets the definition of a short-stay transfer, which results in a per diem case level adjustment.

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TABLE 2: Relative Weights And Average Length Of Stay Values For The Revised Case-Mix Groups

CMG	CMG Description (M=motor, A=age)	Relative Weight				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	No Comorbidity Tier	Tier 1	Tier 2	Tier 3	No Comorbidity Tier
0101	Stroke M >=72.50	1.0380	0.8853	0.8196	0.7842	10	10	10	9
0102	Stroke M >=63.50 and M <72.50	1.3254	1.1305	1.0466	1.0014	13	13	12	11
0103	Stroke M >=50.50 and M <63.50	1.6934	1.4442	1.3371	1.2794	15	16	15	14
0104	Stroke M >=41.50 and M <50.50	2.1990	1.8755	1.7363	1.6614	19	19	18	18
0105	Stroke M <41.50 and A >=84.50	2.4967	2.1294	1.9714	1.8863	23	23	21	20
0106	Stroke M <41.50 and A <84.50	2.8614	2.4405	2.2593	2.1618	26	24	23	23
0201	Traumatic brain injury M >=73.50	1.1733	0.9427	0.8472	0.7923	10	11	10	10
0202	Traumatic brain injury M >=61.50 and M <73.50	1.4690	1.1803	1.0607	0.9920	13	13	12	12
0203	Traumatic brain injury M >=49.50 and M <61.50	1.7700	1.4221	1.2781	1.1953	15	15	14	14
0204	Traumatic brain injury M >=35.50 and M <49.50	2.1993	1.7670	1.5880	1.4851	20	19	17	16
0205	Traumatic brain injury M <35.50	2.7551	2.2136	1.9894	1.8605	31	23	21	18
0301	Non-traumatic brain injury M >=65.50	1.2295	0.9957	0.9188	0.8518	11	11	10	10
0302	Non-traumatic brain injury M >=52.50 and M <65.50	1.5763	1.2766	1.1780	1.0920	14	14	13	12
0303	Non-traumatic brain injury M >=42.50 and M <52.50	1.8862	1.5276	1.4096	1.3068	16	16	15	14
0304	Non-traumatic brain injury M <42.50 and A >=78.50	2.1149	1.7128	1.5805	1.4652	19	18	16	16
0305	Non-traumatic brain injury M <42.50 and A <78.50	2.3053	1.8670	1.7228	1.5971	21	20	17	17
0401	Traumatic spinal cord injury M >=56.50	1.3703	1.1649	1.0453	0.9724	12	12	12	11
0402	Traumatic spinal cord injury M >=47.50 and M <56.50	1.7842	1.5168	1.3611	1.2662	17	16	14	15
0403	Traumatic spinal cord injury M >=41.50 and M <47.50	2.1436	1.8224	1.6352	1.5213	20	20	18	17
0404	Traumatic spinal cord injury M <31.50 and A <61.50	3.5461	3.0147	2.7051	2.5166	27	35	32	25
0405	Traumatic spinal cord injury M >=31.50 and M <41.50	2.7520	2.3395	2.0993	1.9530	25	26	22	21
0406	Traumatic spinal cord injury M >=24.50 and M <31.50 and A >=61.50	3.5946	3.0558	2.7420	2.5510	34	31	28	28
0407	Traumatic spinal cord injury M <24.50 and A >=61.50	4.1177	3.5006	3.1411	2.9223	46	36	32	32
0501	Non-traumatic spinal cord injury M >=60.50	1.3210	1.0176	0.9622	0.8877	13	12	11	10
0502	Non-traumatic spinal cord injury M >=53.50 and M <60.50	1.6394	1.2629	1.1941	1.1017	15	14	13	12
0503	Non-traumatic spinal cord injury M >=48.50 and M <53.50	1.8988	1.4627	1.3830	1.2760	16	16	15	14
0504	Non-traumatic spinal cord injury M >=39.50 and M <48.50	2.2679	1.7470	1.6519	1.5240	21	19	18	17
0505	Non-traumatic spinal cord injury M <39.50	2.9524	2.2743	2.1505	1.9840	28	24	22	21
0601	Neurological M >=64.50	1.3775	1.0296	0.9651	0.8771	12	11	10	10
0602	Neurological M >=52.50 and M	1.7131	1.2803	1.2002	1.0907	14	13	12	12

CMG	CMG Description (M=motor, A=age)	Relative Weight				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	No Comorbidity Tier	Tier 1	Tier 2	Tier 3	No Comorbidity Tier
	<64.50								
0603	Neurological M >=43.50 and M <52.50	2.0340	1.5202	1.4251	1.2951	16	15	15	14
0604	Neurological M <43.50	2.3598	1.7637	1.6533	1.5025	20	18	17	16
0701	Fracture of lower extremity M >=61.50	1.2537	1.0123	0.9586	0.8812	11	12	11	10
0702	Fracture of lower extremity M >=52.50 and M <61.50	1.5680	1.2660	1.1990	1.1021	14	14	13	12
0703	Fracture of lower extremity M >=41.50 and M <52.50	1.9049	1.5380	1.4566	1.3389	17	16	15	15
0704	Fracture of lower extremity M <41.50	2.1759	1.7569	1.6638	1.5295	19	18	17	17
0801	Replacement of lower-extremity joint M >=63.50	1.1346	0.9128	0.8117	0.7566	10	10	9	9
0802	Replacement of lower-extremity joint M >=57.50 and M <63.50	1.3335	1.0729	0.9540	0.8893	12	11	11	10
0803	Replacement of lower-extremity joint M >=51.50 and M <57.50	1.4900	1.1988	1.0659	0.9937	12	13	12	11
0804	Replacement of lower-extremity joint M >=42.50 and M <51.50	1.7165	1.3810	1.2279	1.1447	14	15	13	13
0805	Replacement of lower-extremity joint M <42.50	1.9985	1.6080	1.4297	1.3328	17	17	15	14
0901	Other orthopedic M >=63.50	1.2185	0.9646	0.9131	0.8270	11	11	10	10
0902	Other orthopedic M >=51.50 and M <63.50	1.5163	1.2004	1.1363	1.0291	13	13	12	12
0903	Other orthopedic M >=44.50 and M <51.50	1.7843	1.4125	1.3370	1.2109	15	15	14	14
0904	Other orthopedic M <44.5	2.0484	1.6216	1.5349	1.3901	17	17	16	15
1001	Amputation lower extremity M >=64.50	1.2985	1.0813	0.9716	0.8979	12	13	11	11
1002	Amputation lower extremity M >=55.50 and M <64.50	1.6123	1.3426	1.2064	1.1149	14	15	13	13
1003	Amputation lower extremity M >=47.50 and M <55.50	1.8837	1.5685	1.4094	1.3026	16	17	15	14
1004	Amputation lower extremity M <47.50	2.2178	1.8468	1.6594	1.5336	18	19	17	16
1101	Amputation non-lower extremity M >=58.50	1.3042	1.1630	1.0187	0.9860	12	10	11	13
1102	Amputation non-lower extremity M >=52.50 and M <58.50	1.7339	1.5462	1.3544	1.3109	14	12	14	14
1103	Amputation non-lower extremity M <52.50	1.9502	1.7390	1.5233	1.4744	17	13	16	14
1201	Osteoarthritis M >=61.50	1.4424	0.9550	0.9550	0.8764	11	10	10	11
1202	Osteoarthritis M >=49.50 and M <61.50	1.8004	1.1921	1.1921	1.0940	13	14	13	12
1203	Osteoarthritis M <49.50 and A >=74.50	2.0937	1.3863	1.3863	1.2722	15	14	16	14
1204	Osteoarthritis M <49.50 and A <74.50	2.1990	1.4560	1.4560	1.3362	15	15	15	15
1301	Rheumatoid other arthritis M >=62.50	1.1318	0.9310	0.8820	0.7831	9	11	10	9
1302	Rheumatoid other arthritis M >=51.50 and M <62.50	1.5523	1.2769	1.2096	1.0740	12	13	13	12
1303	Rheumatoid other arthritis M >=44.50 and M <51.50 and A >=64.50	1.7844	1.4679	1.3905	1.2346	14	15	14	14

CMG	CMG Description (M=motor, A=age)	Relative Weight				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	No Comorbidity Tier	Tier 1	Tier 2	Tier 3	No Comorbidity Tier
1304	Rheumatoid other arthritis M <44.50 and A >=64.50	2.0734	1.7056	1.6157	1.4345	14	17	16	16
1305	Rheumatoid other arthritis M <51.50 and A <64.50	2.0944	1.7229	1.6321	1.4491	15	16	16	16
1401	Cardiac M >=68.50	1.1571	0.9424	0.8493	0.7600	11	10	10	9
1402	Cardiac M >=55.50 and M <68.50	1.4500	1.1810	1.0643	0.9523	13	13	11	11
1403	Cardiac M >=45.50 and M <55.50	1.7623	1.4353	1.2935	1.1574	15	15	13	13
1404	Cardiac M <45.50	2.0649	1.6818	1.5156	1.3561	18	17	16	14
1501	Pulmonary M >=68.50	1.2965	1.0348	0.9661	0.9281	11	10	10	10
1502	Pulmonary M >=56.50 and M <68.50	1.5970	1.2746	1.1901	1.1433	13	13	12	12
1503	Pulmonary M >=45.50 and M <56.50	1.8540	1.4797	1.3816	1.3272	16	14	13	13
1504	Pulmonary M <45.50	2.1395	1.7076	1.5943	1.5316	21	16	15	14
1601	Pain syndrome M >=65.50	0.9934	0.9934	0.8962	0.8051	9	10	11	9
1602	Pain syndrome M >=58.50 and M <65.50	1.1097	1.1097	1.0011	0.8994	10	11	11	11
1603	Pain syndrome M >=43.50 and M <58.50	1.3534	1.3534	1.2210	1.0969	12	14	13	13
1604	Pain syndrome M <43.50	1.7185	1.7185	1.5503	1.3928	13	15	17	15
1701	Major multiple trauma without brain or spinal cord injury M >=57.50	1.3861	1.0888	0.9928	0.9032	12	13	11	11
1702	Major multiple trauma without brain or spinal cord injury M >=50.50 and M <57.50	1.6923	1.3293	1.2121	1.1026	15	14	13	13
1703	Major multiple trauma without brain or spinal cord injury M >=41.50 and M <50.50	2.0051	1.5749	1.4361	1.3064	18	15	16	15
1704	Major multiple trauma without brain or spinal cord injury M >=36.50 and M <41.50	2.2215	1.7450	1.5912	1.4475	17	19	17	16
1705	Major multiple trauma without brain or spinal cord injury M <36.50	2.4273	1.9066	1.7385	1.5815	22	20	18	17
1801	Major multiple trauma with brain or spinal cord injury M >=67.50	1.2438	0.9770	0.8778	0.8157	14	13	10	10
1802	Major multiple trauma with brain or spinal cord injury M >=55.50 and M <67.50	1.5968	1.2544	1.1270	1.0473	13	15	12	12
1803	Major multiple trauma with brain or spinal cord injury M >=45.50 and M <55.50	1.9458	1.5285	1.3733	1.2761	17	16	15	14
1804	Major multiple trauma with brain or spinal cord injury M >=40.50 and M <45.50	2.2380	1.7581	1.5795	1.4678	21	19	17	16
1805	Major multiple trauma with brain or spinal cord injury M >=30.50 and M <40.50	2.6613	2.0906	1.8783	1.7454	28	22	20	19
1806	Major multiple trauma with brain or spinal cord injury M <30.50	3.3710	2.6481	2.3792	2.2108	35	29	22	24
1901	Guillain-Barré M >=66.50	1.1854	0.9355	0.9258	0.8741	14	12	13	10
1902	Guillain-Barré M >=51.50 and M <66.50	1.6098	1.2705	1.2573	1.1871	17	14	14	14
1903	Guillain-Barré M >=38.50 and M	2.5682	2.0268	2.0058	1.8938	23	21	21	21

CMG	CMG Description (M=motor, A=age)	Relative Weight				Average Length of Stay			
		Tier 1	Tier 2	Tier 3	No Comorbidity Tier	Tier 1	Tier 2	Tier 3	No Comorbidity Tier
	<51.50								
1904	Guillain-Barré M <38.50	3.6734	2.8991	2.8689	2.7087	42	30	27	29
2001	Miscellaneous M >=66.50	1.2176	0.9846	0.9006	0.8283	11	11	10	9
2002	Miscellaneous M >=55.50 and M <66.50	1.4972	1.2106	1.1073	1.0184	13	13	12	11
2003	Miscellaneous M >=46.50 and M <55.50	1.7706	1.4317	1.3095	1.2044	15	15	14	13
2004	Miscellaneous M <46.50 and A >=77.50	1.9940	1.6124	1.4748	1.3564	18	17	15	15
2005	Miscellaneous M <46.50 and A <77.50	2.1432	1.7330	1.5851	1.4578	19	18	16	15
2101	Burns M >=52.50	1.8160	1.3699	1.1285	1.1285	17	13	13	14
2102	Burns M <52.50	2.4202	1.8256	1.5040	1.5040	20	21	15	15
5001	Short-stay cases, length of stay is 3 days or fewer				0.1646				2
5101	Expired, orthopedic, length of stay is 13 days or fewer				0.7315				8
5102	Expired, orthopedic, length of stay is 14 days or more				1.8082				19
5103	Expired, not orthopedic, length of stay is 15 days or fewer				0.8414				8
5104	Expired, not orthopedic, length of stay is 16 days or more				2.0739				20

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Generally, updates to the CMG relative weights result in some increases and some decreases to the CMG relative weight values. Table 3 shows how we estimate that the application of the proposed revisions for FY 2021 would affect particular CMG relative weight values, which would affect the overall distribution of payments within CMGs and tiers. We note that, because we propose to implement the CMG relative weight revisions in a budget-neutral manner (as previously described), total estimated aggregate payments to IRFs for FY 2021 would not be affected as a result of the proposed CMG relative weight revisions. However, the proposed revisions would affect the distribution of payments within CMGs and tiers.

TABLE 3—DISTRIBUTIONAL EFFECTS OF THE CHANGES TO THE CMG RELATIVE WEIGHTS

Percentage change in CMG relative weights	Number of cases affected	Percentage of cases affected
Increased by 15% or more	64	0.0
Increased by between 5% and 15%	1,678	0.4
Changed by less than 5%	401,521	99.3
Decreased by between 5% and 15%	936	0.2
Decreased by 15% or more	11	0.0

As shown in Table 3, 99.3 percent of all IRF cases are in CMGs and tiers that would experience less than a 5 percent change (either increase or decrease) in the CMG relative weight value as a result of the proposed revisions for FY 2021. The proposed changes in the average length of stay values for FY 2021, compared with the FY 2020 average length of stay values, are small and do not show any particular trends in IRF length of stay patterns.

We invite public comment on our proposed updates to the CMG relative weights and average length of stay values for FY 2021.

V. Proposed FY 2021 IRF PPS Payment Update

A. Background

Section 1886(j)(3)(C) of the Act requires the Secretary to establish an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services for which payment is made under the IRF PPS. According to section 1886(j)(3)(A)(i) of the Act, the increase factor shall be used to update the IRF prospective payment rates for each FY. Section 1886(j)(3)(C)(ii)(I) of the Act requires the application of the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act. Thus, we propose to update the IRF PPS payments for FY 2021 by a market basket increase factor as required by section 1886(j)(3)(C) of the Act based upon the most current data available, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

We have utilized various market baskets through the years in the IRF PPS. For a discussion of these market baskets, we refer readers to the FY 2016 IRF PPS final rule (80 FR 47046).

In FY 2016, we finalized the use of a 2012-based IRF market basket, using Medicare cost report (MCR) data for both freestanding and hospital-based

IRFs (80 FR 47049 through 47068). Beginning with FY 2020, we finalized a rebased and revised IRF market basket to reflect a 2016 base year. The FY 2020 IRF PPS final rule (84 FR 39071 through 39086) contains a complete discussion of the development of the 2016-based IRF market basket.

B. Proposed FY 2021 Market Basket Update and Productivity Adjustment

For FY 2021 (that is, beginning October 1, 2020 and ending September 30, 2021), we propose to update the IRF PPS payments by a market basket increase factor as required by section 1886(j)(3)(C) of the Act, with a productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act. For FY 2021, we propose to use the same methodology described in the FY 2020 IRF PPS final rule (84 FR 39085) to compute the FY 2021 market basket increase factor to update the IRF PPS base payment rate.

Consistent with historical practice, we are proposing to estimate the market basket update for the IRF PPS based on IHS Global Inc.'s (IGI's) forecast using the most recent available data. IGI is a nationally-recognized economic and financial forecasting firm with which we contract to forecast the components of the market baskets and multifactor productivity (MFP). Based on IGI's fourth quarter 2019 forecast with historical data through the third quarter of 2019, the 2016-based IRF market basket increase factor for FY 2021 is projected to be 2.9 percent. Therefore, we are proposing that the 2016-based IRF market basket increase factor for FY 2021 would be 2.9 percent. We are also proposing that if more recent data become available after the publication of this proposed rule and before the publication of the final rule (for example, a more recent estimate of the market basket update), we would use such data to determine the FY 2021 market basket update in the final rule.

According to section 1886(j)(3)(C)(i) of the Act, the Secretary shall establish an increase factor based on an appropriate percentage increase in a market basket of goods and services. Section 1886(j)(3)(C)(ii) of the Act then requires that, after establishing the increase factor for a FY, the Secretary shall reduce such increase factor for FY 2012 and each subsequent FY, by the productivity adjustment described in section 1886(b)(3)(B)(xi)(II) of the Act. Section 1886(b)(3)(B)(xi)(II) of the Act sets forth the definition of this productivity adjustment. The statute defines the productivity adjustment to be equal to the 10-year moving average of changes in annual economy-wide, private nonfarm business MFP (as projected by the Secretary for the 10-year period ending with the applicable FY, year, cost reporting period, or other annual period) (the ''MFP adjustment''). The U.S. Department of Labor's Bureau of Labor Statistics (BLS) publishes the official measure of private nonfarm business MFP. Please see *http://www.bls.gov/mfp* for the BLS historical published MFP data. A complete description of the MFP projection methodology is available on the CMS website at *https://www.cms.gov/Research-Statistics-Dataand-Systems/Statistics-Trends-andReports/MedicareProgramRatesStats/MarketBasketResearch.html.*

Using IGI's fourth quarter 2019 forecast, the MFP adjustment for FY 2021 (the 10-year moving average of MFP for the period ending FY 2021) is projected to be 0.4 percent. Thus, in accordance with section 1886(j)(3)(C) of the Act, we are proposing to base the FY 2021 market basket update, which is used to determine the applicable percentage increase for the IRF payments, on the 2016-based IRF market basket. We are proposing to then reduce this percentage increase by the estimated MFP adjustment for FY 2021 of 0.4 percentage point (the 10-year moving average of MFP for the period ending FY 2021 based on IGI's fourth quarter 2019 forecast). Therefore, the proposed FY 2021 IRF update would be 2.5 percent (2.9 percent market basket update, less 0.4 percentage point MFP adjustment). Furthermore, we are proposing that if more recent data become available after the publication of this proposed rule and before the publication of the final rule (for example, a more recent estimate of the market basket and MFP adjustment), we would use such data to determine the FY 2021 market basket update and MFP adjustment in the final rule.

For FY 2021, the Medicare Payment Advisory Commission (MedPAC) recommends that we reduce IRF PPS payment rates by 5 percent. As discussed, and in accordance with sections 1886(j)(3)(C) and 1886(j)(3)(D) of the Act, the Secretary is proposing to update the IRF PPS payment rates for FY 2021 by an adjusted market basket increase factor of 2.5 percent, as section 1886(j)(3)(C) of the Act does not provide the Secretary with the authority to apply a different update factor to IRF PPS payment rates for FY 2021.

We invite public comment on the proposed market basket update and productivity adjustment.

C. Proposed Labor-Related Share for FY 2021

Section 1886(j)(6) of the Act specifies that the Secretary is to adjust the proportion (as estimated by the Secretary from time to time) of IRFs' costs which are attributable to wages and wage-related costs, of the prospective payment rates computed under section 1886(j)(3) of the Act for area differences in wage levels by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for such facilities. The labor-related share is determined by identifying the national average proportion of total costs that are related to, influenced by, or vary with the local labor market. We propose to continue to classify a cost category as labor-related if the costs are labor-intensive and vary with the local labor market.

Based on our definition of the labor-related share and the cost categories in the 2016-based IRF market basket, we propose to calculate the labor-related share for FY 2021 as the sum of the FY 2021 relative importance of Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Facilities Support Services, Installation, Maintenance, and Repair Services, All Other: Labor-related Services, and a portion of the Capital-Related relative importance from the 2016-based IRF market basket. For more details regarding the methodology for determining specific cost categories for inclusion in the 2016-based IRF labor-related share, see the FY 2020 IRF PPS final rule (84 FR 39087 through 39089).

The relative importance reflects the different rates of price change for these cost categories between the base year (2016) and FY 2021. Based on IGI's fourth quarter 2019 forecast of the 2016-based IRF market basket, the sum of the FY 2021 relative importance for Wages and Salaries, Employee Benefits, Professional Fees: Labor-related, Administrative and Facilities Support Services, Installation Maintenance & Repair Services, and All Other: Labor-related Services is 69.0 percent. We propose that the portion of Capital-Related costs that are influenced by the local labor market is 46 percent. Since the relative importance for Capital-Related costs is 8.5 percent of the 2016-based IRF market basket for FY 2021, we propose to take 46 percent of 8.5 percent to determine the labor-related share of Capital-Related costs for FY 2021 of 3.9 percent. Therefore, we are proposing a total labor-related share for FY 2021 of

72.9 percent (the sum of 69.0 percent for the labor-related share of operating costs and 3.9 percent for the labor-related share of Capital-Related costs). We propose that if more recent data become available after publication of this proposed rule and before the publication of the final rule (for example, a more recent estimate of the labor-related share), we will use such data to determine the FY 2021 IRF labor-related share in the final rule.

Table 4 shows the FY 2021 proposed labor-related share and the FY 2020 final labor-related share using the 2016-based IRF market basket relative importance.

TABLE 4—FY 2021 IRF PROPOSED LABOR-RELATED SHARE AND FY 2020 IRF LABOR-RELATED SHARE

	FY 2021 proposed labor-related share [1]	FY 2020 final labor-related share [2]
Wages and Salaries	48.4	48.1
Employee Benefits	11.4	11.4
Professional Fees: Labor-Related [3]	5.0	5.0
Administrative and Facilities Support Services	0.8	0.8
Installation, Maintenance, and Repair Services	1.6	1.6
All Other: Labor-Related Services	1.8	1.8
Subtotal	69.0	68.7
Labor-Related portion of Capital-Related (46%)	3.9	4.0
Total Labor-Related Share	72.9	72.7

[1] Based on the 2016-based IRF market basket relative importance, IHS Global, Inc. 4th quarter 2019 forecast.
[2] Based on the 2016-based IRF market basket relative importance as published in the **Federal Register** (84 FR 39089).
[3] Includes all contract advertising and marketing costs and a portion of accounting, architectural, engineering, legal, management consulting, and home office contract labor costs.

We invite public comment on the proposed labor-related share for FY 2021.

D. Proposed Wage Adjustment for FY 2021

1. Background

Section 1886(j)(6) of the Act requires the Secretary to adjust the proportion of rehabilitation facilities' costs attributable to wages and wage-related costs (as estimated by the Secretary from time to time) by a factor (established by the Secretary) reflecting the relative hospital wage level in the geographic area of the rehabilitation facility compared to the national average wage level for those facilities. The Secretary is required to update the IRF PPS wage index on the basis of information available to the Secretary on the wages and wage-related costs to furnish rehabilitation services. Any adjustment or updates made under section 1886(j)(6) of the Act for a FY are made in a budget-neutral manner.

For FY 2021, we propose to maintain the policies and methodologies described in the FY 2020 IRF PPS final rule (84 FR 39090) related to the labor market area definitions and the wage index methodology for areas with wage data. Thus, we propose to use the CBSA labor market area definitions and the FY 2021 pre-reclassification and pre-floor hospital wage index data. In accordance with section 1886(d)(3)(E) of the Act, the FY 2021 pre-reclassification and pre-floor hospital wage index is based on data submitted for hospital cost reporting periods beginning on or after October 1, 2016, and before October 1, 2017 (that is, FY 2017 cost report data).

The labor market designations made by the OMB include some geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation of the IRF PPS wage index. We propose to continue to use the same methodology discussed in the FY 2008 IRF PPS final rule (72 FR 44299) to address those geographic areas where there are no hospitals and, thus, no hospital wage index data on which to base the calculation for the FY 2021 IRF PPS wage index.

2. Core-Based Statistical Areas (CBSAs) for the FY 2021 IRF Wage Index

a. Background

The wage index used for the IRF PPS is calculated using the pre-reclassification and pre-floor inpatient PPS (IPPS) wage index data and is assigned to the IRF on the basis of the labor market area in which the IRF is geographically located. IRF labor market areas are delineated based on the CBSAs established by the OMB. The current CBSA delineations (which were implemented for the IRF PPS beginning with FY 2016) are based on revised OMB delineations issued on February 28, 2013, in OMB Bulletin No. 13–01. OMB Bulletin No. 13–01 established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas in the United States and Puerto Rico based on the 2010 Census, and provided guidance on the use of the delineations of these statistical areas using standards published in the June 28, 2010 **Federal Register** (75 FR 37246 through 37252). We refer readers to the FY 2016 IRF PPS final rule (80 FR 47068 through 47076) for a full discussion of our implementation of the OMB labor market area delineations beginning with the FY 2016 wage index.

Generally, OMB issues major revisions to statistical areas every 10 years, based on the results of the decennial census. However, OMB occasionally issues minor updates and revisions to statistical areas in the years between the decennial censuses. On July 15, 2015, OMB issued OMB Bulletin No. 15–01, which provides minor updates to and supersedes OMB Bulletin No. 13–01 that was issued on February 28, 2013. The attachment to OMB Bulletin No. 15–01 provides detailed information on the update to statistical areas since February 28, 2013. The updates provided in OMB Bulletin No. 15–01 are based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2012 and July 1, 2013.

In the FY 2018 IRF PPS final rule (82 FR 36250 through 36251), we adopted the updates set forth in OMB Bulletin

No. 15–01 effective October 1, 2017, beginning with the FY 2018 IRF wage index. For a complete discussion of the adoption of the updates set forth in OMB Bulletin No. 15–01, we refer readers to the FY 2018 IRF PPS final rule. In the FY 2019 IRF PPS final rule (83 FR 38527), we continued to use the OMB delineations that were adopted beginning with FY 2016 to calculate the area wage indexes, with updates set forth in OMB Bulletin No. 15–01 that we adopted beginning with the FY 2018 wage index.

On August 15, 2017, OMB issued OMB Bulletin No. 17–01, which provided updates to and superseded OMB Bulletin No. 15–01 that was issued on July 15, 2015. The attachments to OMB Bulletin No. 17–01 provide detailed information on the update to statistical areas since July 15, 2015, and are based on the application of the 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas to Census Bureau population estimates for July 1, 2014 and July 1, 2015. In the FY 2020 IRF PPS final rule (84 FR 39090 through 39091), we adopted the updates set forth in OMB Bulletin No. 17–01 effective October 1, 2019, beginning with the FY 2020 IRF wage index.

On April 10, 2018, OMB issued OMB Bulletin No. 18–03, which superseded the August 15, 2017 OMB Bulletin No. 17–01, and on September 14, 2018, OMB issued OMB Bulletin No. 18–04, which superseded the April 10, 2018 OMB Bulletin No. 18–03. These bulletins established revised delineations for Metropolitan Statistical Areas, Micropolitan Statistical Areas, and Combined Statistical Areas, and provided guidance on the use of the delineations of these statistical areas. A copy of the most recent bulletin may be obtained at *https://www.whitehouse.gov/wp-content/uploads/2018/09/Bulletin-18-04.pdf.* We note that on March 6, 2020 OMB issued OMB Bulletin 20–01 (available on the web at *https://www.whitehouse.gov/wp-content/uploads/2020/03/Bulletin-20-01.pdf*), which, as discussed later in the proposed rule, was not issued in time for development of this proposed rule.

While OMB Bulletin No. 18–04 is not based on new census data, there were some material changes based on the revised OMB delineations. The revisions OMB published on September 14, 2018 contain a number of significant changes. For example, under the new OMB delineations, there would be new CBSAs, urban counties that would become rural, rural counties that would become urban, and existing CBSAs that would be split apart. We discuss these changes in more detail in section V.D.2.b. of this proposed rule. We are proposing to adopt the updates to the OMB delineations announced in OMB Bulletin No. 18–04 effective beginning with FY 2021 under the IRF PPS. As noted previously in this proposed rule, the March 6, 2020 OMB Bulletin 20–01 was not issued in time for development of this proposed rule. While we do not believe that the minor updates included in OMB Bulletin 20–01 would impact our proposed updates to the CBSA-based labor market area delineations, if appropriate, we would propose any updates from this bulletin in the FY 2022 IRF PPS proposed rule.

b. Proposed Implementation of New Labor Market Area Delineations

We believe it is important for the IRF PPS to use the latest labor market area delineations available as soon as is reasonably possible to maintain a more accurate and up-to-date payment system that reflects the reality of population shifts and labor market conditions. We further believe that using the most current delineations will increase the integrity of the IRF PPS wage index system by creating a more accurate representation of geographic variations in wage levels. Therefore, we are proposing to adopt the new OMB delineations as described in the September 14, 2018 OMB Bulletin No. 18–04, effective beginning with the FY 2021 IRF PPS wage index. We are proposing to use these new delineations to calculate area wage indexes in a manner that is generally consistent with the CBSA-based methodologies. As the adoption of the new OMB delineations may have significant negative impacts on the wage index values for certain geographic areas, we also are proposing to apply a 5 percent cap on any decrease in an IRF's wage index from the IRF's wage index from the prior FY. This proposed transition is discussed in more detail in section V.D.3. of this proposed rule.

(1) Micropolitan Statistical Areas

OMB defines a ''Micropolitan Statistical Area'' as a CBSA associated with at least one urban cluster that has a population of at least 10,000, but less than 50,000 (75 FR 37252). We refer to these areas as Micropolitan Areas. Since FY 2006, we have treated Micropolitan Areas as rural and include hospitals located in Micropolitan Areas in each State's rural wage index. We refer the reader to the FY 2006 IRF PPS final rule for a complete discussion regarding treating Micropolitan Areas as rural. Therefore, in conjunction with our proposal to implement the new OMB labor market delineations beginning in FY 2021 and consistent with the treatment of Micropolitan Areas under the IPPS, we are proposing to continue to treat Micropolitan Areas as ''rural'' and to include Micropolitan Areas in the calculation of the state's rural wage index.

(2) Urban Counties That Would Become Rural Under the New OMB Delineations

As previously discussed, we are proposing to implement the new OMB labor market area delineations (based upon the 2010 Decennial Census data) beginning in FY 2021. Our analysis shows that a total of 34 counties (and county equivalents) that are currently considered part of an urban CBSA would be considered located in a rural area, beginning in FY 2021, under these new OMB delineations. Table 5 lists the 34 urban counties that would be rural if we finalize our proposal to implement the new OMB delineations.

TABLE 5—COUNTIES THAT WOULD TRANSITION FROM URBAN TO RURAL STATUS

FIPS county code	County/county equivalent	State	Current CBSA	Current CBSA name
01127	Walker	AL	13820	Birmingham-Hoover, AL.
12045	Gulf	FL	37460	Panama City, FL.
13007	Baker	GA	10500	Albany, GA.
13235	Pulaski	GA	47580	Warner Robins, GA.
15005	Kalawao	HI	27980	Kahului-Wailuku-Lahaina, HI.
17039	De Witt	IL	14010	Bloomington, IL.
17053	Ford	IL	16580	Champaign-Urbana, IL.
18143	Scott	IN	31140	Louisville/Jefferson County, KY-IN.
18179	Wells	IN	23060.	Fort Wayne, IN.
19149	Plymouth	IA	43580	Sioux City, IA-NE-SD.

TABLE 5—COUNTIES THAT WOULD TRANSITION FROM URBAN TO RURAL STATUS—Continued

FIPS county code	County/county equivalent	State	Current CBSA	Current CBSA name
20095	Kingman	KS	48620	Wichita, KS.
21223	Trimble	KY	31140	Louisville/Jefferson County, KY-IN.
22119	Webster	LA	43340	Shreveport-Bossier City, LA.
26015	Barry	MI	24340	Grand Rapids-Wyoming, MI.
26159	Van Buren	MI	28020	Kalamazoo-Portage, MI.
27143	Sibley	MN	33460	Minneapolis-St. Paul-Bloomington, MN-WI.
28009	Benton	MS	32820	Memphis, TN-MS-AR.
29119	Mc Donald	MO	22220	Fayetteville-Springdale-Rogers, AR-MO.
30037	Golden Valley	MT	13740	Billings, MT.
31081	Hamilton	NE	24260	Grand Island, NE.
38085	Sioux	ND	13900	Bismarck, ND.
40079	Le Flore	OK	22900	Fort Smith, AR-OK.
45087	Union	SC	43900	Spartanburg, SC.
46033	Custer	SD	39660	Rapid City, SD.
47081	Hickman	TN	34980	Nashville-Davidson-Murfreesboro-Franklin, TN.
48007	Aransas	TX	18580	Corpus Christi, TX.
48221	Hood	TX	23104	Fort Worth-Arlington, TX.
48351	Newton	TX	13140	Beaumont-Port Arthur, TX.
48425	Somervell	TX	23104	Fort Worth-Arlington, TX.
51029	Buckingham	VA	16820	Charlottesville, VA.
51033	Caroline	VA	40060	Richmond, VA.
51063	Floyd	VA	13980	Blacksburg-Christiansburg-Radford, VA.
53013	Columbia	WA	47460	Walla Walla, WA.
53051	Pend Oreille	WA	44060	Spokane-Spokane Valley, WA.

We are proposing that the wage data for all hospitals located in the counties listed above would now be considered rural, beginning in FY 2021, when calculating their respective State's rural wage index. This rural wage index value would also be used under the IRF PPS. We refer readers to section V.D.3. of this proposed rule for a discussion of the proposed wage index transition policy due to these proposed changes.

(3) Rural Counties That Would Become Urban Under the New OMB Delineations

As previously discussed, we are proposing to implement the new OMB labor market area delineations (based upon the 2010 Decennial Census data) beginning in FY 2021. Analysis of these OMB labor market area delineations shows that a total of 47 counties (and county equivalents) that are currently considered located in rural areas would be considered located in urban areas under the new OMB delineations. Table 6 lists the 47 rural counties that would be urban if we finalize our proposal to implement the new OMB delineations.

TABLE 6—COUNTIES THAT WOULD TRANSITION FROM RURAL TO URBAN STATUS

FIPS county code	County/county equivalent	State	Proposed CBSA code	Proposed CBSA name
01063	Greene	AL	46220	Tuscaloosa, AL.
01129	Washington	AL	33660	Mobile, AL.
05047	Franklin	AR	22900	Fort Smith, AR-OK.
12075	Levy	FL	23540	Gainesville, FL.
13259	Stewart	GA	17980	Columbus, GA-AL.
13263	Talbot	GA	17980	Columbus, GA-AL.
16077	Power	ID	38540	Pocatello, ID.
17057	Fulton	IL	37900	Peoria, IL.
17087	Johnson	IL	16060	Carbondale-Marion, IL.
18047	Franklin	IN	17140	Cincinnati, OH-KY-IN.
18121	Parke	IN	45460	Terre Haute, IN.
18171	Warren	IN	29200	Lafayette-West Lafayette, IN.
19015	Boone	IA	11180	Ames, IA.
19099	Jasper	IA	19780	Des Moines-West Des Moines, IA.
20061	Geary	KS	31740	Manhattan, KS.
21043	Carter	KY	26580	Huntington-Ashland, WV-KY-OH.
22007	Assumption	LA	12940	Baton Rouge, LA.
22067	Morehouse	LA	33740	Monroe, LA.
25011	Franklin	MA	44140	Springfield, MA.
26067	Ionia	MI	24340	Grand Rapids-Kentwood, MI.
26155	Shiawassee	MI	29620	Lansing-East Lansing, MI.
27075	Lake	MN	20260	Duluth, MN-WI.
28031	Covington	MS	25620	Hattiesburg, MS.
28051	Holmes	MS	27140	Jackson, MS.
28131	Stone	MS	25060	Gulfport-Biloxi, MS.
29053	Cooper	MO	17860	Columbia, MO.

TABLE 6—COUNTIES THAT WOULD TRANSITION FROM RURAL TO URBAN STATUS—Continued

FIPS county code	County/county equivalent	State	Proposed CBSA code	Proposed CBSA name
29089	Howard	MO	17860	Columbia, MO.
30095	Stillwater	MT	13740	Billings, MT.
37007	Anson	NC	16740	Charlotte-Concord-Gastonia, NC-SC.
37029	Camden	NC	47260	Virginia Beach-Norfolk-Newport News, VA-NC.
37077	Granville	NC	20500	Durham-Chapel Hill, NC.
37085	Harnett	NC	22180	Fayetteville, NC.
39123	Ottawa	OH	45780	Toledo, OH.
45027	Clarendon	SC	44940	Sumter, SC.
47053	Gibson	TN	27180	Jackson, TN.
47161	Stewart	TN	17300	Clarksville, TN-KY.
48203	Harrison	TX	30980	Longview, TX.
48431	Sterling	TX	41660	San Angelo, TX.
51097	King And Queen	VA	40060	Richmond, VA.
51113	Madison	VA	47894	Washington-Arlington-Alexandria, DC-VA-MD-WV.
51175	Southampton	VA	47260	Virginia Beach-Norfolk-Newport News, VA-NC.
51620	Franklin City	VA	47260	Virginia Beach-Norfolk-Newport News, VA-NC.
54035	Jackson	WV	16620	Charleston, WV.
54065	Morgan	WV	25180	Hagerstown-Martinsburg, MD-WV.
55069	Lincoln	WI	48140	Wausau-Weston, WI.
72001	Adjuntas	PR	38660	Ponce, PR.
72083	Las Marias	PR	32420	Mayagüez, PR.

We are proposing that when calculating the area wage index, beginning with FY 2021, the wage data for hospitals located in these counties would be included in their new respective urban CBSAs. Typically, providers located in an urban area receive a higher wage index value than or equal to providers located in their State's rural area. We refer readers to section V.D.3. of this proposed rule for a discussion of the proposed wage index transition policy.

(4) Urban Counties That Would Move to a Different Urban CBSA Under the New OMB Delineations

In certain cases, adopting the new OMB delineations would involve a change only in CBSA name and/or number, while the CBSA continues to encompass the same constituent counties. For example, CBSA 19380 (Dayton, OH) would experience both a change to its number and its name, and become CBSA 19430 (Dayton-Kettering, OH), while all of its three constituent counties would remain the same. In other cases, only the name of the CBSA would be modified, and none of the currently assigned counties would be reassigned to a different urban CBSA. Table 7 shows the current CBSA code and our proposed CBSA code where we are proposing to change either the name or CBSA number only. We are not discussing further in this section these proposed changes because they are inconsequential changes with respect to the IRF PPS wage index.

TABLE 7—CURRENT CBSAS THAT WOULD CHANGE CBSA CODE OR TITLE

Proposed CBSA code	Proposed CBSA title	Current CBSA code	Current CBSA title
10540	Albany-Lebanon, OR	10540	Albany, OR.
11500	Anniston-Oxford, AL	11500	Anniston-Oxford-Jacksonville, AL.
12060	Atlanta-Sandy Springs-Alpharetta, GA	12060	Atlanta-Sandy Springs-Roswell, GA.
12420	Austin-Round Rock-Georgetown, TX	12420	Austin-Round Rock, TX.
13460	Bend, OR	13460	Bend-Redmond, OR.
13980	Blacksburg-Christiansburg, VA	13980	Blacksburg-Christiansburg-Radford, VA.
14740	Bremerton-Silverdale-Port Orchard, WA	14740	Bremerton-Silverdale, WA.
15380	Buffalo-Cheektowaga, NY	15380	Buffalo-Cheektowaga-Niagara Falls, NY.
19430	Dayton-Kettering, OH	19380	Dayton, OH.
24340	Grand Rapids-Kentwood, MI	24340	Grand Rapids-Wyoming, MI.
24860	Greenville-Anderson, SC	24860	Greenville-Anderson-Mauldin, SC.
25060	Gulfport-Biloxi, MS	25060	Gulfport-Biloxi-Pascagoula, MS.
25540	Hartford-East Hartford-Middletown, CT	25540	Hartford-West Hartford-East Hartford, CT.
25940	Hilton Head Island-Bluffton, SC	25940	Hilton Head Island-Bluffton-Beaufort, SC.
28700	Kingsport-Bristol, TN-VA	28700	Kingsport-Bristol-Bristol, TN-VA.
31860	Mankato, MN	31860	Mankato-North Mankato, MN.
33340	Milwaukee-Waukesha, WI	33340	Milwaukee-Waukesha-West Allis, WI.
34940	Naples-Marco Island, FL	34940	Naples-Immokalee-Marco Island, FL.
35660	Niles, MI	35660	Niles-Benton Harbor, MI.
36084	Oakland-Berkeley-Livermore, CA	36084	Oakland-Hayward-Berkeley, CA.
36500	Olympia-Lacey-Tumwater, WA	36500	Olympia-Tumwater, WA.
38060	Phoenix-Mesa-Chandler, AZ	38060	Phoenix-Mesa-Scottsdale, AZ.
39150	Prescott Valley-Prescott, AZ	39140	Prescott, AZ.
23224	Frederick-Gaithersburg-Rockville, MD	43524	Silver Spring-Frederick-Rockville, MD.
44420	Staunton, VA	44420	Staunton-Waynesboro, VA.
44700	Stockton, CA	44700	Stockton-Lodi, CA.

TABLE 7—CURRENT CBSAS THAT WOULD CHANGE CBSA CODE OR TITLE—Continued

Proposed CBSA code	Proposed CBSA title	Current CBSA code	Current CBSA title
45940	Trenton-Princeton, NJ	45940	Trenton, NJ.
46700	Vallejo, CA	46700	Vallejo-Fairfield, CA.
47300	Visalia, CA	47300	Visalia-Porterville, CA.
48140	Wausau-Weston, WI	48140	Wausau, WI.
48424	West Palm Beach-Boca Raton-Boynton Beach, FL.	48424	West Palm Beach-Boca Raton-Delray Beach, FL.

In some cases, if we adopt the new OMB delineations, counties would shift between existing and new CBSAs, changing the constituent makeup of the CBSAs. We consider this type of change, where CBSAs are split into multiple new CBSAs, or a CBSA loses one or more counties to another urban CBSA to be significant modifications.

Table 8 lists the urban counties that would move from one urban CBSA to another a newly proposed or modified CBSA if we adopted the new OMB delineations.

TABLE 8—URBAN COUNTIES THAT WOULD MOVE TO A NEWLY PROPOSED OR MODIFIED CBSA

FIPS county code	County name	State	Current CBSA	Current CBSA name	Proposed CBSA code	Proposed CBSA name
17031	Cook	IL	16974	Chicago-Naperville-Arlington Heights, IL	16984	Chicago-Naperville-Evanston, IL.
17043	Du Page	IL	16974	Chicago-Naperville-Arlington Heights, IL	16984	Chicago-Naperville-Evanston, IL.
17063	Grundy	IL	16974	Chicago-Naperville-Arlington Heights, IL	16984	Chicago-Naperville-Evanston, IL.
17093	Kendall	IL	16974	Chicago-Naperville-Arlington Heights, IL	20994	Elgin, IL.
17111	Mc Henry	IL	16974	Chicago-Naperville-Arlington Heights, IL	16984	Chicago-Naperville-Evanston, IL.
17197	Will	IL	16974	Chicago-Naperville-Arlington Heights, IL	16984	Chicago-Naperville-Evanston, IL.
34023	Middlesex	NJ	35614	New York-Jersey City-White Plains, NY-NJ.	35154	New Brunswick-Lakewood, NJ.
34025	Monmouth	NJ	35614	New York-Jersey City-White Plains, NY-NJ.	35154	New Brunswick-Lakewood, NJ.
34029	Ocean	NJ	35614	New York-Jersey City-White Plains, NY-NJ.	35154	New Brunswick-Lakewood, NJ.
34035	Somerset	NJ	35084	Newark, NJ-PA	35154	New Brunswick-Lakewood, NJ.
36027	Dutchess	NY	20524	Dutchess County-Putnam County, NY	39100	Poughkeepsie-Newburgh-Middletown, NY.
36071	Orange	NY	35614	New York-Jersey City-White Plains, NY-NJ.	39100	Poughkeepsie-Newburgh-Middletown, NY.
36079	Putnam	NY	20524	Dutchess County-Putnam County, NY	35614	New York-Jersey City-White Plains, NY-NJ.
47057	Grainger	TN	28940	Knoxville, TN	34100	Morristown, TN.
54043	Lincoln	WV	26580	Huntington-Ashland, WV-KY-OH	16620	Charleston, WV.
72055	Guanica	PR	38660	Ponce, PR	49500	Yauco, PR.
72059	Guayanilla	PR	38660	Ponce, PR	49500	Yauco, PR.
72111	Penuelas	PR	38660	Ponce, PR	49500	Yauco, PR.
72153	Yauco	PR	38660	Ponce, PR	49500	Yauco, PR.

If providers located in these counties move from one CBSA to another under the new OMB delineations, there may be impacts, both negative and positive, upon their specific wage index values. We refer readers to section V.D.3. of this proposed rule for a discussion of the proposed wage index transition policy due to these proposed changes.

We believe these revisions to the CBSA-based labor market area delineations as established in OMB Bulletin 18–04 would ensure that the IRF PPS area wage level adjustment most appropriately accounts for and reflects the relative wage levels in the geographic area of the IRF. Therefore, we are proposing to adopt the revisions to the CSBA based labor market area delineations under the IRF PPS, effective October 1, 2020. Accordingly, the proposed FY 2021 IRF PPS wage index values (which are available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRF-Rules-and-Related-Files.html*) reflect the proposed revisions to the CBSA-based labor market area delineations.

Furthermore, consistent with the requirement at § 412.624(e)(1) that changes to area wage level adjustment are made in a budget neutral manner, we are proposing to adopt these revisions to the CSBA based labor market area delineations in a budget neutral manner. Our proposed methodology for calculating the proposed budget neutrality factor is discussed in section V.D.4. of this proposed rule.

We invite public comment on the proposal to adopt the new OMB delineations, effective beginning with the FY 2021 IRF PPS wage index.

3. Proposed Transition Policy

Overall, we believe that our proposal to adopt the revised OMB delineations for FY 2021 would result in wage index values being more representative of the actual costs of labor in a given area. However, we also recognize that approximately 5 percent of IRFs would experience decreases in their area wage index values as a result of our proposal to adopt the revised OMB delineations. We also realize that many IRFs would have higher area wage index values under our proposal.

To mitigate the potential impacts of revisions to the OMB delineations on IRFs, we have in the past provided for transition periods when adopting changes that have significant payment implications, particularly large negative impacts. For example, we proposed and finalized budget neutral transition policies to help mitigate negative

impacts on IRFs following the adoption of the new CBSA delineations based on the 2010 decennial census data in the FY 2016 IRF PPS final rule (80 FR 47035). Specifically, we implemented a 1-year blended wage index for all IRFs due to our adoption of the revised delineations. This required calculating and comparing two wage indexes for each IRF since that blended wage index was computed as the sum of 50 percent of the FY 2016 IRF PPS wage index values under the FY 2015 CBSA delineations and 50 percent of the FY 2016 IRF PPS wage index values under the FY 2016 new OMB delineations. While we believed that using the new OMB delineations would create a more accurate payment adjustment for differences in area wage levels, we also recognized that adopting such changes may cause some short-term instability in IRF PPS payments, in particular for IRFs that would be negatively impacted by the proposed adoption of the updates to the OMB delineations. For example, IRF's currently located in CBSA 35614 (New York-Jersey City-White Plains, NY-NJ) that would be located in new CBSA 35154 (New Brunswick-Lakewood, NJ) under the proposed changes to the CBSA-based labor market area delineations would experience a nearly 17 percent decrease in the wage index as a result of the proposed change. Therefore, consistent with past practice we are proposing a transition policy to help mitigate any significant negative impacts that IRFs may experience due to our proposal to adopt the revised OMB delineations under the IRF PPS. Specifically, for FY 2021 as a transition, we are proposing to apply a 5 percent cap on any decrease in an IRF's wage index from the IRF's wage index from the prior FY. This transition would allow the effects of our proposed adoption of the revised OMB delineations to be phased in over 2 years, where the estimated reduction in an IRF's wage index would be capped at 5 percent in FY 2021 (that is, no cap would be applied to any reductions in the wage index for the second year (FY 2022)). We believe a 5 percent cap on the overall decrease in an IRF's wage index value would be an appropriate transition as it would effectively mitigate any significant decreases in an IRF's wage index for FY 2021.

Furthermore, consistent with the requirement at § 412.624(e)(1) that changes to area wage level adjustment are made in a budget neutral manner, we are proposing that this proposed transitional wage index would not result in any change in estimated aggregate IRF PPS payments by applying a budget neutrality factor to the standard payment conversion factor. Our proposed methodology for calculating this proposed budget neutrality factor is discussed below in section V.D.4. of this proposed rule.

We invite comments on our proposed implementation of the new OMB delineations and our proposed transition methodology.

4. Proposed Wage Adjustment

To calculate the wage-adjusted facility payment for the proposed payment rates set forth in this proposed rule, we would multiply the proposed unadjusted Federal payment rate for IRFs by the FY 2021 labor-related share based on the 2016-based IRF market basket relative importance (72.9 percent) to determine the labor-related portion of the standard payment amount. A full discussion of the calculation of the labor-related share is located in section V.C. of this proposed rule. We would then multiply the labor-related portion by the applicable IRF wage index. The wage index tables are available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRF-Rules-and-Related-Files.html.*

Adjustments or updates to the IRF wage index made under section 1886(j)(6) of the Act must be made in a budget-neutral manner. We propose to calculate a budget-neutral wage adjustment factor as established in the FY 2004 IRF PPS final rule (68 FR 45689), codified at § 412.624(e)(1), as described in the steps below. We propose to use the listed steps to ensure that the FY 2021 IRF standard payment conversion factor reflects the proposed update to the wage indexes (based on the FY 2017 hospital cost report data and taking into account the proposed revisions to the OMB delineations and the transition policy) and the proposed update to the labor-related share, in a budget-neutral manner:

Step 1. Calculate the total amount of estimated IRF PPS payments using the labor-related share and the wage indexes from FY 2020 (as published in the FY 2020 IRF PPS final rule (84 FR 39054)).

Step 2. Calculate the total amount of estimated IRF PPS payments using the proposed FY 2021 wage index values (based on updated hospital wage data and taking into account the proposed changes to geographic labor market area delineations and the transition policy) and the proposed FY 2021 labor-related share of 72.9 percent.

Step 3. Divide the amount calculated in step 1 by the amount calculated in step 2. The resulting quotient is the proposed FY 2021 budget-neutral wage adjustment factor of 0.9999.

Step 4. Apply the budget neutrality factor from step 3 to the FY 2021 IRF PPS standard payment amount after the application of the increase factor to determine the proposed FY 2021 standard payment conversion factor.

We discuss the calculation of the proposed standard payment conversion factor for FY 2021 in section V.E. of this proposed rule.

We invite public comment on the proposed IRF wage adjustment for FY 2021.

E. Description of the Proposed IRF Standard Payment Conversion Factor and Payment Rates for FY 2021

To calculate the proposed standard payment conversion factor for FY 2021, as illustrated in Table 5, we begin by applying the proposed increase factor for FY 2021, as adjusted in accordance with sections 1886(j)(3)(C) of the Act, to the standard payment conversion factor for FY 2020 ($16,489). Applying the proposed 2.5 percent increase factor for FY 2021 to the standard payment conversion factor for FY 2020 of $16,489 yields a standard payment amount of $16,901. Then, we apply the proposed budget neutrality factor for the FY 2021 wage index (taking into account the proposed revisions to the CBSA delineations and the transition policy), and labor-related share of 0.9999, which results in a proposed standard payment amount of $16,900. We next apply the proposed budget neutrality factor for the revised CMGs and CMG relative weights of 0.9969, which results in the standard payment conversion factor of $16,847 for FY 2021.

We invite public comment on the proposed FY 2021 standard payment conversion factor.

TABLE 9—CALCULATIONS TO DETERMINE THE PROPOSED FY 2021 STANDARD PAYMENT CONVERSION FACTOR

Explanation for adjustment	Calculations
Standard Payment Conversion Factor for FY 2020	$16,489

TABLE 9—CALCULATIONS TO DETERMINE THE PROPOSED FY 2021 STANDARD PAYMENT CONVERSION FACTOR—Continued

Explanation for adjustment	Calculations
Market Basket Increase Factor for FY 2021 (2.9 percent), reduced by 0.4 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.	× 1.025
Budget Neutrality Factor for the Updates to the Wage Index and Labor-Related Share	× 0.9999
Budget Neutrality Factor for the Revisions to the CMGs and CMG Relative Weights	× 0.9969
Proposed FY 2020 Standard Payment Conversion Factor	= $16,847

After the application of the proposed CMG relative weights described in section IV. of this proposed rule to the proposed FY 2021 standard payment conversion factor ($16,847), the resulting unadjusted IRF prospective payment rates for FY 2021 are shown in Table 10.

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TABLE 10: FY 2021 Payment Rates

CMG	Payment Rate Tier 1	Payment Rate Tier 2	Payment Rate Tier 3	Payment Rate No Comorbidity
0101	$ 17,487.19	$ 14,914.65	$ 13,807.80	$ 13,211.42
0102	$ 22,329.01	$ 19,045.53	$ 17,632.07	$ 16,870.59
0103	$ 28,528.71	$ 24,330.44	$ 22,526.12	$ 21,554.05
0104	$ 37,046.55	$ 31,596.55	$ 29,251.45	$ 27,989.61
0105	$ 42,061.90	$ 35,874.00	$ 33,212.18	$ 31,778.50
0106	$ 48,206.01	$ 41,115.10	$ 38,062.43	$ 36,419.84
0201	$ 19,766.59	$ 15,881.67	$ 14,272.78	$ 13,347.88
0202	$ 24,748.24	$ 19,884.51	$ 17,869.61	$ 16,712.22
0203	$ 29,819.19	$ 23,958.12	$ 21,532.15	$ 20,137.22
0204	$ 37,051.61	$ 29,768.65	$ 26,753.04	$ 25,019.48
0205	$ 46,415.17	$ 37,292.52	$ 33,515.42	$ 31,343.84
0301	$ 20,713.39	$ 16,774.56	$ 15,479.02	$ 14,350.27
0302	$ 26,555.93	$ 21,506.88	$ 19,845.77	$ 18,396.92
0303	$ 31,776.81	$ 25,735.48	$ 23,747.53	$ 22,015.66
0304	$ 35,629.72	$ 28,855.54	$ 26,626.68	$ 24,684.22
0305	$ 38,837.39	$ 31,453.35	$ 29,024.01	$ 26,906.34
0401	$ 23,085.44	$ 19,625.07	$ 17,610.17	$ 16,382.02
0402	$ 30,058.42	$ 25,553.53	$ 22,930.45	$ 21,331.67
0403	$ 36,113.23	$ 30,701.97	$ 27,548.21	$ 25,629.34
0404	$ 59,741.15	$ 50,788.65	$ 45,572.82	$ 42,397.16
0405	$ 46,362.94	$ 39,413.56	$ 35,366.91	$ 32,902.19
0406	$ 60,558.23	$ 51,481.06	$ 46,194.47	$ 42,976.70
0407	$ 69,370.89	$ 58,974.61	$ 52,918.11	$ 49,231.99
0501	$ 22,254.89	$ 17,143.51	$ 16,210.18	$ 14,955.08
0502	$ 27,618.97	$ 21,276.08	$ 20,117.00	$ 18,560.34
0503	$ 31,989.08	$ 24,642.11	$ 23,299.40	$ 21,496.77
0504	$ 38,207.31	$ 29,431.71	$ 27,829.56	$ 25,674.83
0505	$ 49,739.08	$ 38,315.13	$ 36,229.47	$ 33,424.45
0601	$ 23,206.74	$ 17,345.67	$ 16,259.04	$ 14,776.50
0602	$ 28,860.60	$ 21,569.21	$ 20,219.77	$ 18,375.02
0603	$ 34,266.80	$ 25,610.81	$ 24,008.66	$ 21,818.55
0604	$ 39,755.55	$ 29,713.05	$ 27,853.15	$ 25,312.62
0701	$ 21,121.08	$ 17,054.22	$ 16,149.53	$ 14,845.58
0702	$ 26,416.10	$ 21,328.30	$ 20,199.55	$ 18,567.08
0703	$ 32,091.85	$ 25,910.69	$ 24,539.34	$ 22,556.45
0704	$ 36,657.39	$ 29,598.49	$ 28,030.04	$ 25,767.49
0801	$ 19,114.61	$ 15,377.94	$ 13,674.71	$ 12,746.44
0802	$ 22,465.47	$ 18,075.15	$ 16,072.04	$ 14,982.04
0803	$ 25,102.03	$ 20,196.18	$ 17,957.22	$ 16,740.86
0804	$ 28,917.88	$ 23,265.71	$ 20,686.43	$ 19,284.76
0805	$ 33,668.73	$ 27,089.98	$ 24,086.16	$ 22,453.68
0901	$ 20,528.07	$ 16,250.62	$ 15,383.00	$ 13,932.47
0902	$ 25,545.11	$ 20,223.14	$ 19,143.25	$ 17,337.25
0903	$ 30,060.10	$ 23,796.39	$ 22,524.44	$ 20,400.03
0904	$ 34,509.39	$ 27,319.10	$ 25,858.46	$ 23,419.01
1001	$ 21,875.83	$ 18,216.66	$ 16,368.55	$ 15,126.92
1002	$ 27,162.42	$ 22,618.78	$ 20,324.22	$ 18,782.72

CMG	Payment Rate Tier 1	Payment Rate Tier 2	Payment Rate Tier 3	Payment Rate No Comorbidity
1003	$ 31,734.69	$ 26,424.52	$ 23,744.16	$ 21,944.90
1004	$ 37,363.28	$ 31,113.04	$ 27,955.91	$ 25,836.56
1101	$ 21,971.86	$ 19,593.06	$ 17,162.04	$ 16,611.14
1102	$ 29,211.01	$ 26,048.83	$ 22,817.58	$ 22,084.73
1103	$ 32,855.02	$ 29,296.93	$ 25,663.04	$ 24,839.22
1201	$ 24,300.11	$ 16,088.89	$ 16,088.89	$ 14,764.71
1202	$ 30,331.34	$ 20,083.31	$ 20,083.31	$ 18,430.62
1203	$ 35,272.56	$ 23,355.00	$ 23,355.00	$ 21,432.75
1204	$ 37,046.55	$ 24,529.23	$ 24,529.23	$ 22,510.96
1301	$ 19,067.43	$ 15,684.56	$ 14,859.05	$ 13,192.89
1302	$ 26,151.60	$ 21,511.93	$ 20,378.13	$ 18,093.68
1303	$ 30,061.79	$ 24,729.71	$ 23,425.75	$ 20,799.31
1304	$ 34,930.57	$ 28,734.24	$ 27,219.70	$ 24,167.02
1305	$ 35,284.36	$ 29,025.70	$ 27,495.99	$ 24,412.99
1401	$ 19,493.66	$ 15,876.61	$ 14,308.16	$ 12,803.72
1402	$ 24,428.15	$ 19,896.31	$ 17,930.26	$ 16,043.40
1403	$ 29,689.47	$ 24,180.50	$ 21,791.59	$ 19,498.72
1404	$ 34,787.37	$ 28,333.28	$ 25,533.31	$ 22,846.22
1501	$ 21,842.14	$ 17,433.28	$ 16,275.89	$ 15,635.70
1502	$ 26,904.66	$ 21,473.19	$ 20,049.61	$ 19,261.18
1503	$ 31,234.34	$ 24,928.51	$ 23,275.82	$ 22,359.34
1504	$ 36,044.16	$ 28,767.94	$ 26,859.17	$ 25,802.87
1601	$ 16,735.81	$ 16,735.81	$ 15,098.28	$ 13,563.52
1602	$ 18,695.12	$ 18,695.12	$ 16,865.53	$ 15,152.19
1603	$ 22,800.73	$ 22,800.73	$ 20,570.19	$ 18,479.47
1604	$ 28,951.57	$ 28,951.57	$ 26,117.90	$ 23,464.50
1701	$ 23,351.63	$ 18,343.01	$ 16,725.70	$ 15,216.21
1702	$ 28,510.18	$ 22,394.72	$ 20,420.25	$ 18,575.50
1703	$ 33,779.92	$ 26,532.34	$ 24,193.98	$ 22,008.92
1704	$ 37,425.61	$ 29,398.02	$ 26,806.95	$ 24,386.03
1705	$ 40,892.72	$ 32,120.49	$ 29,288.51	$ 26,643.53
1801	$ 20,954.30	$ 16,459.52	$ 14,788.30	$ 13,742.10
1802	$ 26,901.29	$ 21,132.88	$ 18,986.57	$ 17,643.86
1803	$ 32,780.89	$ 25,750.64	$ 23,135.99	$ 21,498.46
1804	$ 37,703.59	$ 29,618.71	$ 26,609.84	$ 24,728.03
1805	$ 44,834.92	$ 35,220.34	$ 31,643.72	$ 29,404.75
1806	$ 56,791.24	$ 44,612.54	$ 40,082.38	$ 37,245.35
1901	$ 19,970.43	$ 15,760.37	$ 15,596.95	$ 14,725.96
1902	$ 27,120.30	$ 21,404.11	$ 21,181.73	$ 19,999.07
1903	$ 43,266.47	$ 34,145.50	$ 33,791.71	$ 31,904.85
1904	$ 61,885.77	$ 48,841.14	$ 48,332.36	$ 45,633.47
2001	$ 20,512.91	$ 16,587.56	$ 15,172.41	$ 13,954.37
2002	$ 25,223.33	$ 20,394.98	$ 18,654.68	$ 17,156.98
2003	$ 29,829.30	$ 24,119.85	$ 22,061.15	$ 20,290.53
2004	$ 33,592.92	$ 27,164.10	$ 24,845.96	$ 22,851.27
2005	$ 36,106.49	$ 29,195.85	$ 26,704.18	$ 24,559.56
2101	$ 30,594.15	$ 23,078.71	$ 19,011.84	$ 19,011.84
2102	$ 40,773.11	$ 30,755.88	$ 25,337.89	$ 25,337.89
5001	$ -	$ -	$ -	$ 2,773.02
5101	$ -	$ -	$ -	$ 12,323.58

CMG	Payment Rate Tier 1	Payment Rate Tier 2	Payment Rate Tier 3	Payment Rate No Comorbidity
5102	$ -	$ -	$ -	$ 30,462.75
5103	$ -	$ -	$ -	$ 14,175.07
5104	$ -	$ -	$ -	$ 34,938.99

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F. Example of the Methodology for Adjusting the Proposed Prospective Payment Rates

Table 11 illustrates the methodology for adjusting the proposed prospective payments (as described in section V. of this proposed rule). The following examples are based on two hypothetical Medicare beneficiaries, both classified into CMG 0104 (without comorbidities). The proposed unadjusted prospective payment rate for CMG 0104 (without comorbidities) appears in Table 10.

Example: One beneficiary is in Facility A, an IRF located in rural Spencer County, Indiana, and another beneficiary is in Facility B, an IRF located in urban Harrison County, Indiana. Facility A, a rural non-teaching hospital has a Disproportionate Share Hospital (DSH) percentage of 5 percent (which would result in a LIP adjustment of 1.0156), a wage index of 0.8382, and a rural adjustment of 14.9 percent. Facility B, an urban teaching hospital, has a DSH percentage of 15 percent (which would result in a LIP adjustment of 1.0454 percent), a wage index of 0.8683, and a teaching status adjustment of 0.0784.

To calculate each IRF's labor and non-labor portion of the proposed prospective payment, we begin by taking the unadjusted prospective payment rate for CMG 0104 (without comorbidities) from Table 10. Then, we multiply the proposed labor-related share for FY 2021 (72.9 percent) described in section V.C. of this proposed rule by the proposed unadjusted prospective payment rate. To determine the non-labor portion of the proposed prospective payment rate, we subtract the labor portion of the Federal payment from the proposed unadjusted prospective payment.

To compute the proposed wage-adjusted prospective payment, we multiply the labor portion of the proposed Federal payment by the appropriate wage index located in Tables A and B. These tables are available on the CMS website at *https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/IRF-Rules-and-Related-Files.html.*

The resulting figure is the wage-adjusted labor amount. Next, we compute the proposed wage-adjusted Federal payment by adding the wage-adjusted labor amount to the non-labor portion of the proposed Federal payment.

Adjusting the proposed wage-adjusted Federal payment by the facility-level adjustments involves several steps. First, we take the wage-adjusted prospective payment and multiply it by the appropriate rural and LIP adjustments (if applicable). Second, to determine the appropriate amount of additional payment for the teaching status adjustment (if applicable), we multiply the teaching status adjustment (0.0784, in this example) by the wage-adjusted and rural-adjusted amount (if applicable). Finally, we add the additional teaching status payments (if applicable) to the wage, rural, and LIP-adjusted prospective payment rates. Table 11 illustrates the components of the adjusted payment calculation.

TABLE 11—EXAMPLE OF COMPUTING THE FY 2021 IRF PROSPECTIVE PAYMENT

Steps		Rural Facility A (Spencer Co., IN)	Urban Facility B (Harrison Co., IN)
1	Unadjusted Payment	$27,989.61	$27,989.61
2	Labor Share	× 0.729	× 0.729
3	Labor Portion of Payment	= $20,404.43	= $20,404.43
4	CBSA-Based Wage Index (shown in the Addendum, Tables A and B)	× 0.8382	× 0.8683
5	Wage-Adjusted Amount	= $17,102.99	= $17,717.16
6	Non-Labor Amount	+ $7,585.18	+ $7,585.18
7	Wage-Adjusted Payment	= $24,688.17	= $25,302.35
8	Rural Adjustment	× 1.149	× 1.000
9	Wage- and Rural-Adjusted Payment	= $28,366.71	= $25,302.35
10	LIP Adjustment	× 1.0156	× 1.0454
11	Wage-, Rural- and LIP-Adjusted Payment	= $28,809.23	= $26,451.07
12	Wage-and Rural-Adjusted Payment	$28,366.71	$25,302.35
13	Teaching Status Adjustment	× 0	× 0.0784
14	Teaching Status Adjustment Amount	= $0.00	= $1,983.70
15	Wage-, Rural-, and LIP-Adjusted Payment	+ $28,809.23	+ $26,451.07
16	Total Adjusted Payment	= $28,809.23	= $28,434.78

Thus, the proposed adjusted payment for Facility A would be $28,809.23, and the adjusted payment for Facility B would be $28,434.78.

VI. Proposed Update to Payments for High-Cost Outliers Under the IRF PPS for FY 2021

A. Proposed Update to the Outlier Threshold Amount for FY 2021

Section 1886(j)(4) of the Act provides the Secretary with the authority to make payments in addition to the basic IRF prospective payments for cases incurring extraordinarily high costs. A case qualifies for an outlier payment if the estimated cost of the case exceeds the adjusted outlier threshold. We calculate the adjusted outlier threshold by adding the IRF PPS payment for the case (that is, the CMG payment adjusted by all of the relevant facility-level adjustments) and the adjusted threshold amount (also adjusted by all of the relevant facility-level adjustments).

Then, we calculate the estimated cost of a case by multiplying the IRF's overall CCR by the Medicare allowable covered charge. If the estimated cost of the case is higher than the adjusted outlier threshold, we make an outlier payment for the case equal to 80 percent of the difference between the estimated cost of the case and the outlier threshold.

In the FY 2002 IRF PPS final rule (66 FR 41362 through 41363), we discussed our rationale for setting the outlier threshold amount for the IRF PPS so that estimated outlier payments would equal 3 percent of total estimated payments. For the 2002 IRF PPS final rule, we analyzed various outlier policies using 3, 4, and 5 percent of the total estimated payments, and we concluded that an outlier policy set at 3 percent of total estimated payments would optimize the extent to which we could reduce the financial risk to IRFs of caring for high-cost patients, while still providing for adequate payments for all other (non-high cost outlier) cases.

Subsequently, we updated the IRF outlier threshold amount in the FYs 2006 through 2020 IRF PPS final rules and the FY 2011 and FY 2013 notices (70 FR 47880, 71 FR 48354, 72 FR 44284, 73 FR 46370, 74 FR 39762, 75 FR 42836, 76 FR 47836, 76 FR 59256, 77 FR 44618, 78 FR 47860, 79 FR 45872, 80 FR 47036, 81 FR 52056, 82 FR 36238, 83 FR 38514, and 84 FR 39054, respectively) to maintain estimated outlier payments at 3 percent of total estimated payments. We also stated in the FY 2009 final rule (73 FR 46370 at 46385) that we would continue to analyze the estimated outlier payments for subsequent years and adjust the outlier threshold amount as appropriate to maintain the 3 percent target.

To update the IRF outlier threshold amount for FY 2021, we propose to use FY 2019 claims data and the same methodology that we used to set the initial outlier threshold amount in the FY 2002 IRF PPS final rule (66 FR 41316 and 41362 through 41363), which is also the same methodology that we used to update the outlier threshold amounts for FYs 2006 through 2020. The outlier threshold is calculated by simulating aggregate payments and using an iterative process to determine a threshold that results in outlier payments being equal to 3 percent of total payments under the simulation. To determine the outlier threshold for FY 2021, we estimate the amount of FY 2021 IRF PPS aggregate and outlier payments using the most recent claims available (FY 2019) and the proposed FY 2021 standard payment conversion factor, labor-related share, and wage indexes, incorporating any applicable budget-neutrality adjustment factors. The outlier threshold is adjusted either up or down in this simulation until the estimated outlier payments equal 3 percent of the estimated aggregate payments. Based on an analysis of the preliminary data used for the proposed rule, we estimated that IRF outlier payments as a percentage of total estimated payments would be approximately 2.6 percent in FY 2020. Therefore, we propose to update the outlier threshold amount from $9,300 for FY 2020 to $8,102 for FY 2021 to maintain estimated outlier payments at approximately 3 percent of total estimated aggregate IRF payments for FY 2021.

We invite public comment on the proposed update to the FY 2021 outlier threshold amount to maintain estimated outlier payments at approximately 3 percent of total estimated IRF payments.

B. Proposed Update to the IRF Cost-to-Charge Ratio Ceiling and Urban/Rural Averages for FY 2021

Cost-to-charge ratios (CCRs) are used to adjust charges from Medicare claims to costs and are computed annually from facility-specific data obtained from MCRs. IRF specific CCRs are used in the development of the CMG relative weights and the calculation of outlier payments under the IRF PPS. In accordance with the methodology stated in the FY 2004 IRF PPS final rule (68 FR 45674, 45692 through 45694), we proposed to apply a ceiling to IRFs' CCRs. Using the methodology described in that final rule, we propose to update the national urban and rural CCRs for IRFs, as well as the national CCR ceiling for FY 2021, based on analysis of the most recent data that is available. We apply the national urban and rural CCRs in the following situations:

- New IRFs that have not yet submitted their first MCR.
- IRFs whose overall CCR is in excess of the national CCR ceiling for FY 2021, as discussed below in this section.
- Other IRFs for which accurate data to calculate an overall CCR are not available.

Specifically, for FY 2021, we propose to estimate a national average CCR of 0.490 for rural IRFs, which we calculated by taking an average of the CCRs for all rural IRFs using their most recently submitted cost report data. Similarly, we propose to estimate a national average CCR of 0.400 for urban IRFs, which we calculated by taking an average of the CCRs for all urban IRFs using their most recently submitted cost report data. We apply weights to both of these averages using the IRFs' estimated costs, meaning that the CCRs of IRFs with higher total costs factor more heavily into the averages than the CCRs of IRFs with lower total costs. For this proposed rule, we have used the most recent available cost report data (FY 2018). This includes all IRFs whose cost reporting periods begin on or after October 1, 2017, and before October 1, 2018. If, for any IRF, the FY 2018 cost report was missing or had an ''as submitted'' status, we used data from a previous FY's (that is, FY 2004 through FY 2017) settled cost report for that IRF. We do not use cost report data from before FY 2004 for any IRF because changes in IRF utilization since FY 2004 resulting from the 60 percent rule and IRF medical review activities suggest that these older data do not adequately reflect the current cost of care. Using updated FY 2018 cost report data for this proposed rule, we estimate a national average CCR of 0.490 for rural IRFs, and a national average CCR of 0.400 for urban IRFs.

In accordance with past practice, we propose to set the national CCR ceiling at 3 standard deviations above the mean CCR. Using this method, we propose a national CCR ceiling of 1.33 for FY 2021. This means that, if an individual IRF's CCR were to exceed this ceiling of 1.33 for FY 2021, we would replace the IRF's CCR with the appropriate proposed national average CCR (either rural or urban, depending on the geographic location of the IRF). We calculated the proposed national CCR ceiling by:

Step 1. Taking the national average CCR (weighted by each IRF's total costs, as previously discussed) of all IRFs for which we have sufficient cost report data (both rural and urban IRFs combined).

Step 2. Estimating the standard deviation of the national average CCR computed in step 1.

Step 3. Multiplying the standard deviation of the national average CCR computed in step 2 by a factor of 3 to compute a statistically significant reliable ceiling.

Step 4. Adding the result from step 3 to the national average CCR of all IRFs for which we have sufficient cost report data, from step 1.

We are also proposing that if more recent data become available after the publication of this proposed rule and before the publication of the final rule, we would use such data to determine the FY 2021 national average rural and urban CCRs and the national CCR ceiling in the final rule.

We invite public comment on the proposed update to the IRF CCR ceiling

and the urban/rural averages for FY 2021.

VII. Proposed Removal of the Post-Admission Physician Evaluation Requirement From the IRF Coverage Requirements

We are committed to transforming the health care delivery system, and the Medicare program, by putting an additional focus on patient-centered care and working with providers and clinicians to improve patient outcomes. We refer to this transformation as ''Patients Over Paperwork.'' That is, CMS recognizes it is imperative that we develop and implement policies that allow providers and clinicians to focus the majority of their time treating patients rather than completing paperwork. Moreover, we believe it is essential for us to reexamine current regulations and administrative requirements to ensure that we are not placing unnecessary burden on providers.

In the FY 2018 IRF PPS proposed rule (82 FR 20743), we included a request for information (RFI) to solicit comments from stakeholders requesting information on CMS flexibilities and efficiencies. The purpose of the RFI was to receive feedback regarding ways in which we could reduce burden for hospitals and clinicians, improve quality of care, decrease costs and ensure that patients receive the best care. We received comments from IRF industry associations, state and national hospital associations, industry groups representing hospitals, and individual IRF providers in response to the solicitation. In the FY 2019 IRF PPS final rule (83 FR 38549 through 38553), we finalized several changes to the regulatory requirements that we believed were responsive to stakeholder feedback and helpful to providers in reducing administrative burden.

Patients over Paperwork has continued to be a priority for the agency, as we target ways in which we can reduce paperwork burden for hospitals and clinicians while improving quality of care for patients. Therefore, we are proposing to revise the current IRF coverage criteria. Specifically, we are focused on reducing medical record documentation requirements that we believe are no longer necessary.

IRF care is only considered by Medicare to be reasonable and necessary under section 1862(a)(1) of the Act if the patient meets all of the IRF coverage requirements outlined in § 412.622(a)(3), (4), and (5). Failure to meet the IRF coverage criteria in a particular case will result in denial of the IRF claim. Under § 412.622(a)(4)(ii), to document that each patient for whom the IRF seeks payment is reasonably expected to meet all of the requirements in § 412.622(a)(3) at the time of admission, the patient's medical record at the IRF must contain a post-admission physician evaluation that meets ALL of the following requirements:

- It is completed by the rehabilitation physician within 24 hours of the patient's admission to the IRF.
- It documents the patient's status on admission to the IRF, includes a comparison with the information noted in the preadmission screening documentation, and serves as the basis for the development of the overall individualized plan of care.
- It is retained in the patient's medical record at the IRF.

Before the current IRF coverage criteria were implemented in January 1, 2010, Medicare permitted ''trial'' IRF admissions (HCFAR 85–2–4 through 85–2–5). A ''trial'' IRF admission meant that patients were sometimes admitted to IRFs for 3 to 10 days to assess whether the patients would benefit significantly from treatment in the IRF or other settings. Therefore, if it was determined during a ''trial'' admission that a patient was not appropriate for IRF level services, their claims for items and services provided during the trial period could not be denied for failure to meet IRF coverage criteria. Over time, we concluded that IRFs had developed a better ability and were more capable of recognizing if a patient was appropriate for IRF services prior to being admitted. Therefore, the concept of a ''trial'' IRF admission was eliminated when we rescinded HCFA Ruling 85–2 through a **Federal Register** notice titled ''Medicare Program; Criteria for Medicare Coverage of Inpatient Hospital Rehabilitation Services'' (74 FR 54835), effective January 1, 2010. We discussed our intent to rescind HCFA Ruling 85–2 in detail in the FY 2010 IRF PPS final rule (74 FR 39797 through 39798).

In addition, the Medicare Benefit Policy Manual, chapter 1, section 110.1.2 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html*), states, ''In most cases, the clinical picture of the patient that emerges from the post-admission physician evaluation will closely resemble the information documented in the preadmission screening. However, for a variety of reasons, the patient's condition at the time of admission may occasionally not match the description of the patient's condition on the preadmission screening. If this occurs, the IRF must immediately begin the discharge process. It may take a day or more for the IRF to find placement for the patient in another setting of care. [Medicare Administrative Contractors (MACs)] will therefore allow the patient to continue receiving treatment in the IRF until placement in another setting can be found.'' It further states that in these particular cases, ''Medicare authorizes its MACs to permit the IRF claim to be paid at the appropriate CMG for IRF patient stays of 3 days or less.''

At this time, we believe that IRFs are more knowledgeable in determining prior to admission, whether a patient meets the coverage criteria for IRF services than they were when the IRF coverage requirements were initially implemented. Over time, we have analyzed the data regarding the number of above-mentioned cases described in chapter 1, section 110.1.2, of the Medicare Benefit Policy Manual, and it has trended downward since the IRF coverage requirements were initially implemented. In FY 2019, the payment was utilized 4 times across all 1,117 Medicare certified IRFs. Additionally, we believe that if IRFs are doing their due diligence while completing the pre-admission screening as required in § 412.622(a)(4)(i) by making sure each prospective IRF patient meets all of the requirements to be admitted to the IRF, then the post-admission physician evaluation is unnecessary.

Finally, we have removed the post-admission physician evaluation requirement during the public health emergency for the COVID–19 pandemic in the interim final rule with comment entitled, ''Medicare and Medicaid Programs; Policy and Regulatory Revisions in Response to the COVID–19 Public Health Emergency'', published on April 6, 2020 (85 FR 19230) (hereinafter referred to as the April 6, 2020 IFC). We believe that this will provide us with experience to determine whether this requirement can be removed permanently to reduce paperwork burden for hospitals and clinicians while improving quality of care for patients.

Therefore, we are proposing to remove the post-admission physician evaluation documentation requirement at § 412.622(a)(4)(ii) beginning with FY 2021, that is, for all IRF discharges beginning on or after October 1, 2020. Accordingly, we are proposing to amend § 412.622(a)(3)(iv) to remove the reference to § 412.622(a)(4)(ii). We would also rescind the above-mentioned policy described in chapter 1, section

110.1.2, of the Medicare Benefit Policy Manual.

In the April 6, 2020 IFC, to address the public health emergency for the COVID–19 pandemic, we finalized removal of the post-admission physician evaluation requirement at § 412.622(a)(4)(ii) only for the duration of the public health emergency for the COVID–19 pandemic. In this proposed rule, we are proposing to remove the requirement at § 412.622(a)(4)(ii) permanently, beginning in FY 2021.

We note that our proposal would not preclude an IRF patient from being evaluated by a rehabilitation physician or, if the proposed policy changes in section XI. of this proposed rule are finalized, non-physician practitioners within the first 24 hours of admission if the IRF believes that the patient's condition warrants such an evaluation. We are simply proposing that a post-admission physician evaluation would no longer be an IRF documentation requirement. Nor would our proposal remove one of the required rehabilitation physician visits in the first week of the patient's stay in the IRF as specified in § 412.622(a)(3)(iv). IRFs will need to continue to meet the requirements at § 412.622(a)(3)(iv) as they always have.

While this proposal does not attribute to any direct savings for Medicare Part-A or Part-B, we do believe that removing the post-admission physician evaluation would reduce administrative and paperwork burden for both IRF providers and MACs.

We invite public comment on our proposal to remove the post-admission physician evaluation documentation requirement at § 412.622(a)(4)(ii) beginning with FY 2021, that is, for all IRF discharges beginning on or after October 1, 2020, and our proposed conforming amendments to § 412.622(a)(3)(iv) to remove the reference to § 412.622(a)(4)(ii). We anticipate that stakeholders' experience with the removal of this requirement during the public health emergency for the COVID–19 pandemic will help to inform whether removing this requirement permanently can reduce the paperwork burden for IRFs while maintaining quality of care for beneficiaries. We also invite public comment on rescinding the above-mentioned policy described in chapter 1, sections 110.1.2, of the Medicare Benefit Policy Manual.

VIII. Proposed Revisions to Certain IRF Coverage Documentation Requirements

A. Codification of Existing Preadmission Screening Documentation Instructions and Guidance

Another way in which CMS has continued to explore burden reduction for providers and clinicians, while keeping patient centered care a priority, is by reviewing subregulatory guidance to identify any longstanding policies, instructions, or guidance that would be appropriate to codify through notice and comment rulemaking.

Specifically, in regards to the IRF PPS payment requirements, we conducted a detailed review of the Medicare Benefit Policy Manual, chapter 1, section 110.1.2 (Pub. 100–02), as well as, the IRF PPS website (*https://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/InpatientRehabFacPPS/index*), to identify any such policies.

Currently, § 412.622(a)(4)(i) requires that a comprehensive preadmission screening must meet ALL of the following requirements:

- It is conducted by a licensed or certified clinician(s) designated by a rehabilitation physician described in § 412.622(a)(3)(iv) within the 48 hours immediately preceding the IRF admission.
- It includes a detailed and comprehensive review of each patient's condition and medical history.
- It serves as the basis for the initial determination of whether or not the patient meets the requirements for an IRF admission to be considered reasonable and necessary in § 412.622(a)(3).
- It is used to inform a rehabilitation who reviews and comments his or her concurrence with the findings and results of the preadmission screening.
- It is retained in the patient's medical record at the IRF.

When the pre-admission screening documentation requirements were finalized (74 FR 39790 through 39792), we did not specify any individual elements as being required for the pre-admission screening documentation to be considered detailed and comprehensive in accordance with § 412.622(a)(4)(i)(B). In addition, we did not specify at § 412.622(a)(4)(i)(D) that the rehabilitation physician must review and concur with the preadmission screening prior to the IRF admission. The Medicare Benefit Policy Manual, chapter 1, section 110.1.1 (Pub. 100–02) provides a more detailed description of what elements the preadmission screening should include and clarifies that the rehabilitation physician should review and concur with the preadmission screening prior to the patient being admitted to the IRF.

In chapter 1, section 110.1.1 of the Medicare Benefit Policy Manual currently, we state, ''The preadmission screening documentation must indicate the patient's prior level of function (prior to the event or condition that led to the patient's need for intensive rehabilitation therapy), expected level of improvement, and the expected length of time necessary to achieve that level of improvement. It must also include an evaluation of the patient's risk for clinical complications, the conditions that caused the need for rehabilitation, the treatments needed (that is, physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics), expected frequency and duration of treatment in the IRF, anticipated discharge destination, any anticipated post-discharge treatments, and other information relevant to the care needs of the patient.'' Additionally, we state, ''All findings of the preadmission screening must be conveyed to a rehabilitation physician prior to the IRF admission. In addition, the rehabilitation physician must document that he or she has reviewed and concurs with the findings and results of the preadmission screening prior to the IRF admission.'' These have been our documentation instructions and guidance since the implementation of the IRF coverage requirements on January 1, 2010.

We believe that codifying these longstanding instructions and guidance would improve clarity and reduce administrative burden on both IRF providers and MACs. With patient centered care being such a high priority in today's healthcare climate, we want to mitigate, as much as possible, tasks that take away from time spent directly with the patient. Lastly, we believe IRF providers and MACs will appreciate all preadmission screening documentation requirements being located in the same place for ease of reference.

Thus, in the interest of reducing administrative burden and being able to locate all preadmission screening documentation requirements in the same place for ease of reference, we are proposing to make the following regulatory amendments:

- At § 412.622(a)(4)(i)(B), to provide that the comprehensive preadmission screening must include a detailed and comprehensive review of each patient's condition and medical history, including the patient's level of function prior to the event or condition that led to the patient's need for intensive rehabilitation therapy, expected level of improvement, and the expected length

of time necessary to achieve that level of improvement; an evaluation of the patient's risk for clinical complications; the conditions that caused the need for rehabilitation; the treatments needed (that is, physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics); expected frequency and duration of treatment in the IRF; anticipated discharge destination; and anticipated post-discharge treatments; and

- At § 412.622(a)(4)(i)(D), to provide that the comprehensive preadmission screening must be used to inform a rehabilitation physician who must then review and document his or her concurrence with the findings and results of the preadmission screening prior to the IRF admission. We refer readers to section IX. of this proposed rule for a discussion of our proposal to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently required to be performed by a rehabilitation physician.

We invite public comment on our proposal to amend § 412.622(a)(4)(i)(B) and (D) to codify our longstanding documentation instructions and guidance of the preadmission screening in regulation text.

B. Definition of a ''Week''

In § 412.622(a)(3)(ii) we state that in certain well-documented cases, this intensive rehabilitation therapy program might instead consist of at least 15 hours of intensive rehabilitation therapy within a 7 consecutive day period, beginning with the date of admission to the IRF. This language is also used many times throughout the IRF Services section of the Medicare Benefit Policy Manual. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.1.2 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

However, we understand there is some question as to whether the term ''week'' may be construed as a different period (for example, Monday through Sunday). To provide clarity and reduce administrative burden for stakeholders regarding several of the IRF coverage requirements, we are proposing to amend our regulation text to clarify that we define a ''week'' as ''a 7 consecutive calendar day period'' for purposes of the IRF coverage requirements.

Therefore, we are proposing to amend § 412.622(c) to clarify our definition of a ''week'' as a period of ''7 consecutive calendar days beginning with the date of admission to the IRF.'' We are also proposing to make conforming amendments to § 412.622(a)(3)(ii) by replacing ''7 consecutive day period, beginning with the date of admission to the IRF'' with ''week''.

We invite public comment on these proposals.

C. Solicitation of Comments Regarding Further Changes to the Preadmission Screening Documentation Requirements

As noted in section VII. of this proposed rule, we are considering ways in which we can continue to help reduce administrative burden on IRF providers. Specifically, we have been reviewing the pre-admission screening documentation requirements under § 412.622(a)(4)(i) and are considering whether we could remove some of the requirements, but still maintain an IRF patient's clinical history, as well as documentation of their medical and functional needs in sufficient detail to adequately describe and support the patient's need for IRF services.

To assist us in balancing the needs of the patient with the desire to reduce the regulatory burden on rehabilitation physicians, we are seeking feedback from stakeholders about potentially removing some of the preadmission screening documentation requirements. Specifically, we would appreciate feedback regarding:

- What aspects of the preadmission screening do stakeholders believe are most or least critical and useful for supporting the appropriateness of an IRF admission, and why?

IX. Proposal To Allow Non-Physician Practitioners To Perform Certain IRF Coverage Requirements That Are Currently Required To Be Performed by a Rehabilitation Physician

Several of the IRF coverage requirements at § 412.622(a)(3), (4), and (5) expressly state that a requirement must be completed by a rehabilitation physician, defined at § 412.622(c) as a licensed physician who is determined by the IRF to have specialized training and experience in inpatient rehabilitation. For example, under § 412.622(a)(3)(iv), for an IRF claim to be considered reasonable and necessary under section 1862(a)(1) of the Act, there must be a reasonable expectation at the time of the patient's admission to the IRF that the patient requires physician supervision by a rehabilitation physician. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process. For more information, please refer to the Medicare Benefit Policy Manual, chapter 1, section 110.2.4 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs.html.*

In addition, under § 412.622(a)(4)(ii), to document that each patient for whom the IRF seeks payment is reasonably expected to meet all of the requirements in § 412.622(a)(3) at the time of admission, the patient's medical record at the IRF must contain a post-admission physician evaluation that must, among other requirements, be completed by a rehabilitation physician within 24 hours of the patient's admission to the IRF. For more information, we refer readers to the Medicare Benefit Policy Manual, chapter 1, section 110.1.2 (Pub. 100–02), which can be downloaded from the CMS website at *https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/internet-Only-Manuals-IOMs.html.*

In response to the RFI in the FY 2018 proposed rule (82 FR 20742 through 20743), we received comments suggesting that we consider amending the requirements in § 412.622(a)(3)(iv) and (a)(4)(ii) to allow non-physician practitioners to fulfill some of the requirements that rehabilitation physicians are currently required to complete. The commenters suggested that expanding the use of non-physician practitioners in meeting some of the IRF coverage requirements would ease the documentation burden on rehabilitation physicians.

We solicited additional comments in the FY 2019 proposed rule (83 FR 20998 through 20999) on potentially allowing non-physician practitioners to fulfill some of the requirements in § 412.622(a)(3), (4), and (5) that rehabilitation physicians are currently required to complete. Specifically, we sought feedback from the industry and asked:

- Does the IRF industry believe non-physician practitioners have the specialized training in rehabilitation that they need to have to appropriately assess IRF patients both medically and functionally?
- How would the non-physician practitioner's credentials be documented and monitored to ensure that IRF patients are receiving high quality care?

• Do stakeholders believe that utilizing non-physician practitioners to fulfill some of the requirements that are currently required to be completed by a rehabilitation physician would have an impact of the quality of care for IRF patients?

We received significant feedback in response to our solicitation of comments on allowing non-physician practitioners to fulfill the requirements at § 412.622(a)(3), (4) and (5). However, the comments from stakeholders were conflicting. Some commenters expressed concern with allowing non-physician practitioners to fulfill some or all of the requirements that rehabilitation physicians are currently required to meet. These commenters generally raised the following specific concerns:

• The first concern was that IRF patients would not continue receiving the hospital level and quality of care that is necessary to treat such complex conditions in an IRF if being treated only by a non-physician practitioner.

• The second concern was that non-physician practitioners have no specialized training in inpatient rehabilitation that would enable them to adequately assess the interaction between patients' medical and functional care needs in an IRF.

Conversely, we also received comments from industry stakeholders stating that non-physician practitioners do have the necessary education and are qualified to provide the same level of care currently being provided to IRF patients by rehabilitation physicians. These commenters stated that non-physician practitioners are capable of performing the same tasks that the rehabilitation physicians currently must perform in IRFs. These commenters stated that non-physician practitioners have a history of treating complex patients across all settings, and are already doing so in IRFs. They also stated that the types of patient assessments that they would be required to do in the IRFs are the same types of assessments they are currently authorized to provide in other settings, such as inpatient hospitals, skilled nursing facilities, hospice, and outpatient rehabilitation centers. Additionally, commenters stated that because non-physician practitioners practice in conjunction with rehabilitation physicians in IRFs already, time spent practicing with rehabilitation physicians has provided many non-physician practitioners with direct rehabilitation experience to provide quality of care and services to IRF patients. Lastly, several commenters stated that non-physician practitioner educational programs include didactic and clinical experiences to prepare graduates for advanced clinical practice. These commenters stated that current accreditation requirements and competency-based standards ensure that non-physician practitioners are equipped to provide safe, high level quality care.

Additionally, several commenters stated that allowing non-physician practitioners to practice to the full extent of their education, training, and scope of practice will increase the number of available health care providers able to work in the post-acute care setting resulting in lower costs and improved quality of care. Allowing the use of non-physician practitioners, authorized to provide care to the full extent of their states scope of practice, would also help offset deficiencies in physician supply, especially in rural areas. Physician burnout is also something that commenters suggested can occur overtime, and they commented that allowing the use of non-physician practitioners could potentially help decrease the rate at which physicians move on from providing care in IRFs.

After carefully reviewing and taking all feedback that we received to our solicitation of comments into consideration, as section 5(c) of the October 3, 2019, Executive Order 13890 on Protecting and Improving Medicare for Our Nation's Seniors (84 FR 53573) instructed that we do, we have decided to propose to allow the use of non-physician practitioners to perform the IRF services and documentation requirements currently required to be performed by the rehabilitation physician in § 412.622(a)(3), (4), and (5). We agree with commenters that non-physician practitioners have the training and experience to perform the IRF requirements, and believe that allowing IRFs to utilize non-physician practitioners practicing to their full scope of practice under applicable state law will increase access to post-acute care services specifically in rural areas, where rehabilitation physicians are often in short supply. We believe that alleviating access barriers to post-acute care services will improve the quality of care and lead to better patient outcomes in rural areas. We also agree with commenters that non-physician practitioners have the appropriate education and are capable of providing hospital level quality of care to complex IRF patients. Lastly, we believe that it continues to be the IRF's responsibility to exercise their best judgment regarding who has appropriate specialized training and experience, provided that these duties are within the practitioner's scope of practice under applicable state law.

We are proposing to mirror our current definition of a rehabilitation physician with the proposed definition of a non-physician practitioner in that we expect the IRF to determine whether the non-physician practitioner has specialized training and experience in inpatient rehabilitation and thus may perform any of the duties that are required to be performed by a rehabilitation physician, provided that the duties are within the non-physician practitioner's scope of practice under applicable state law.

Therefore, we are proposing to add new § 412.622(d) providing that for purposes of § 412.622, a non-physician practitioner who is determined by the IRF to have specialized training and experience in inpatient rehabilitation may perform any of the duties that are required to be performed by a rehabilitation physician, provided that the duties are within the non-physician practitioner's scope of practice under applicable state law.

Additionally, we note that if an IRF believes in any given situation a rehabilitation physician should have sole responsibility, or shared responsibility with non-physician practitioners, for overseeing a patient's care, the IRF should make that decision. Furthermore, IRFs are required to meet the hospital Conditions of Participation in section 1861(e) of the Act and in the regulations in part 482. Under section 1861(e)(4) of the Act and § 482.12(c), every Medicare patient is generally required to be under the care of a physician.

This proposal does not preclude IRFs from making decisions regarding the role of rehabilitation physicians or non-physician practitioners. We are merely proposing to allow non-physician practitioners to perform the IRF coverage requirements at § 412.622(a)(3), (4), and (5) that are currently required to be performed by a rehabilitation physician, provided that these duties are within the practitioner's scope of practice under applicable state law.

We invite public comment on this proposal. Specifically, we invite commenters to comment on our analysis of this issue, and whether they have any other evidence to inform this analysis. We encourage commenters to share with us whether they believe that quality of care in IRFs will be impacted by this proposal, including any specific evidence that may help to inform this issue. We also request information from IRFs regarding whether or not their

facilities would allow non-physician practitioners to complete all of the requirements at § 412.622(a)(3), (4), and (5), some of these requirements at § 412.622(a)(3), (4), and (5), or none of the requirements at § 412.622(a)(3), (4), and (5). This information will assist us in refining our estimates of the changes in Medicare payment that may result from this proposal.

X. Method for Applying the Reduction to the FY 2021 IRF Increase Factor for IRFs That Fail To Meet the Quality Reporting Requirements

As previously noted, section 1886(j)(7)(A)(i) of the Act requires the application of a 2-percentage point reduction of the applicable market basket increase factor for payments for discharges occurring during such FY for IRFs that fail to comply with the quality data submission requirements. In accordance with § 412.624(c)(4)(i), we apply a 2-percentage point reduction to the applicable FY 2021 market basket increase factor in calculating an adjusted FY 2021 standard payment conversion factor to apply to payments for only those IRFs that failed to comply with the data submission requirements. As previously noted, application of the 2-percentage point reduction may result in an update that is less than 0.0 for a FY and in payment rates for a FY being less than such payment rates for the preceding FY. Also, reporting-based reductions to the market basket increase factor are not cumulative; they only apply for the FY involved.

Table 12 shows the calculation of the proposed adjusted FY 2021 standard payment conversion factor that would be used to compute IRF PPS payment rates for any IRF that failed to meet the quality reporting requirements for the applicable reporting period.

TABLE 12—CALCULATIONS TO DETERMINE THE PROPOSED ADJUSTED FY 2021 STANDARD PAYMENT CONVERSION FACTOR FOR IRFS THAT FAILED TO MEET THE QUALITY REPORTING REQUIREMENT

Explanation for Adjustment	Calculations
Standard Payment Conversion Factor for FY 2020	$16,489
Market Basket Increase Factor for FY 2021 (2.9 percent), reduced by 0.4 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act, and further reduced by 2 percentage points for IRFs that failed to meet the quality reporting requirement	× 1.005
Budget Neutrality Factor for the Updates to the Wage Index and Labor-Related Share	× 0.9999
Budget Neutrality Factor for the Revisions to the CMGs and CMG Relative Weights	× 0.9969
Adjusted FY 2021 Standard Payment Conversion Factor	= $16,518

XI. Collection of Information Requirements

As discussed in section VIII. of this proposed rule, we are proposing to amend § 412.622(a)(4)(i)(B) and (D) to codify our longstanding documentation instructions and guidance of the preadmission screening in regulation text. As per our discussion in the FY 2010 IRF PPS final rule (74 CR 39803), we do not believe that there is any burden associated with this requirement. The burden associated with this requirement is the time and effort put forth by the rehabilitation physician to document his or her concurrence with the pre-admission findings and the results of the pre-admission screening and retain the information in the patient's medical record. The burden associated with this requirement is in keeping with the ''Conditions of Participation: Medical record services,'' that are already applicable to Medicare participating hospitals. Therefore, we believe that this requirement reflects customary and usual business and medical practice. Thus, in accordance with section 1320.3(b)(2) of the Act, the burden is not subject to the PRA.

As discussed in section VIII. of this proposed rule, we are proposing to remove the post-admission physician evaluation requirement at § 412.622(a)(4)(ii) beginning with FY 2021, that is, for all IRF discharges beginning on or after October 1, 2020. Accordingly, we are proposing to amend § 412.622(a)(3)(iv) to remove the reference to § 412.622(a)(4)(ii). Additionally, we are making revisions to the requirements to allow non-physician practitioners to complete any of the IRF coverage requirements in § 412.622(a)(3), (4), and (5) that we currently require a rehabilitation physician to fulfill, provided that these duties are within the practitioner's scope of practice under applicable state law. We discuss any potential cost savings from this proposal in the Overall Impact section of this proposed rule.

XII. 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.

XIII. Regulatory Impact Analysis

A. Statement of Need

This proposed rule would update the IRF prospective payment rates for FY 2021 as required under section 1886(j)(3)(C) of the Act and in accordance with section 1886(j)(5) of the Act, which requires the Secretary to publish in the **Federal Register** on or before the August 1 before each FY, the classification and weighting factors for CMGs used under the IRF PPS for such FY and a description of the methodology and data used in computing the prospective payment rates under the IRF PPS for that FY. This proposed rule would also implement section 1886(j)(3)(C) of the Act, which requires the Secretary to apply a MFP adjustment to the market basket increase factor for FY 2012 and subsequent years.

Furthermore, this proposed rule would adopt policy changes under the statutory discretion afforded to the Secretary under section 1886(j) of the Act. We are proposing to adopt the most recent OMB statistical area delineations and apply a 5 percent cap on any wage index decreases compared to FY 2020 in a budget neutral manner. We are also proposing to amend the IRF coverage requirements to remove the post-admission physician evaluation requirement and codify existing documentation instructions and guidance. Additionally, consistent with section 5(c) of Executive Order 13890, we are proposing to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently

required to be performed by a rehabilitation physician.

B. Overall Impact

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 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), 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). Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) Having an annual effect on the economy of $100 million or more in any 1 year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

We estimate the total impact of the policy updates described in this proposed rule by comparing the estimated payments in FY 2021 with those in FY 2020. This analysis results in an estimated $270 million increase for FY 2021 IRF PPS payments. We estimate that this rulemaking is ''economically significant'' as measured by the $100 million threshold, and hence also a major rule under the Congressional Review Act. Also, the rule has been reviewed by OMB. Accordingly, we have prepared an RIA that, to the best of our ability, presents the costs and benefits of the rulemaking.

C. Anticipated Effects

1. Effects on IRFs

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. Most IRFs and most other providers and suppliers are small entities, either by having revenues of $8.0 million to $41.5 million or less in any 1 year depending on industry classification, or by being nonprofit organizations that are not dominant in their markets. (For details, see the Small Business Administration's final rule that set forth size standards for health care industries, at 65 FR 69432 at *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf,* effective January 1, 2017 and updated on August 19, 2019.) Because we lack data on individual hospital receipts, we cannot determine the number of small proprietary IRFs or the proportion of IRFs' revenue that is derived from Medicare payments. Therefore, we assume that all IRFs (an approximate total of 1,120 IRFs, of which approximately 55 percent are nonprofit facilities) are considered small entities and that Medicare payment constitutes the majority of their revenues. HHS generally uses a revenue impact of 3 to 5 percent as a significance threshold under the RFA. As shown in Table 13, we estimate that the net revenue impact of this proposed rule on all IRFs is to increase estimated payments by approximately 2.9 percent. However, we find that certain categories of IRF providers would be expected to experience revenue impacts in the 3 to 5 percent range. We estimate a 3.2 percent overall impact for rural IRFs. Additionally, we estimate a 3.1 percent overall impact for teaching IRFs with a resident to average daily census ratio of less than 10 percent, a 3.6 percent overall impact for teaching IRFs with resident to average daily census ratio of 10 to 19 percent, and a 3.3 percent overall impact for teaching IRFs with a resident to average daily census ratio greater than 19 percent. Also, we estimate a 3.4 percent overall impact for IRFs with a DSH patient percentage of 0 percent and a 3.2 percent overall impact for IRFs with a DSH patient percentage greater than 20 percent. As a result, we anticipate this proposed rule would have a positive impact on a substantial number of small entities. MACs are not considered to be small entities. Individuals and states are not included in the definition of a small entity.

In addition, section 1102(b) of the Act requires us to prepare an RIA if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA. For purposes of section 1102(b) of the Act, we define a small rural hospital as a hospital that is located outside of a Metropolitan Statistical Area and has fewer than 100 beds. As shown in Table 13, we estimate that the net revenue impact of this proposed rule on rural IRFs is to increase estimated payments by approximately 3.2 percent based on the data of the 132 rural units and 11 rural hospitals in our database of 1,117 IRFs for which data were available. We estimate an overall impact for rural IRFs in all areas except Rural New England, Rural South Atlantic, and Rural East South Central of between 3.2 percent and 4.8 percent. As a result, we anticipate this proposed rule would have a positive impact on a substantial number of small rural hospitals.

Section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, enacted March 22, 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 2020, that threshold is approximately $156 million. This proposed rule does not mandate any requirements for State, local, or tribal governments, or for the private sector.

Executive Order 13132 establishes certain requirements that an agency must meet when it issues 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. As stated, this proposed rule will not have a substantial effect on state and local governments, preempt state law, or otherwise have a federalism implication.

Executive Order 13771, titled Reducing Regulation and Controlling Regulatory Costs, was issued on January 30, 2017 and requires that the costs associated with significant new regulations ''shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least two prior regulations.''

This proposed rule, if finalized as proposed, is expected to be a deregulatory action for the purposes of Executive Order 13771.

2. Detailed Economic Analysis

This proposed rule would update the IRF PPS rates contained in the FY 2020 IRF PPS final rule (84 FR 39054). Specifically, this proposed rule would update the CMG relative weights and average length of stay values, the wage index, and the outlier threshold for high-cost cases. This proposed rule would apply a MFP adjustment to the FY 2021 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act. In addition, it includes proposals to adopt the most recent OMB statistical area delineations and apply a transition wage index under the IRF PPS. We are also proposing to amend the IRF coverage requirements to remove the post-admission physician evaluation requirement and codify existing documentation instructions and guidance. Additionally, consistent with section 5(c) of Executive Order 13890, we are proposing to amend the IRF coverage requirements to allow non-physician practitioners to perform certain requirements that are currently required to be performed by a rehabilitation physician.

We estimate that the impact of the changes and updates described in this proposed rule would be a net estimated increase of $270 million in payments to IRF providers. This estimate does not include the implementation of the required 2 percentage point reduction of the market basket increase factor for any IRF that fails to meet the IRF quality reporting requirements (as discussed in section X. of this proposed rule). The impact analysis in Table 13 of this proposed rule represents the projected effects of the updates to IRF PPS payments for FY 2021 compared with the estimated IRF PPS payments in FY 2020. We determine the effects by estimating payments while holding all other payment variables constant. We use the best data available, but we do not attempt to predict behavioral responses to these changes, and we do not make adjustments for future changes in such variables as number of discharges or case-mix.

We note that certain events may combine to limit the scope or accuracy of our impact analysis, because such an analysis is future-oriented and, thus, susceptible to forecasting errors because of other changes in the forecasted impact time period. Some examples could be legislative changes made by the Congress to the Medicare program that would impact program funding, or changes specifically related to IRFs. Although some of these changes may not necessarily be specific to the IRF PPS, the nature of the Medicare program is such that the changes may interact, and the complexity of the interaction of these changes could make it difficult to predict accurately the full scope of the impact upon IRFs.

In updating the rates for FY 2021, we are proposing standard annual revisions described in this proposed rule (for example, the update to the wage index and market basket increase factor used to adjust the Federal rates). We are also implementing a productivity adjustment to the FY 2021 IRF market basket increase factor in accordance with section 1886(j)(3)(C)(ii)(I) of the Act. We estimate the total increase in payments to IRFs in FY 2021, relative to FY 2020, would be approximately $270 million.

This estimate is derived from the application of the FY 2021 IRF market basket increase factor, as reduced by a productivity adjustment in accordance with section 1886(j)(3)(C)(ii)(I) of the Act, which yields an estimated increase in aggregate payments to IRFs of $230 million. Furthermore, there is an additional estimated $40 million increase in aggregate payments to IRFs due to the proposed updated to the outlier threshold amount. Therefore, summed together, we estimate that these updates will result in a net increase in estimated payments of $270 million from FY 2020 to FY 2021.

The effects of the proposed updates that impact IRF PPS payment rates are shown in Table 13. The following proposed updates that affect the IRF PPS payment rates are discussed separately below:

- The effects of the proposed update to the outlier threshold amount, from approximately 2.6 percent to 3.0 percent of total estimated payments for FY 2021, consistent with section 1886(j)(4) of the Act.
- The effects of the proposed annual market basket update (using the IRF market basket) to IRF PPS payment rates, as required by sections 1886(j)(3)(A)(i) and (j)(3)(C) of the Act, including a productivity adjustment in accordance with section 1886(j)(3)(C)(i)(I) of the Act.
- The effects of applying the proposed budget-neutral labor-related share and wage index adjustment, as required under section 1886(j)(6) of the Act.
- The effects of the proposed budget neutral changes to the wage index due to the OMB delineation revisions and the transition wage index policy.
- The effects of the proposed budget-neutral changes to the CMG relative weights and average LOS values under the authority of section 1886(j)(2)(C)(i) of the Act.
- The total change in estimated payments based on the FY 2021 payment changes relative to the estimated FY 2020 payments.

3. Description of Table 13

Table 13 shows the overall impact on the 1,117 IRFs included in the analysis.

The next 12 rows of Table 13 contain IRFs categorized according to their geographic location, designation as either a freestanding hospital or a unit of a hospital, and by type of ownership; all urban, which is further divided into urban units of a hospital, urban freestanding hospitals, and by type of ownership; and all rural, which is further divided into rural units of a hospital, rural freestanding hospitals, and by type of ownership. There are 974 IRFs located in urban areas included in our analysis. Among these, there are 683 IRF units of hospitals located in urban areas and 291 freestanding IRF hospitals located in urban areas. There are 143 IRFs located in rural areas included in our analysis. Among these, there are 132 IRF units of hospitals located in rural areas and 11 freestanding IRF hospitals located in rural areas. There are 394 for-profit IRFs. Among these, there are 361 IRFs in urban areas and 33 IRFs in rural areas. There are 610 non-profit IRFs. Among these, there are 521 urban IRFs and 89 rural IRFs. There are 113 government-owned IRFs. Among these, there are 92 urban IRFs and 21 rural IRFs.

The remaining four parts of Table 13 show IRFs grouped by their geographic location within a region, by teaching status, and by DSH patient percentage (PP). First, IRFs located in urban areas are categorized for their location within a particular one of the nine Census geographic regions. Second, IRFs located in rural areas are categorized for their location within a particular one of the nine Census geographic regions. In some cases, especially for rural IRFs located in the New England, Mountain, and Pacific regions, the number of IRFs represented is small. IRFs are then grouped by teaching status, including non-teaching IRFs, IRFs with an intern and resident to average daily census (ADC) ratio less than 10 percent, IRFs with an intern and resident to ADC ratio greater than or equal to 10 percent and less than or equal to 19 percent, and IRFs with an intern and resident to ADC ratio greater than 19 percent. Finally, IRFs are grouped by DSH PP, including IRFs with zero DSH PP, IRFs with a

DSH PP less than 5 percent, IRFs with a DSH PP between 5 and less than 10 percent, IRFs with a DSH PP between 10 and 20 percent, and IRFs with a DSH PP greater than 20 percent.

The estimated impacts of each policy described in this rule to the facility categories listed are shown in the columns of Table 13. The description of each column is as follows:

- Column (1) shows the facility classification categories.
- Column (2) shows the number of IRFs in each category in our FY 2021 analysis file.
- Column (3) shows the number of cases in each category in our FY 2021 analysis file.
- Column (4) shows the estimated effect of the proposed adjustment to the outlier threshold amount.
- Column (5) shows the estimated effect of the proposed update to the IRF labor-related share and wage index, in a budget-neutral manner.
- Column (6) shows the estimated effect of the proposed revisions to the CBSA delineations and the transition wage index, in a budget-neutral manner.
- Column (7) shows the estimated effect of the proposed update to the CMG relative weights and average LOS values, in a budget-neutral manner.
- Column (8) compares our estimates of the payments per discharge, incorporating all of the policies reflected in this proposed rule for FY 2021 to our estimates of payments per discharge in FY 2020.

The average estimated increase for all IRFs is approximately 2.9 percent. This estimated net increase includes the effects of the proposed IRF market basket increase factor for FY 2021 of 2.9 percent, reduced by a productivity adjustment of 0.4 percentage point in accordance with section 1886(j)(3)(C)(ii)(I) of the Act. It also includes the approximate 0.4 percent overall increase in estimated IRF outlier payments from the proposed update to the outlier threshold amount. Since we are making the updates to the IRF wage index, labor-related share and the CMG relative weights in a budget-neutral manner, they will not be expected to affect total estimated IRF payments in the aggregate. However, as described in more detail in each section, they would be expected to affect the estimated distribution of payments among providers.

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TABLE 13: IRF Impact Table for FY 2021 (Columns 4 through 8 in percentage)

Facility Classification	Number of IRFs	Number of Cases	Outlier	FY 21 Wage Index and Labor Share	FY 21 Wage Index New CBSA and 5% Cap	CMG Weights	Total Percent Change [1]
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
Total	1,117	409,232	0.4	0.0	0.0	0.0	2.9
Urban unit	683	160,590	0.7	0.0	0.0	0.0	3.3
Rural unit	132	20,608	0.7	0.1	0.0	0.0	3.4
Urban hospital	291	222,986	0.2	0.0	0.0	0.0	2.6
Rural hospital	11	5,048	0.0	0.2	-0.1	-0.1	2.5
Urban For-Profit	361	218,830	0.2	0.0	0.0	0.0	2.6
Rural For-Profit	33	8,454	0.3	0.2	0.0	0.0	2.9
Urban Non-Profit	521	143,397	0.7	0.0	0.0	0.0	3.2
Rural Non-Profit	89	14,078	0.7	0.1	0.0	0.0	3.4
Urban Government	92	21,349	0.7	-0.1	0.2	0.0	3.4
Rural Government	21	3,124	0.4	0.2	0.0	0.1	3.3
Urban	974	383,576	0.4	0.0	0.0	0.0	2.9
Rural	143	25,656	0.6	0.1	0.0	0.0	3.2
Urban by region							
Urban New England	29	16,062	0.4	-0.8	0.0	-0.1	2.0
Urban Middle Atlantic	132	48,621	0.5	0.2	-0.2	0.1	3.1
Urban South Atlantic	152	78,107	0.3	0.2	0.0	0.0	3.0
Urban East North Central	159	49,969	0.5	0.0	0.0	0.0	3.0
Urban East South Central	56	28,340	0.2	0.1	0.0	0.0	2.8
Urban West North Central	73	21,045	0.5	-0.5	0.0	0.0	2.3
Urban West South Central	188	85,097	0.3	0.2	0.1	0.1	3.1
Urban Mountain	87	30,531	0.4	-0.3	0.0	-0.1	2.5
Urban Pacific	98	25,804	0.8	-0.3	0.3	-0.1	3.3
Rural by region							
Rural New England	5	1,345	0.5	-0.4	0.0	-0.2	2.3
Rural Middle Atlantic	11	1,185	1.2	0.5	0.0	0.0	4.3
Rural South Atlantic	16	3,778	0.3	0.3	-0.2	0.0	2.9
Rural East North Central	23	4,034	0.6	0.5	0.1	0.0	3.6
Rural East South Central	21	4,404	0.4	0.0	0.0	-0.1	2.8
Rural West North Central	20	3,024	0.7	0.0	0.2	-0.1	3.3
Rural West South Central	39	6,965	0.4	0.0	0.1	0.1	3.2
Rural Mountain	5	559	1.2	-0.2	0.0	0.1	3.7
Rural Pacific	3	362	1.5	0.8	0.0	0.0	4.8
Teaching status							
Non-teaching	1,014	363,349	0.4	0.0	0.0	0.0	2.9
Resident to ADC less than 10%	59	32,695	0.5	-0.1	0.2	0.0	3.1
Resident to ADC 10%-19%	31	11,643	0.8	0.2	-0.1	0.1	3.6
Resident to ADC greater than 19%	13	1,545	0.4	0.0	0.2	0.1	3.3
Disproportionate share patient percentage (DSH PP)							
DSH PP = 0%	35	7,558	0.5	0.5	-0.1	0.0	3.4
DSH PP <5%	144	58,952	0.4	0.3	-0.3	0.0	2.8
DSH PP 5%-10%	294	129,346	0.4	0.1	-0.1	0.0	2.9
DSH PP 10%-20%	395	144,151	0.4	-0.1	0.1	0.0	2.8
DSH PP greater than 20%	249	69,225	0.6	-0.1	0.1	0.0	3.2

[1]This column includes the impact of the updates in columns (4), (5), (6), and (7) above, and of the IRF market basket increase factor for FY 2021 (2.9 percent), reduced by 0.4 percentage point for the productivity adjustment as required by section 1886(j)(3)(C)(ii)(I) of the Act.

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4. Impact of the Proposed Update to the Outlier Threshold Amount

The estimated effects of the proposed update to the outlier threshold adjustment are presented in column 4 of Table 13. In the FY 2020 IRF PPS final rule (84 FR 39095 through 39097), we used FY 2018 IRF claims data (the best, most complete data available at that time) to set the outlier threshold amount for FY 2020 so that estimated outlier payments would equal 3 percent of total estimated payments for FY 2020.

For this proposed rule, we are using preliminary FY 2019 IRF claims data, and, based on that preliminary analysis, we estimated that IRF outlier payments as a percentage of total estimated IRF payments would be 2.6 percent in FY 2020. Thus, we propose to adjust the outlier threshold amount in this proposed rule to maintain total estimated outlier payments equal to 3 percent of total estimated payments in FY 2021. The estimated change in total

IRF payments for FY 2021, therefore, includes an approximate 0.4 percent increase in payments because the estimated outlier portion of total payments is estimated to increase from approximately 2.6 percent to 3 percent.

The impact of this proposed outlier adjustment update (as shown in column 4 of Table 13) is to increase estimated overall payments to IRFs by 0.4 percent.

5. Impact of the Proposed Wage Index and Labor-Related Share

In column 5 of Table 13, we present the effects of the proposed budget-neutral update of the wage index and labor-related share. The proposed changes to the wage index and the labor-related share are discussed together because the wage index is applied to the labor-related share portion of payments, so the proposed changes in the two have a combined effect on payments to providers. As discussed in section V.C. of this proposed rule, we are proposing to update the labor-related share from 72.7 percent in FY 2020 to 72.9 percent in FY 2021.

6. Impact of the Proposed Revisions to the OMB Delineations and the Proposed 5 percent Cap Transition Policy

In column 6 of Table 13, we present the effects of the proposed budget-neutral update of the geographic labor-market area designations under the IRF PPS and the proposed application of the 5 percent cap on any decrease in an IRF's wage index for FY 2021 from the prior FY. As discussed in section V.D.2. of this proposed rule, we are proposing to implement the new OMB delineations as described in the September 14, 2018 OMB Bulletin No. 18–04, effective beginning with the FY 2021 IRF PPS wage index. Additionally, as discussed in section V.D.3. of this proposed rule, we are proposing to apply a 5 percent cap on any decrease in an IRF's wage index from the prior FY to help mitigate any significant negative impacts that IRFs may experience due to our proposal to adopt the revised OMB delineations under the IRF PPS.

7. Impact of the Proposed Update to the CMG Relative Weights and Average LOS Values

In column 7 of Table 13, we present the effects of the proposed budget-neutral update of the CMG relative weights and average LOS values. In the aggregate, we do not estimate that these proposed updates will affect overall estimated payments of IRFs. However, we do expect these updates to have small distributional effects.

8. Effects of the Proposal To Remove the Post-Admission Physician Evaluation

As discussed in section VII. of this proposed rule, we are proposing to remove § 412.622(a)(4)(ii) that requires an IRF to complete a post-admission physician evaluation for all patients admitted to the IRF, beginning with FY 2021, that is, for all IRF discharges beginning on or after October 1, 2020.

We do not estimate that there will be a cost savings associated with our proposal to remove the post-admission physician evaluation, as discussed in section VII. of this proposed rule. While we are proposing to remove the post-admission physician requirement at § 412.622(a)(4)(ii), we are not proposing to remove any of the required rehabilitation physician face-to-face visits in § 412.622(a)(3)(iv). Thus, the rehabilitation physician or, if the proposed policy changes in section XI. of this proposed rule are finalized, non-physician practitioners would still be required to conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF. Since the proposal does not decrease the amount of times the physician is required to visit and assess the patient, we do not estimate any cost savings to the IRF with this proposal.

9. Effects of the Proposal To Allow Non-Physician Practitioners To Perform Certain IRF Coverage Requirements That Are Currently Required To Be Performed by a Rehabilitation Physician

As discussed in section IX. of this proposed rule, we are proposing to allow non-physician practitioners to perform any of the IRF coverage requirements at § 412.622(a)(3), (4), and (5) that are currently required to be performed by a rehabilitation physician, provided that these duties are within the practitioner's scope of practice under applicable state law. While we do not know how many states will allow for this flexibility, we would appreciate information from commenters that would help us analyze the impact of this provision for the final rule. We believe this proposal represents a significant decrease in administrative burden to rehabilitation physicians and providers beginning in FY 2021, that is, all IRF discharges on or after October 1, 2020. We estimate the cost savings associated with this proposed change in the following way.

These requirements must currently be fulfilled by a rehabilitation physician; therefore, to estimate the burden reduction of these proposed changes, we obtained the hourly wage rate for a physician (there was not a specific wage rate for a rehabilitation physician) from the Bureau of Labor Statistics (*http://www.bls.gov/ooh/healthcare/home.htm*) to be $100.00. The hourly wage rate including fringe benefits and overhead is $200.00. We also obtained the average hourly wage rate for a non-physician practitioner. As discussed in section IX. of this proposed rule, we defer to each state's scope of practice in determining who is recognized as a non-physician practitioner; however, for the purposes of this burden reduction estimation, we used a combined average wage from the Bureau of Labor Statistics, for a nurse practitioner and a physician's assistant as the Executive Order specifically identifies both of these practitioners, which is $53.50. The hourly wage rate including fringe benefits and overhead is $107.00.

We estimate that the pre-admission screening documentation review and compliance requirement at § 412.622(a)(3) takes approximately 10 minutes to complete. In FY 2019, we estimate that there were approximately 1,117 total IRFs and on average 366 discharges per IRF annually. Therefore, there were an estimated seven patients (366 discharges/52 weeks) at the IRF per week. Per IRF, the rehabilitation physician spends 61 hours (10 minutes × 366 discharges/60 minutes) annually reviewing and concurring with the pre-admission screening. Allowing a non-physician practitioner to complete the review and concurrence of the pre-admission screening, we estimate a reduction of 68,137 hours for rehabilitation physicians across all IRFs annually (1,117 IRFs × 61 hours).

To estimate the total cost savings per IRF annually, assuming the IRF was able and wanted to take maximum use of this regulatory provision, we multiply 61 hours by $200.00 (average physician's salary doubled to account for fringe and overhead costs) which equals $12,200. We then multiply 61 hours by $107.00 (average non-physician practitioners salary doubled to account for fringe and overhead costs) which equals $6,527. We then subtract the non-physician practitioners total cost from the rehabilitation physicians total cost to get an estimated total cost savings per IRF of $5,673 annually. Therefore, we can estimate the total cost savings across all IRFs annually for non-physician practitioners to complete the pre-admission screening would be $6 million ($5,673 × 1,117).

Next we estimate that the development of the patient's plan of care requirement at § 412.622(a)(4)(iii) takes approximately 1 hour to complete. The rehabilitation physician spends 366 hours (1 hour × 366 discharges)

annually per IRF developing plans of care. Allowing a non-physician practitioner to complete the plan of care for each patient, we estimate a reduction of 408,822 hours for rehabilitation physicians across all IRFs annually (1,117 IRFs × 366 hours).

To estimate the total cost savings per IRF annually, assuming the IRF was able and wanted to take maximum use of this regulatory provision, we multiply 366 hours by $200.00 (average physician's salary doubled to account for fringe and overhead costs) which equals $73,200. We then multiply 366 hours by $107.00 (average non-physician practitioners salary doubled to account for fringe and overhead costs) which equals $39,162. The total estimated cost savings per IRF is $34,038 ($73,200 − $39,162). Therefore, we can estimate the total cost savings across all IRFs annually for non-physician practitioners to develop each patient's plan of care would be $38 million ($34,038 × 1,117).

Lastly, we estimate that during the interdisciplinary team meeting requirement at § 412.622(a)(5) that is led by the rehabilitation physician weekly, each patient is discussed for an estimated 15 minutes. The average length of stay of an IRF patient is 14 days; therefore, each patient will be discussed at the interdisciplinary teaming meeting for an estimated total of 30 minutes. The rehabilitation physician spends 183 hours (30 minutes × 366 discharges/60 minutes) annually discussing IRF patients at the interdisciplinary team meeting. Allowing a non-physician practitioner to lead the interdisciplinary team meeting, we estimate a reduction of 204,441 hours for rehabilitation physicians across all IRFs annually (1,117 IRFs × 183 hours).

To estimate the total cost savings per IRF annually, assuming the IRF was able and wanted to take maximum use of this regulatory provision, we multiply 183 hours by $200.00 (average physician's salary doubled to account for fringe and overhead costs) which equals $36,600. We then multiply 183 hours by $107.00 (average non-physician practitioners salary doubled to account for fringe and overhead costs) which equals $19,581. The total estimated cost savings per IRF is $17,019 ($36,600 − $19,581). Therefore, we can estimate the total cost savings across all IRFs annually for non-physician practitioners to lead the interdisciplinary team meeting would be $19 million ($17,019 × 1,117).

We estimate that the overall cost savings per IRF annually assuming the IRF was able and wanted to take maximum use of this regulatory provision, for a non-physician practitioner to fulfill the requirements of the rehabilitation physician to be $56,730 ($5,673 + $34,038 + 17,019). Therefore, the estimated total cost savings across all IRFs annually for allowing non-physician practitioners to fulfill the requirements of the rehabilitation physician in an IRF setting is $63 million.

Please note that the $63 million in burden reduction described above will not solely be savings to the Medicare Trust Fund. We note that all of the cost savings reflected in this estimate will occur on the Medicare Part B side, in the form of reduced Part B payments to physicians under the Medicare Physician Fee Schedule (MPFS). Physician services provided in an IRF are billed directly to Part B; therefore, IRFs do not pay physicians for their services. Therefore, the Medicare Trust Fund will be saving 80 percent of the overall cost savings and 20 percent of the savings will be to beneficiaries due to the coinsurance requirement generally applicable to Medicare Part B services. We estimate that if 100 percent of IRFs allowed non-physician practitioners to fulfill the requirements at § 412.622(a)(3), (4), and (5) the overall savings to Medicare Part B would be $51 million. However, we do not believe that IRFs will adopt this proposed change for all of the services they provide. We are estimating that IRFs will adopt this proposed change for about 50 percent of the services provided (and request comment that would allow for refinement of this estimate). Therefore, we estimate that the overall savings to the Medicare Trust Fund for allowing non-physician practitioners to fulfill the rehabilitation requirements at § 412.622(a)(3), (4), and (5) would be $25.5 million.

We have also estimated the impacts of this proposed change using the MPFS regarding what a physician would bill for these services versus what a non-physician practitioner would bill. The MPFS provides more than 10,000 physician services, the associated relative value units, a fee schedule state indicator and various payment policy indicators needed for payment adjustment. The MPFS pricing amounts are adjusted to reflect the variation in practice costs from area to area. For additional information regarding how to use the MPFS please visit the website at *https://www.cms.gov/apps/physician-fee-schedule/search/search-criteria.aspx.*

The post-admission physician evaluation and the face-to-face physician visits are considered separately payable services for physicians. Therefore, we can use the active pricing paid in calendar year 2020 for a national base payment. The interdisciplinary team meeting is not payable separately which means that the payments to physicians for their time spent conducting the interdisciplinary team meeting are already bundled and included with an existing service.

There are different evaluation and management codes depending on the complexity of the patient and the duration of the visit. The current evaluation and management codes and national pricing for the post-admission physician evaluation in a facility are 99221 ($103.94), 99222 ($140.39), or 99223 ($206.07). For the sake of this estimation, we have used an average of these 3 codes. Therefore, we estimate that the average national pricing which is a standard reference payment amount for physicians without geographic adjustment for the post-admission physician evaluation in a facility is $150.13. Similarly, the current evaluation and management codes for the face-to-face visit in a facility are 99231 ($40.06), 99232 ($73.62), or 99233 ($106.10). Therefore, we estimate that the average national pricing which is a standard reference payment amount for the physicians without geographic adjustment for one of the face-to-face visits in a facility is $73.26. Since the physician is required to conduct at a minimum of 3 face-to-face visits per the requirement at § 412.622(a)(3)(iv) the estimated total for 3 face-to-face visits is $219.78.

Therefore, we estimate that physicians are currently billing $369.91 per IRF patient for the post-admission physician evaluation and the minimum of 3 face-to-face visits currently required to be fulfilled by a physician. In FY 2019, we estimate that there were approximately 1,117 total IRFs and on average 366 discharges per IRF annually. Therefore, we estimate that on average each year physicians are billing $151 million for these services.

According to the Medicare Benefit Policy Manual, chapter 15, section 80 (Pub. 100–02), as well as, the IRF PPS website (*https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/bp102c15.pdf*), non-physician practitioners are able to bill 80 percent of what physicians bill. Therefore, we estimate that on average non-physician practitioners would bill $120.10 for the post-admission physician evaluation and an estimated $58.61 per face-to-face visit (a minimum of 3 visits would be $175.82). Per IRF patient the non-physician practitioner would bill an estimated $295.92. Therefore, we estimate that on average each year a non-physician practitioner

would bill $121 million for these services.

We estimate that if 100 percent of IRFs allowed non-physician practitioners to fulfill the requirements at § 412.622(a)(3), (4), and (5) the overall savings to Medicare Part B would be $31 million. However, we do not believe that IRFs will adopt this proposed change for all of the services they provide. We are estimating that IRFs will adopt this proposed change for about 50 percent of the services provided. To obtain more information on which to base our estimates, we are soliciting feedback from commenters to determine:

- How many IRFs would substitute non-physician practitioners for physicians; and
- Among the IRFs that do substitute non-physician practitioners for physicians, whether it will be for all requirements or only for specific requirements.

In the absence of specific information on which to base a specific estimate of how much IRFs would be expected to substitute non-physician practitioners for physicians under this proposed policy, we are assuming that IRFs would adopt this proposal for about 50 percent of the requirements. Thus, the estimated overall savings to Medicare Part B would be $15.5 million. We are estimating that 80 percent of that would remain in the Medicare Trust Fund and 20 percent would be a savings to beneficiaries. Therefore, we estimate $12.4 million in savings to the Medicare program and $3.1 million in savings to beneficiaries.

D. Alternatives Considered

The following is a discussion of the alternatives considered for the IRF PPS updates contained in this proposed rule.

Section 1886(j)(3)(C) of the Act requires the Secretary to update the IRF PPS payment rates by an increase factor that reflects changes over time in the prices of an appropriate mix of goods and services included in the covered IRF services.

As noted previously in this proposed rule, section 1886(j)(3)(C)(ii)(I) of the Act requires the Secretary to apply a productivity adjustment to the market basket increase factor for FY 2021. Thus, in accordance with section 1886(j)(3)(C) of the Act, we propose to update the IRF prospective payments in this proposed rule by 2.5 percent (which equals the 2.9 percent estimated IRF market basket increase factor for FY 2021 reduced by a 0.4 percentage point productivity adjustment as determined under section 1886(b)(3)(B)(xi)(II) of the Act (as required by section 1886(j)(3)(C)(ii)(I) of the Act)).

We considered maintaining the existing CMG relative weights and average length of stay values for FY 2021. However, in light of recently available data and our desire to ensure that the CMG relative weights and average length of stay values are as reflective as possible of recent changes in IRF utilization and case mix, we believe that it is appropriate to propose to update the CMG relative weights and average length of stay values at this time to ensure that IRF PPS payments continue to reflect as accurately as possible the current costs of care in IRFs.

We considered not implementing the new OMB delineations for purposes of calculating the wage index under the IRF PPS; however, we believe implementing the new OMB delineations would result in wage index values being more representative of the actual costs of labor in a given area.

We considered having no transition period and fully implementing the proposed revisions to the OMB delineations as described in section V.D. of this proposed rule. However, this would not provide any time for IRF providers to adapt to their new wage index values. Thus, we believe that it would be appropriate to provide for a transition period to mitigate any significant decreases in wage index values and to provide time for IRFs to adjust to their new labor market area delineations.

We considered using a blended wage index for all providers that would be computed using 50 percent of the FY 2021 IRF PPS wage index values under the FY 2020 CBSA delineations and 50 percent of the FY 2021 IRF PPS wage index values under the FY 2021 OMB delineations as was utilized in FY 2016 when we adopted the new CBSA delineations based on the 2010 decennial census. However, the revisions to the CBSA delineations announced in the latest OMB bulletin are not based on new census data; they are updates of the CBSA delineations adopted in FY 2016 based on the 2010 census data. As such, we do not believe it is necessary to implement the multifaceted 50/50 blended wage index transition that we established for the adoption of the new OMB delineations based on the decennial census data in FY 2016.

We considered transitioning the wage index to the revised OMB delineations over a number of years to minimize the impact of the proposed wage index changes in a given year. However, we also believe this must be balanced against the need to ensure the most accurate payments possible, which argues for a faster transition to the revised OMB delineations. As discussed above in section V.D. of this proposed rule, we believe that using the most current OMB delineations would increase the integrity of the IRF PPS wage index by creating a more accurate representation of geographic variation in wage levels. As such, we believe it would be appropriate to utilize a 5 percent cap on any decrease in an IRF's wage index from the IRF's final wage index in FY 2020 to allow the effects of our proposed policies to be phased in over 2 years.

We considered maintaining the existing outlier threshold amount for FY 2021. However, analysis of updated FY 2019 data indicates that estimated outlier payments would be less than 3 percent of total estimated payments for FY 2021, by approximately 0.4 percent, unless we updated the outlier threshold amount. Consequently, we propose adjusting the outlier threshold amount in this proposed rule to reflect a 0.4 percent increase thereby setting the total outlier payments equal to 3 percent, instead of 2.6 percent, of aggregate estimated payments in FY 2021.

We considered not removing the post-admission physician evaluation requirement at § 412.622(a)(3)(iv). However, we believe that IRFs are more than capable of determining whether a patient meets the coverage criteria for IRF services prior to admission. Additionally, we believe that if IRFs are doing their due diligence while completing the pre-admission screening by making sure each IRF candidate meets all of the requirements to be admitted to the IRF, then the post-admission physician evaluation is unnecessary.

We considered not amending § 412.622(a)(4)(i)(B) and (D) to codify our longstanding documentation instructions and guidance of the preadmission screening in regulation text. However, we believe for the ease of administrative burden and being able to locate the required elements of the preadmission screening documentation and the review and concurrence of a rehabilitation physician prior to the IRF admission needed for the basis of IRF payment in a timely fashion, we are should make the technical codifications in regulation text.

We considered not amending § 412.622(a)(3), (4), and (5) to allow non-physician practitioners to complete any of the IRF coverage requirements that we currently require a rehabilitation physician to fulfill. However, the non-physician practitioner groups stated that

they have the necessary education and are qualified to provide the same level of care currently being provided to IRF patients by rehabilitation physicians. They also stated that non-physician practitioners have a history of treating complex patients across all settings, and are already doing so in IRFs. They also stated that the types of patient assessments that they would be required to do in the IRFs are the same types of assessments they are currently authorized to provide in other settings, such as inpatient hospitals, skilled nursing facilities, hospice, and outpatient rehabilitation centers. Additionally, they also stated that they have direct rehabilitation experience to provide quality of care and services to IRF patients, that non-physician practitioner educational programs include didactic and clinical experiences to prepare graduates for advanced clinical practice, and that current accreditation requirements and competency-based standards ensure that non-physician practitioners are equipped to provide safe, high level quality care.

Furthermore, we believe that allowing non-physician practitioners to practice to the full extent of their education, training, and scope of practice would increase the number of available health care providers able to work in the post-acute care setting, resulting in lower costs and improved quality of care. Allowing the use of non-physician practitioners, authorized to provide care to the full extent of their states scope of practice, would also help offset deficiencies in physician supply, especially in rural areas. In addition, we believe that allowing the use of non-physician practitioners could reduce the rates of rehabilitation physician burn-out. We reviewed this information, as we were instructed to do by section 5(c) of Executive Order 13890, and we believe it is appropriate at this time to propose to allow non-physician practitioners to complete any of the IRF coverage requirements that we currently require a rehabilitation physician to fulfill.

E. 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 FY 2020 IRF PPS proposed rule would be the number of reviewers of this proposed rule. We acknowledge that this assumption may understate or overstate the costs of reviewing this proposed rule. It is possible that not all commenters reviewed the FY 2020 IRF PPS proposed 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 would be a fair estimate of the number of reviewers of this proposed rule.

We also recognize that different types of entities are in many cases affected by mutually exclusive sections of this proposed rule, and therefore, for the purposes of our estimate we assume that each reviewer reads approximately 50 percent of the rule. We sought 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 $109.36 per hour, including overhead and fringe benefits (*https://www.bls.gov/oes/current/oes_nat.htm*). Assuming an average reading speed, we estimate that it would take approximately 2 hours for the staff to review half of this proposed rule. For each IRF that reviews the rule, the estimated cost is $218.72 (2 hours × $109.36). Therefore, we estimate that the total cost of reviewing this regulation is $274,931.04 ($218.72 × 1,257 reviewers).

F. Accounting Statement and Table

As required by OMB Circular A–4 (available at *http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf*), in Table 14, we have prepared an accounting statement showing the classification of the expenditures associated with the provisions of this proposed rule. Table 14 provides our best estimate of the increase in Medicare payments under the IRF PPS as a result of the proposed updates presented in this proposed rule based on the data for 1,117 IRFs in our database.

TABLE 14—ACCOUNTING STATEMENT: CLASSIFICATION OF ESTIMATED EXPENDITURE

	Category	Transfers
Change in Estimated Transfers from FY 2020 IRF PPS to FY 2021 IRF PPS	Annualized Monetized Transfers	$270 million.
	From Whom to Whom?	Federal Government to IRF Medicare Providers.

Change in Estimated Costs	
Category	Costs.
Annualized monetized cost in FY 2021 for IRFs due to the removal of certain IRF coverage requirements.	Reduction of $15.5 million.

G. Conclusion

Overall, the estimated payments per discharge for IRFs in FY 2021 are projected to increase by 2.9 percent, compared with the estimated payments in FY 2020, as reflected in column 9 of Table 13.

IRF payments per discharge are estimated to increase by 2.9 percent in urban areas and 3.2 percent in rural areas, compared with estimated FY 2020 payments. Payments per discharge to rehabilitation units are estimated to increase 3.3 percent in urban areas and 3.4 percent in rural areas. Payments per discharge to freestanding rehabilitation hospitals are estimated to increase 2.6 percent in urban areas and increase 2.5 percent in rural areas.

Overall, IRFs are estimated to experience a net increase in payments as a result of the proposed policies in this proposed rule. The largest payment increase is estimated to be a 4.8 percent increase for rural IRFs located in the Pacific region. The analysis above, together with the remainder of this preamble, provides an RIA.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by OMB.

List of Subjects in 42 CFR Part 412

Administrative practice and procedure, Health facilities, Medicare, Puerto Rico, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services proposes to amend 42 CFR chapter IV as set forth below:

PART 412—PROSPECTIVE PAYMENT SYSTEMS FOR INPATIENT HOSPITAL SERVICES

■ 1. The authority citation for part 412 continues to read as follows:

Authority: 42 U.S.C. 1302 and 1395hh.

■ 2. Section 412.622 is amended—
■ a. By revising paragraphs (a)(3)(ii) and (iv) and (a)(4)(i)(B) and (D);
■ b. By removing paragraph (a)(4)(ii);
■ c. By redesignating paragraph (a)(4)(iii) as paragraph (a)(4)(ii); and
■ d. In paragraph (c) by adding the definition of ''Week'' in alphabetical order; and
■ e. By adding paragraph (d).

The revisions and addition read as follows:

§ 412.622 Basis of payment.

(a) * * *

(3) * * *

(ii) Generally requires and can reasonably be expected to actively participate in, and benefit from, an intensive rehabilitation therapy program. Under current industry standards, this intensive rehabilitation therapy program generally consists of at least 3 hours of therapy (physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics therapy) per day at least 5 days per week. In certain well-documented cases, this intensive rehabilitation therapy program might instead consist of at least 15 hours of intensive rehabilitation therapy per week. Benefit from this intensive rehabilitation therapy program is demonstrated by measurable improvement that will be of practical value to the patient in improving the patient's functional capacity or adaptation to impairments. The required therapy treatments must begin within 36 hours from midnight of the day of admission to the IRF.

* * * * *

(iv) Requires physician supervision by a rehabilitation physician. The requirement for medical supervision means that the rehabilitation physician must conduct face-to-face visits with the patient at least 3 days per week throughout the patient's stay in the IRF to assess the patient both medically and functionally, as well as to modify the course of treatment as needed to maximize the patient's capacity to benefit from the rehabilitation process, except that during a Public Health Emergency, as defined in § 400.200 of this chapter, such visits may be conducted using telehealth services (as defined in section 1834(m)(4)(F) of the Act).

(4) * * *

(i) * * *

(B) It includes a detailed and comprehensive review of each patient's condition and medical history, including the patient's level of function prior to the event or condition that led to the patient's need for intensive rehabilitation therapy, expected level of improvement, and the expected length of time necessary to achieve that level of improvement; an evaluation of the patient's risk for clinical complications; the conditions that caused the need for rehabilitation; the treatments needed (that is, physical therapy, occupational therapy, speech-language pathology, or prosthetics/orthotics); expected frequency and duration of treatment in the IRF; anticipated discharge destination; and anticipated post-discharge treatments.

* * * * *

(D) It is used to inform a rehabilitation physician who reviews and documents his or her concurrence with the findings and results of the preadmission screening prior to the IRF admission.

* * * * *

(c) * * *

Week means a period of 7 consecutive calendar days beginning with the date of admission to the IRF.

(d) *Non-physician practitioners.* For purposes of this section, a non-physician practitioner who is determined by the IRF to have specialized training and experience in inpatient rehabilitation may perform any of the duties that are required to be performed by a rehabilitation physician, provided that the duties are within the non-physician practitioner's scope of practice under applicable state law.

Dated: March 24, 2020.

Seema Verma,

Administrator, Centers for Medicare & Medicaid Services.

Dated: April 9, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–08359 Filed 4–16–20; 4:15 pm]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket Nos. 17–97, 20–67; FCC 20–42; FRS 16632]

Call Authentication Trust Anchor; Implementation of TRACED Act—Knowledge of Customers by Entities with Access to Numbering Resources

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on proposals to further efforts to promote caller ID authentication and implement Section 4 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act. In addition, the Commission also seeks comment in this document on implementing section 6(a) of the TRACED Act, which concerns access to numbering resources. The Commission concurrently adopted a Report and Order mandating that all originating and terminating voice service providers implement the STIR/SHAKEN caller ID authentication framework in the internet Protocol (IP) portions of their networks by June 30, 2021.

DATES: Comments are due on or before May 15, 2020. Reply Comments are due on or before May 29, 2020.

ADDRESSES: Comments and reply comments may be filed using the Commission's Electronic Comment Filing System (ECFS). See Electronic Filing of Documents in Rulemaking Proceedings, 63 FR 24121 (1998). Interested parties may file comments or reply comments, identified by WC Docket Nos. 17–97, 20–67, by any of the following methods:

- *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *https://www.fcc.gov/ecfs/*
- *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
- U.S. Postal Service first-class, Express, and Priority mail must be

addressed to 445 12th Street, SW, Washington, DC 20554.

Effective March 19, 2020, and until further notice, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

During the time the Commission's building is closed to the general public and until further notice, if more than one docket or rulemaking number appears in the caption of a proceeding, paper filers need not submit two additional copies for each additional docket or rulemaking number; an original and one copy are sufficient.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via email to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via email to *Nicholas_A._Fraser@omb.eop.gov* or via fax at 202–395–5167.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Mason Shefa, Competition Policy Division, Wireline Competition Bureau, at *Mason.Shefa@fcc.gov.* For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an email to *PRA@fcc.gov* or contact Nicole Ongele at (202) 418–2991.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking in WC Docket Nos. 17–97, 20–67; FCC 20–42, adopted and released on March 31, 2020. The full text of this document is available for public inspection during regular business hours, when FCC Headquarters is open to the public, in the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY–A257, Washington, DC 20554 or at the following internet address: *https://docs.fcc.gov/public/attachments/FCC-20-42A1.pdf.* The Report and Order that was adopted concurrently with this Further Notice of Proposed Rulemaking is published elsewhere in the **Federal Register**. To request materials in accessible formats for people with disabilities (*e.g.,* braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (*e.g.,* accessible format documents, sign language interpreters, CART, etc.), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

Synopsis

I. Further Notice of Proposed Rulemaking

1. Building on the important steps we take in the concurrently adopted Report and Order, we offer proposals and seek comment on further efforts to promote caller ID authentication and implement section 4 of the TRACED Act. We also seek comment on implementing section 6(a) of the TRACED Act, which concerns access to numbering resources.

A. Caller ID Authentication Requirements Definitions and Scope

2. In the accompanying Report and Order, we adopted a definition of ''STIR/SHAKEN authentication framework'' that aligns with the statutory language of the TRACED Act. We believe the definition we adopted of the ''STIR/SHAKEN authentication framework'' is sufficient for our implementation of the TRACED Act. We seek comment on this view.

3. We also adopted a definition of ''voice service'' in the Report and Order that aligns with the statutory language of the TRACED Act. In section 4(a)(2) of the TRACED Act, Congress provided a definition of ''voice service'' that is similar, but not identical, to the preexisting definition found in section 64.1600(r) of our rules, which adopts the definition Congress provided in Section 503 of the RAY BAUM'S Act. Both provisions define voice service as ''any service that is interconnected with the public switched telephone network and that furnishes voice communications to an end user using resources from the North American Numbering Plan or any successor to the North American Numbering Plan adopted by the Commission under section 251(e)(1) of the [Act].'' In the TRACED Act, Congress included a similar definition but added a provision that ''without limitation, any service that enables real-time, two-way voice communications, including any service that requires [I]nternet [P]rotocol-compatible customer premises equipment (commonly known as 'CPE') and permits out-bound calling, whether or not the service is one-way or two-way voice over [I]nternet [P]rotocol.'' We seek comment on how, if at all, the scope of the TRACED Act definition varies from the section 64.1600(r) definition on the basis of the foregoing language. Should we provide further guidance on the meaning of the ''without limitation'' language in the TRACED Act, or is it clear as written? Looking at the two definitions as a whole, we seek comment on whether Congress intended to create two distinct definitions with different scopes or whether the similarity between the definitions means that we should harmonize our interpretations of the two definitions. Additionally, we seek comment on whether the TRACED Act's definition of ''voice service'' should cause us to revisit our decision in the accompanying Report and Order to exempt from our rules providers that lack control of the network infrastructure necessary to implement STIR/SHAKEN.

4. Congress directed many of the requirements in the TRACED Act to ''providers of voice service.'' On one reading, an entity is a provider of voice service only with respect to calls that meet the definition of ''voice service,'' *i.e.,* ''provider'' is defined on a call-by-call basis. On another reading, an entity that provides any voice service is always a ''provider of voice service,'' *i.e.,* ''provider'' is defined on an entity-by-entity basis. We propose adopting the former interpretation. Based on this interpretation, a provider is not subject to the TRACED Act for all services simply because some fall under the TRACED Act definition of ''voice service''; instead, only those services that meet the TRACED Act definition of ''voice service'' are subject to TRACED Act obligations. We propose this interpretation because it gives meaning to Congress's inclusion of a definition for ''voice service'' and appears to best comport with the TRACED Act's allocation of duties on the basis of call technology, *e.g.,* differentiating duties between calls over IP and non-IP networks. Further, we have previously used a call-by-call understanding of intermediate providers in our rules. We seek comment on this interpretation. Should we instead read the TRACED Act to establish a status-based approach, thus capturing a provider's entire network if some parts of its network meet the statutory definition?

B. Extending the STIR/SHAKEN Implementation Mandate to Intermediate Providers

5. To further help ensure that caller ID authentication information reaches call recipients, we propose extending our STIR/SHAKEN mandate to intermediate providers. We seek comment on this proposal, in general, and on the specific

implementing measures we propose below for authenticated and unauthenticated calls that intermediate providers receive. In each case, we propose applying the obligations we establish for IP calls both to calls that an intermediate provider passes to a terminating voice service provider and to calls that it passes to a subsequent intermediate provider. We seek comment on this proposed scope. We further propose adopting these rules pursuant to our authority under the Communications Act. We seek comment on this proposal, as well as whether we have independent authority under either the TRACED Act or the Truth in Caller ID Act.

6. *Authenticated Calls.* We propose to require intermediate providers to pass any Identity header they receive to the subsequent intermediate or voice service provider in the call path. Technically, this proposal would require that the Identity header be forwarded downstream in the SIP INVITE transmitted by the intermediate provider. This proposal is consistent with the NANC's recommendation ''that all carriers that route calls between originating and terminating carriers, such as long-distance providers and least-cost routers, maintain the integrity of the required SHAKEN/STIR signaling.'' We anticipate that imposing such a mandate on intermediate providers is necessary to ensure that calls transmitted in IP retain authentication information across the entire call path. If any of the intermediate providers in the call path are unable or unwilling to transmit the Identity header through their network, the terminating voice service provider will be unable to verify the caller ID information. If fully implemented, the STIR/SHAKEN framework creates an ''end-to end'' system for authenticating the identity of the calling party. The component SHAKEN standard specifically addresses the reality that call paths often involve voice service providers that do not connect directly with each other, but rather connect indirectly through one or more third party networks. Indeed, a framework like STIR/SHAKEN that identifies the true origination of calls is expressly required because voice service providers do not have direct peering relationships with all other voice service providers. We therefore anticipate that adopting our proposal will be essential to preventing gaps that would undermine the value of STIR/SHAKEN implementation by voice service providers that originate and terminate calls that may transit over intermediate provider networks. We seek comment on this preliminary view. What are the benefits or drawbacks to imposing this obligation on intermediate providers? What, if any, are the technical barriers preventing intermediate providers from complying with this obligation? Are market forces alone sufficient to drive intermediate providers to implement STIR/SHAKEN, making regulatory action unnecessary? If we were to adopt our proposal, should we create any limitations or exceptions? In addition to this proposed requirement, should we require intermediate providers to append to the SIP INVITE their own additional Identity header to more accurately and easily support traceback to each provider in the call path? Are there any other actions reasonably necessary for implementation of STIR/SHAKEN that we should require of intermediate providers?

7. Additionally, we propose to require intermediate providers to pass the Identity header *unaltered,* thereby prohibiting the manipulation of STIR/SHAKEN Identity header information by intermediate providers when transmitting this information along with a SIP call. This prohibition would prevent a downstream provider from altering or stripping the caller ID authentication information in the Identity header and ensure such providers do not tamper with authenticated calls after they leave the originating voice service provider's network. Based on comments filed earlier in this proceeding, we anticipate that such a prohibition would be beneficial because it would better ensure the integrity of authentication information that reaches the terminating voice service provider and call recipient. We seek comment on our proposal. Are there legitimate reasons, technical or otherwise, for an intermediate provider to alter or strip STIR/SHAKEN header information? Would establishing this prohibition impact the ability of intermediate providers to complete calls if, for instance, a terminating voice service provider is unable to accept the STIR/SHAKEN header information for a technical reason? If so, how can we distinguish between malicious or negligent manipulation and manipulation done for legitimate technical reasons? In the absence of a Commission prohibition, could the practice of malicious or negligent manipulation of the Identity header be adequately policed by participating providers or the industry through the STI–GA? We do not propose prohibiting a terminating voice service provider from altering or stripping the Identity header for a call that it receives before attempting to verify it. We regard this scenario as unlikely since terminating voice service providers need to verify the Identity header information in order for their subscribers to receive the benefits of STIR/SHAKEN, and we do not believe our rules need to address it. Do commenters agree? Is there any reason we should extend this prohibition to terminating voice service providers?

8. *Unauthenticated Calls.* We propose that when an intermediate provider receives an unauthenticated call that it will exchange with another intermediate or voice service provider as a SIP call, it must authenticate such a call with a ''gateway'' or ''C'' attestation. Such attestation conveys that the provider has no relationship with the initiator of the call, but it records the entry point of the call into its IP network. This action is already contemplated in the industry standards. We propose requiring it because, although this attestation level lacks any assertion of the calling party's identity, we understand from the record developed thus far that it would provide a useful data point to inform analytics and allow for traceback of the call to the gateway source. We seek comment on this proposal. What are the benefits of or drawbacks to imposing this obligation on intermediate providers? Would the widespread use of ''C'' attestation negatively impact the utility of attestation information to terminating voice service providers and their subscribers? What, if any, are the technical barriers preventing intermediate providers from complying with this obligation? Should we create any limitations or exceptions to a rule requiring gateway attestation? Are there any circumstances where an originating voice service provider would need to be subject to this requirement? Multiple commenters support imposing STIR/SHAKEN requirements on gateway providers as a way to identify robocalls that originate abroad and to identify which provider served as the entry point for these calls to U.S. networks. Is this an effective way to use STIR/SHAKEN to combat illegal calls originating outside the United States? ATIS has been working on technical standards intended as potential mechanisms for implementing STIR/SHAKEN for internationals calls. The first technical report addresses how calls authenticated in one country can be verified in a second country through bilateral arrangements between the two countries. A second draft technical report under current consideration

addresses how the SHAKEN trust environment could be extended to full international deployment in the absence of bilateral arrangements. Both approaches are intended to support caller ID authentication and traceback for cross-border calls. Are there other rules involving STIR/SHAKEN that we should consider regarding intermediate providers to further combat illegal calls originating abroad? In response to our questions in the *2019 Robocall Declaratory Ruling and Further Notice* regarding the use of STIR/SHAKEN to combat illegally spoofed calls originating abroad, Verizon suggests that we impose an obligation to use STIR/SHAKEN on any provider, regardless of its geographic location, if it intends to allow its customers to use U.S. telephone numbers. Verizon suggests, however, that the STIR/SHAKEN rules need only apply to calls to U.S. consumers that involve the use of numbers from the U.S. portion of the NANP. According to Verizon, U.S.-inbound international calls originating from foreign carriers only with numbers from their countries' numbering plans do not materially contribute to the robocall problem. And USTelecom suggests that we consider obligating gateway providers to pass international traffic only to downstream providers that have implemented STIR/SHAKEN. USTelecom notes that the Commission implemented a similar framework with respect to intermediate providers in the rural call completion context and argues that a similar approach adopted in the SHAKEN context would ensure a heightened degree of transparency and accountability. They argue that such an obligation would help ensure that any gateway attestation is not stripped out downstream by a provider's network that does not have STIR/SHAKEN capability and consequently frustrate efforts to trace calls originating abroad back to the gateway provider. Should we consider adopting either of these ideas instead of, or in addition to, our proposed rules? Beyond imposing obligations on gateway and intermediate providers, are there other actions we could take to promote caller ID authentication implementation to combat robocalls originating abroad?

9. *Limiting Intermediate Provider Requirements to IP Networks.* As with the rules adopted in the Report and Order, we propose to limit the application of these obligations to calls that an intermediate provider receives in SIP and will exchange with another intermediate or voice service provider in SIP. We preliminarily believe this is an appropriate scope given that STIR/SHAKEN is limited to SIP calls. We seek comment on this proposal. Is there any reason to require intermediate providers to implement caller ID authentication solutions in the non-IP portions of their networks? In this regard, we specifically invite comment on whether out-of-band STIR, a potential STIR/SHAKEN solution for non-IP networks, will include a role for intermediate providers as it develops.

10. We further seek comment on how to prevent the use of non-IP intermediate providers as a way to circumvent our rules. How can we prevent a gateway or originating voice service provider from concealing its identity as the source of a call by purposefully routing that call through an intermediate provider that uses non-IP technology? By doing so, the provider could both fool terminating providers—who otherwise may have seen that the caller ID verification failed—and stymie traceback efforts. We also seek comment on the seriousness of this threat. Are there technical or economic reasons why this is not likely to occur? Would call pattern analysis minimize the effectiveness of this conduct? And would the ability to trace a call back to the gateway provider allow sufficient traceback to identify the originating provider? Or is this threat credible such that we should take action to prevent it? If so, what action should we take?

11. *Definition of Intermediate Provider.* We propose using the definition of ''intermediate provider'' found in section 64.1600(i) of our rules. This section provides that an ''intermediate provider'' is ''any entity that carries or processes traffic that traverses or will traverse the [PSTN] at any point insofar as that entity neither originates nor terminates that traffic.'' The broad scope of this definition seems well-suited to further the goal of widespread implementation of the STIR/SHAKEN framework. We seek comment on this proposal. Are there alternative formulations to the definition of ''intermediate provider'' that more accurately capture its role and characteristics for the purpose of STIR/SHAKEN implementation? In the context of rural call completion, the Commission's rules use a slightly narrower definition to exclude from their scope intermediate providers that may only incidentally transmit voice traffic, such as internet Service Providers. Is this narrower definition a better fit for STIR/SHAKEN, or does the broader definition we propose better support the goal of ubiquitous deployment?

12. *Legal Authority.* We propose relying on our authority under section 251(e) of the Act to apply these rules to intermediate providers. We concluded in the Report and Order that our exclusive jurisdiction over numbering policy provides authority to require voice service providers to implement STIR/SHAKEN in order to prevent the fraudulent abuse of NANP resources. We preliminarily believe that this same analysis extends to intermediate providers. Just as with calls displaying a falsified or spoofed caller ID on an originating or terminating voice service provider's network, calls with illegally spoofed caller ID that transit intermediate providers' networks are exploiting numbering resources to further illegal schemes. By imposing these requirements on intermediate providers, we would protect consumers and prevent bad actors from abusing NANP resources. We seek comment on this proposal. Consistent with our conclusion in this document's Report and Order, we propose concluding that the section 251(e)(2) requirements do not apply in the context of our establishing STIR/SHAKEN requirements. Alternatively, even if section 251(e)(2) does apply, we propose that competitive neutrality is satisfied in this instance because each carrier is responsible for bearing its own implementation costs. We seek comment on these proposals.

13. We also seek comment on two potential additional sources of authority. First, we seek comment on whether the TRACED Act provides us with authority to impose the obligations we propose for intermediate providers. In the TRACED Act, Congress directs the Commission to require voice service providers to implement STIR/SHAKEN in the IP portions of their networks. Section 4(a)(2) defines ''voice service'' in part as any service that ''that furnishes voice communications to an end user using resources from the North American Numbering Plan.'' We do not preliminarily read this definition to include intermediate providers. Is this a correct interpretation, or can we rely on the TRACED Act to reach intermediate providers? At the same time, we propose concluding that we are not foreclosed by the limited definition of ''voice service'' from imposing STIR/SHAKEN requirements on intermediate providers. We propose reaching this conclusion for two independent reasons. First, section 4(d) of the TRACED Act states that ''[n]othing in this section shall preclude the Commission from initiating a rulemaking pursuant to its existing statutory authority.'' Second, the STIR/SHAKEN framework creates a chain of

trust between the originating and terminating voice service providers. Each intermediate provider operating between the originating and terminating voice service provider in the call path must transmit the call's Identity header unaltered in order to successfully provide end-to-end caller ID authentication. We believe that in directing us to require providers of voice service to implement the ''STIR/SHAKEN authentication framework'' as defined in the TRACED Act, Congress intended to refer to the standards created by the information and communications technology industry. These standards are designed to enable caller ID authentication through an end-to-end chain of trust. Intermediate providers play a critical role in ensuring the success of such a system. We believe Congress intended for the STIR/SHAKEN framework, as mandated in section 4 of the TRACED Act, to be an effective means of battling unlawful robocalls, and we therefore propose concluding that Congress took this aspect of STIR/SHAKEN into account in enacting the TRACED Act and allowed us latitude to impose requirements on intermediate providers in support of its direction to require voice service providers to implement the STIR/SHAKEN authentication framework. We also believe that our proposals lie within the Commission's statutory authority to adopt rules ''necessary in the execution of its functions.'' We seek comment on this proposed analysis.

14. Second, we seek comment on whether our authority under the Truth in Caller ID Act allows us to impose the rules described above. In the Truth in Caller ID Act, Congress charged us with prescribing rules to make unlawful the spoofing of caller ID information ''in connection with any telecommunications service or IP-enabled voice service . . . with the intent to defraud, cause harm, or wrongfully obtain anything of value.'' Does imposing STIR/SHAKEN implementation obligations on intermediate providers fit within this directive? We also seek comment on what other sources of authority we have to apply STIR/SHAKEN obligations on intermediate providers.

15. *Alternatives.* To the extent that commenters believe we cannot or should not apply such obligations to intermediate providers, we seek comment on alternative measures we could take to ensure that STIR/SHAKEN information traverses the entire call path. In the *Second Rural Call Completion Report and Order,* the Commission required larger originating long-distance providers to monitor the performance of downstream intermediate providers with regard to call completion. Should we impose a comparable requirement here? For instance, should we require originating voice service providers to ensure, by contract and/or through periodic monitoring, that all intermediate providers in the call path transmit STIR/SHAKEN information? Should we require originating voice service providers to take remedial measures where necessary because of intermediate provider failures, as in the rural call completion context? What are the benefits and drawbacks of this approach compared to our proposal? We expect that the same sources of authority that we rely on in the Report and Order to impose direct STIR/SHAKEN obligations on originating voice service providers would allow us to impose a monitoring duty on them as well. We seek comment on this view and, in general, on sources of authority we may have for any alternatives that commenters propose.

C. Assessment of Burdens or Barriers to Implementation

16. The TRACED Act directs the Commission, not later than December 30, 2020 ''and as appropriate thereafter,'' to assess any burdens and barriers to (1) voice service providers that use time-division multiplexing network technology (TDM), a non-IP network technology; (2) small voice service providers; and (3) rural voice service providers. It further directs us to assess burdens and barriers created by the ''inability to purchase or upgrade equipment to support the call authentication frameworks . . . or lack of availability of such equipment.''

17. To this end, we seek comment on the burdens and barriers to implementation for the classes of providers identified, particularly the burdens presented by equipment availability and cost. In comments previously filed, parties contended that small and rural providers, and operators of TDM networks, may incur substantial costs upgrading their networks, and updating or replacing service agreements. Do commenters agree with this position? What are other burdens and barriers to implementation for such voice service providers? Does cost and/or the availability of necessary equipment and equipment updates pose barriers to implementation for voice service providers that are not small, rural, or operators of TDM networks?

18. We also seek comment on how we should interpret the TRACED Act's direction to assess burdens and barriers to implementation ''as appropriate thereafter.'' Should we coordinate this assessment with our revision of any granted extensions in compliance? Or should we do so on a specific schedule or as-needed basis, separate from our extension review process?

D. Extension of Implementation Deadline

19. The TRACED Act includes two provisions for extension of the June 30, 2021 implementation date for caller ID authentication frameworks. First, in connection with an assessment of burdens or barriers to implementation, the Commission ''may, upon a public finding of undue hardship, delay required compliance'' with the June 30, 2021 date for caller ID authentication framework implementation. Second, we ''shall grant a delay of required compliance'' with the June 30, 2021 implementation date ''to the extent that . . . a provider or class of providers of voice services, or type of voice calls, materially relies on a non-[IP] network for the provision of such service or calls.'' Under either provision, an extension may be provider-specific or apply to a ''class of providers of voice service, or type of voice calls.'' We must annually reevaluate any granted extension for compliance. When granting an extension of the implementation deadline under either provision, we must require that provider to ''implement an appropriate robocall mitigation program to prevent unlawful robocalls from originating on the network of the provider.'' Based on these directives, we propose granting a one-year implementation extension to small, including small rural, voice service providers due to undue hardship; and propose granting an extension for the parts of a voice service provider's network that rely on technology that cannot initiate, maintain, and terminate SIP calls. We seek comment on these proposals, whether to grant additional extensions, and related issues below.

20. *Extensions for Undue Hardship by Category of Provider.* The TRACED Act grants us the discretion to delay a provider's obligation to comply with the June 30, 2021 call authentication framework implementation date upon a public finding of hardship. It states that the extension may be ''for a reasonable period of time . . . as necessary . . . to address the identified burdens and barriers.''

21. The first category of voice service providers identified by the TRACED Act for a potential extension due to undue hardship is voice service providers that use TDM network technology. Because the TRACED Act includes a separate

extension for voice service providers that ''material[ly] rely'' on non-IP technology, we propose to grant the same extension to voice service providers that use TDM technology under the undue hardship standard as we grant to providers that materially rely on non-IP technology. We believe that such a solution minimizes complexity and aligns the compliance requirements for similarly-situated voice service providers. We seek comment on this proposal. To give meaning to each provision from Congress, should we instead distinguish an undue hardship extension on the basis of TDM technology from the extension for providers that materially rely on non-IP technology, and if so how?

22. The second category of voice service providers identified by the TRACED Act for a potential extension due to undue hardship is small voice service providers. We propose granting a one-year implementation extension for such providers and we seek comment on this proposal. According to NTCA, small voice service providers face numerous burdens and barriers to implementation, including the inability to ''procure ready-to-install solutions on the same timeframe as the nation's largest carriers.'' It contends that a delayed compliance date would allow small voice service providers to ''obtain solutions from vendors,'' and benefit from the competition among vendors which, over time, will likely ''drive down prices and improve the quality of SHAKEN/STIR offerings for smaller providers.'' We tentatively conclude that granting such an extension to small voice service providers addresses the concerns in the record, such as vendor availability, and grants sufficient time for them to implement STIR/SHAKEN on their IP networks. Do commenters agree? Alternatively, would granting such an extension to small voice service providers compromise the efficacy of the STIR/SHAKEN framework unduly? Given the TRACED Act's implementation deadline of June 30, 2021, is it necessary to grant small voice service providers an implementation extension? Or does this deadline already provide small voice service providers with sufficient time to implement STIR/SHAKEN on their IP networks? Some commenters claim that a ''hosted'' solution to implement STIR/SHAKEN currently exists and suggest that providers to whom this solution is available would not need an extension to comply with the implementation mandate.

23. We propose to define ''small providers of voice service'' for the purposes of our assessment of burdens and barriers and of our implementation extension as those that have 100,000 or fewer voice subscriber lines (counting the total of all business and residential fixed subscriber lines and mobile phones and aggregated over all of a provider's affiliates). In the *First Rural Call Completion Order,* the Commission determined that the 100,000-subscriber-line threshold ensured that many subscribers would continue to benefit from our rules while also limiting the burden on smaller voice service providers. We seek comment on this proposal. What are the benefits and drawbacks of establishing an 100,000 subscriber-line threshold? Is there an alternative measure the Commission should use to define ''small providers of voice service''? How should we distinguish small providers that must overcome significant technical challenges to implement STIR/SHAKEN from those that are able to implement it without hardship? Do commenters agree that a class-based extension for small providers is appropriate, or should we review each small provider seeking an implementation extension on a case-by-case basis?

24. The third category of voice service providers identified by the TRACED Act for a potential extension due to undue hardship is rural voice service providers. We believe it is unnecessary to grant a separate implementation extension for rural voice service providers as the challenges faced by these providers are already addressed by either the small voice service provider extension or the extension for voice service providers that materially rely on a non-IP network. We seek comment on this view. Alternatively, by using the separate terms ''small'' and ''rural,'' did Congress intend to create two distinct extensions for rural and small voice service providers? Are there rural voice service providers that face unique challenges not addressed by either proposed extension and, if so, what definition of ''rural'' should we adopt to appropriately capture those entities?

25. We seek comment on whether we should grant an implementation extension for any other voice service providers or classes of voice service providers, or types of voice calls. We specifically seek comment on Congress's direction to consider whether to grant an extension on the basis of ''the inability to purchase or upgrade equipment to support the call authentication frameworks under this section, or lack of availability of such equipment.'' Are there entities, or a class of entities, that should receive an extension on this basis? Are there voice service providers other than small voice service providers who face a burden due to the inability to purchase or unavailability of equipment necessary to participate in caller ID authentication? Are there other specific voice service providers or classes of voice service providers, or types of voice calls, for which we should grant an extension of the implementation deadline? On what basis would we grant such an extension? What would constitute a sufficient burden or barrier to justify a finding of undue hardship? What type of evidence should the voice service provider or class of voice service providers be required to present to demonstrate undue hardship? And what is a reasonable length of time to extend the deadline for such voice service providers and why?

26. We also seek comment on whether we should grant an extension for undue hardship for enterprise calls. If we were to grant such an extension, should it apply to all enterprise calling cases or only to those that are most challenging? What types of enterprise calling cases should be considered particularly challenging for purposes of any extension? Would granting an extension for enterprise calls unduly limit the benefits offered by widespread implementation of STIR/SHAKEN? Additionally, would granting this extension decrease incentives for voice service providers to solve existing issues with enterprise calling quickly? Even assuming for the sake of argument that achieving ''A'' attestation may remain a challenge in some circumstances, why would it be preferable to allow enterprise calls to go unauthenticated rather than potentially receiving ''B'' (partial) or ''C'' (gateway) attestation?

27. We do not interpret the TRACED Act's extension provisions to extend to intermediate providers, because its definition of ''voice service'' refers to ''furnish[ing] voice communications to an end user.'' Should we nonetheless choose to provide an extension based on undue hardship for intermediate providers? On what basis would we grant such an extension, to whom should we grant it, and how long should any such extension last? Would granting an extension for some intermediate providers have unique negative impacts on the operation of STIR/SHAKEN across the voice network?

28. Furthermore, should we adopt an extension for voice service providers that have legal obligations to maintain extensive networks in high cost areas, such as eligible telecommunications carriers and carriers of last resort that bear particularly extensive obligations? An eligible telecommunications carrier

must, throughout the service area for which the designation is received, ''offer the services that are supported by Federal universal service support mechanisms . . . either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier).'' 47 U.S.C. 214(e)(1)(A). Carriers of last resort are ''required to fulfill all reasonable requests for service within [their] territory.'' *See, e.g.,* CA PUC 275.6. Or would we adequately address the burdens and barriers faced by such voice service providers by the other extensions we propose, including the extension for non-IP network technology?

29. *Extension for Undue Hardship Due to Challenges in Interconnecting in IP.* The record developed in response to the *2019 Further Notice* reflects that, for certain voice service providers, a barrier to the exchange of authenticated calls occurs at the interconnection point. Specifically, voice service providers reported that even if they were able to authenticate calls on their own network, they could not exchange authenticated calls with another voice service provider in certain instances because the interconnection point was not IP-enabled, even if the receiving voice service provider itself operates on an IP network. We seek comment on whether we should provide an implementation extension pursuant to TRACED Act section 4(b)(5)(A)(ii) to voice service providers that will not be able to carry authentication information to the next intermediate or voice service provider in the call path due to an inability to interconnect in IP. To what extent should a terminating or originating voice service provider's implementation extension on this basis depend on the actions of the intermediate or voice service provider with which it is seeking IP interconnection in order to exchange authenticated calls? Although the accompanying Report and Order requires transmission of authenticated calls by originating voice service providers only where technically feasible, it requires authentication of all SIP calls. Under what circumstances would challenges in interconnecting in IP constitute an ''undue hardship'' such that the voice service provider should be excused from authentication? Would it be appropriate to limit any such extension to rural local exchange carriers or some other subset of small and/or rural voice service providers? Is such an extension an appropriate way to avoid requiring voice service providers to invest in network upgrades that they cannot make use of? Or would such an extension discourage voice service providers from coming to a negotiated resolution and transitioning to IP? We also seek comment on ways to address this issue and to encourage the voluntary adoption of IP interconnection agreements between voice service providers. We also seek comment on barriers to end-to-end STIR/SHAKEN transmission, including the degree to which barriers to IP interconnection hinder end-to-end caller ID authentication.

30. *Extension for Certain Non-IP Networks.* The TRACED Act specifically directs that ''the Commission shall grant a delay'' ''for any provider or class of providers of voice service, or type of voice calls, only to the extent that such a provider or class of providers of voice service, or type of voice calls, materially relies on a non-[I]nternet [P]rotocol network for the provision of such service or calls . . . until a call authentication protocol has been developed for calls delivered over non-[IP] networks and is reasonably available.'' We propose to grant such an extension only for those portions of a voice service provider's network that rely on technology that cannot initiate, maintain, and terminate SIP calls. Do commenters agree with this approach? Under this reading of the statute, we would interpret ''material[]'' to mean ''important or having an important effect''; and, consistent with our call-by-call interpretation of the TRACED Act, we would read ''reli[ance]'' with reference to the particular portion of the network in question. Altogether, under this reading, we would treat reliance on a non-internet Protocol network as material if that portion of the network is incapable of using SIP. We seek comment on whether, within the framework we propose, we should adopt a different interpretation of ''non-[I]nternet [P]rotocol network.''

31. We also seek comment on other approaches to this statutory provision. For instance, should we grant an extension for a voice service provider's entire network if that voice service provider materially relies on non-IP technology? On this view, how should we interpret ''materially relies''? Would we find that a voice service provider ''materially relies on a [non-IP] network'' if its network substantially relies on non-IP technology, and on that reading what portion of a network must be non-IP for reliance to be substantial? Would we measure that percentage by a technical measure, such as the percentage of non-IP switches in the network? Alternatively, should we consider gauging substantial reliance by the percentage of a voice service provider's subscriber base served by non-IP network technology?

32. Additionally, we seek comment on how the Commission should determine if a caller ID authentication protocol developed for calls delivered over non-IP networks is ''reasonably available'' under section 4(b)(5)(B) such that this extension period would end. For example, should we conclude that reasonable availability varies by voice service provider, *e.g.,* based on size and cost, and if so, how? Should we conclude that reasonable availability depends on whether an effective protocol can be purchased or otherwise obtained by a certain percentage of providers with non-IP networks? While some commenters have referred to out-of-band STIR as a framework that could potentially allow non-IP voice service providers to participate in STIR/SHAKEN, it is our understanding that this framework is still in its infancy and is not readily available to be implemented. We seek comment on this understanding. Are there other available technologies to enable legacy networks to participate in caller ID authentication for which we should consider encouraging development and, ultimately, mandate implementation? If so, what are they, how do they operate, and how might they best be implemented? What efforts, if any, are currently underway to develop such technologies, and how near are they to viability?

33. The TRACED Act further provides that we should limit or terminate an extension of compliance if we determine in a future assessment that a voice service provider ''is not making reasonable efforts to develop the call authentication protocol'' for non-IP networks. We propose to interpret the ''reasonable efforts'' requirement as being satisfied so long as a voice service provider is actively working to develop a caller ID authentication protocol for non-IP networks. We also propose that a voice service provider satisfies this obligation if it is able to provide the Bureau upon request documented proof that it is participating, either on its own or through a representative, as a member of a working group or consortium that is working to develop a non-IP solution, or actively testing such a solution. We propose that the Bureau would have authority to determine whether the provider is meeting the standard we establish. We seek comment on this approach. Should we impose a different standard on larger voice service providers that have more resources available to invest in technology development and network upgrades?

Should we impose a stricter standard for the steps voice service providers must take to develop a non-IP solution? If so, what should we require as part of this more stringent standard? Should we adopt our proposed standard initially but shift to a more stringent standard if we find that the voice service provider in question, or industry as a whole, is not making sufficient progress toward implementation of caller ID authentication on non-IP networks?

34. *Extensions Based on Type of Voice Call.* We seek comment on Congress's direction that extensions may be voice service provider-specific or apply to a class of voice service providers or type of voice calls. Are there any interpretive issues we should consider with respect to this provision? Would it be practical to grant an extension based on a type of voice call, or would that be unnecessarily complicated for voice service providers?

35. *Reevaluating Granted Extensions.* We propose directing the Bureau to reevaluate any extensions annually after the first extension is granted, as required by the TRACED Act, and revise or extend them as necessary. We seek comment on this proposal. Should we direct the Bureau to consider any specific criteria beyond the statutory criteria? We propose directing the Bureau to issue a Public Notice seeking comment on its annual review and consider the comments it receives before issuing a Public Notice of its decision. Are there other specific administrative steps that we should direct the Bureau to include in the reevaluation process? Should the Bureau be able to expand or only contract the scope of entities that are entitled to a class-based or other extension?

36. *Robocall Mitigation During Extension Period.* The TRACED Act directs us to require any voice service provider that has been granted an extension to, during the time of an extension, ''implement an appropriate robocall mitigation program to prevent unlawful robocalls from originating on the network of the provider.'' We propose interpreting this requirement to apply to both voice service providers that receive an extension on the basis of undue hardship and voice service providers that materially rely on a non-internet Protocol network, and we seek comment on this proposal. The TRACED Act states that extensions for material reliance on a non-IP network are ''grant[ed] . . . under subparagraph (A)(ii),'' and that the robocall mitigation program applies ''during the time of a delay of compliance granted under subparagraph (A)(ii).'' TRACED Act 4(b)(5)(B), 4(b)(5)(C)(i). Further, the TRACED Act states that extensions for material reliance on a non-IP network are ''[s]ubject to subparagraphs (C) through (F),'' and paragraph (C)(i) sets forth the robocall mitigation program requirement. TRACED Act 4(b)(5)(B), 4(b)(5)(C)(i). We seek comment on the requirements we should adopt for a robocall mitigation program. Should we prescribe specific robocall mitigation practices for these voice service providers? If so, what practices should we prescribe and why? Should we implement a system, proposed by Verizon, where a voice service provider that originates traffic but does not participate in STIR/SHAKEN certifies that ''it takes appropriate measures to ensure that it is not contributing to the robocall problem''? Similar to Verizon, USTelecom proposes that ''[t]he Commission should require every provider of voice service to register with the Commission and certify that all of its traffic is either (i) signed with STIR/SHAKEN or (ii) subject to a robocall mitigation program.'' It adds that the Commission should ''establish a public database identifying every 499 filer that has issued its certification, along with appropriate rules requiring transit service providers to confirm that their customers have such certifications on file and are in good standing.'' We seek comment on USTelecom's proposal. Would adopting a public certification requirement meet the TRACED Act robocall mitigation program requirement? According to USTelecom's proposal, the certification should be ''non-prescriptive'' and, instead, the Commission ''should require the service provider to confirm that it (i) takes reasonable steps to avoid originating illegal robocall traffic and (ii) that it is committed to cooperating with law enforcement and the industry traceback consortium in investigating and stopping any illegal robocallers that it learns are using its service to originate calls.'' What are the benefits or drawbacks to this approach? Is this an appropriate means to allow for some voice service provider discretion to create a program that is workable while ensuring an effective robocall mitigation program? Conversely, does this form of certification allow too much discretion for voice service providers to determine the scope of the robocall mitigation program? If we require a certification, should we specify minimum standards that a certifying voice service provider must meet, and should we require the certification to be made in a public registry? Further, should call analytics be part of any robocall mitigation program? How could voice service providers with non-IP networks make use of analytics when caller ID authentication is not available?

37. *Alternative Methodologies During an Extension.* The TRACED Act directs us to ''identify, in consultation with small providers of voice service, and those in rural areas, alternative effective alternative effective methodologies to protect consumers from unauthenticated calls during any delay of compliance.'' Accordingly, we ask such voice service providers to share the most effective alternative methodologies. Have small and rural voice service providers already developed any effective methods to protect their subscribers from illegal robocalls on their networks? Or are any small or rural voice service providers in the process of developing such methodologies? If so, at what stage in development are these potential solutions and when could they be deployed? What are the specific challenges to such development? Is there any other information on this issue that small and rural voice service providers would like to share? How can the Commission and other voice service providers support the efforts of small and rural voice service providers to develop alternative effective methodologies to protect their subscribers from unauthenticated calls? For instance, would it be helpful for us to convene small and rural voice service providers to identify potential solutions? Alternatively, should voice service providers that receive an extension be required to participate in industry-led traceback efforts?

38. *Preventing Abuse of Extension Process.* We also seek comment on ways to combat potential evasion of our caller ID authentication rules using the extension process. For instance, how can we prevent a voice service provider from avoiding participating in STIR/SHAKEN by purposefully using non-IP network technology to avoid our mandate for the duration of the extension granted to voice service providers that materially rely on non-IP network technology? We seek comment on the seriousness of this threat. Are there economic or technological reasons why this is unlikely to occur? Does the TRACED Act's requirement that the Commission limit an extension if it determines a voice service provider ''is not making reasonable efforts to develop'' a non-IP caller ID authentication protocol give us leverage to prevent such conduct? Should we take specific further action to prevent this behavior? If so, what action should we take? And how can we distinguish between a voice service provider with

genuine reasons to use non-IP technology and a voice service provider doing so to avoid participating in STIR/SHAKEN?

39. *Full Participation.* Section 4(b)(5)(D) of the TRACED Act requires us to ''take reasonable measures'' to address any issues observed in our assessment of the burdens and barriers to the implementation of caller ID authentication frameworks, and to ''enable as promptly as reasonable full participation of all classes of providers of voice service and types of voice calls to receive the highest level of trust.'' According to the legislation, such measures ''shall include, without limitation, as appropriate, limiting or terminating a delay of compliance granted to a provider'' under section 4(b)(5)(B) of the TRACED Act if we determine in our assessment that the voice service provider is not making reasonable efforts to develop the required caller ID authentication protocol for non-IP networks. We seek comment on this requirement and how best to fulfill the ''full participation'' element of this provision beyond the existing proposals contained herein. Are there further steps we might take, beyond those already proposed, to enable full participation of all classes of voice service providers in a caller ID authentication framework? If so, what are they and how would any such steps be implemented?

E. Caller ID Authentication in Non-IP Networks

40. Because STIR/SHAKEN is a SIP-based solution, those portions of a voice service provider's network that are not capable of initiating, maintaining, and terminating SIP calls cannot authenticate or verify calls under that framework. The TRACED Act directs us, not later than June 30, 2021, to require voice service providers to take ''reasonable measures'' to implement an effective caller ID authentication framework in the non-IP portions of their networks. We propose to interpret the TRACED Act's requirement that a voice service provider take ''reasonable measures'' to implement an effective caller ID authentication framework in the non-IP portions of its network as being satisfied only if the voice service provider is actively working to implement a caller ID authentication framework on those portions of its network, either by upgrading its non-IP networks to IP so that the STIR/SHAKEN authentication framework may be implemented, or by working to develop a non-IP authentication solution. Consistent with our proposed approach to assessing whether a provider is making ''reasonable efforts'' to develop a call authentication protocol in the context of determining whether to limit or terminate an extension of compliance granted under section 4(b)(5)(B) for non-IP networks, we propose that a provider satisfies the ''reasonable measures'' requirement under section 4(b)(1)(B) if it is able to provide the Commission upon request documented proof that it is participating, either on its own or through a representative, as a member of a working group or consortium that is working to develop a non-IP solution, or actively testing such a solution.

41. Although some commenters have referred to out-of-band STIR as a framework that could potentially allow non-IP voice service providers to participate in STIR/SHAKEN, our preliminary view is that out-of-band STIR is still in its infancy and is not sufficiently widespread or readily available to be implemented. Indeed, the TRACED Act itself acknowledges that no viable non-IP solution currently exists insofar as it directs us to grant an extension for voice service providers that ''materially rel[y] on a non-[I]nternet [P]rotocol network . . . until a call authentication protocol has been developed for calls delivered over non-[I]nternet [P]rotocol networks and is reasonably available.'' Given this, we believe the best approach is to continue to promote the transition to IP while simultaneously encouraging voice service providers to develop a non-IP solution that may benefit those legacy networks that are not yet in transition

42. We seek comment on this approach. Is our proposed approach an appropriate interpretation of the TRACED Act's ''reasonable measures'' requirement? Should we implement a different standard? If we adopt the standard we propose, do commenters agree with our proposals on how to evaluate whether a company is ''actively working'' toward developing an authentication framework? Should the standard be the same for all voice service providers, or should this standard vary according to the size or resources of a voice service provider? If commenters believe this standard should be variable, how should it vary across different types or classes of voice service providers? How should voice service providers be separated out under such a variable standard—according to size, resources, cost, or some other metric? How should the obligations of this requirement vary between the different classes of voice service providers?

43. We also seek comment on our preliminary view that out-of-band STIR is not yet sufficiently developed or widespread to form the basis of a specific implementation requirement at present. Do commenters anticipate that it will be technologically possible for voice service providers to have the capability to implement this framework on a widespread basis by June 30, 2021? Are there reasons we should or should not encourage its development and, in turn, implementation?

44. We encourage voice service providers to transition their networks to IP, and one of the many benefits of the IP transition is the ability to implement STIR/SHAKEN. We wish to ensure that the framework we develop in this proceeding is consistent with our efforts in other proceedings to promote the transition to IP. We believe that our proposed approach balances encouraging the transition to IP with Congress's goal of promoting an effective caller ID authentication solution for non-IP networks. Do commenters agree with this assessment? Does our proposed approach appropriately account for the technological limits of legacy networks and the challenges of upgrading those networks while simultaneously encouraging the transition to IP? Is there an alternative approach or additional steps we should take to better promote the IP transition in this case? If so, what alternative approach or steps should we take?

45. We further propose to revisit our approach to the TRACED Act's ''reasonable measures'' requirement for non-IP networks and the extension for non-IP networks if industry fails to make sufficient progress in overcoming this barrier to the ubiquitous implementation of caller ID authentication through either transitioning to IP or implementing a non-IP authentication solution. We seek comment on this proposal. At what point should we reconsider this issue? If the Commission finds, at a later date, that insufficient progress in developing a non-IP solution has been made, should we impose a more stringent requirement as to the steps that voice service providers must take to develop and implement such a solution? What kinds of stricter requirements should we impose? Should we require voice service providers to either deploy a non-IP solution or upgrade their network technology to participate in STIR/SHAKEN?

F. Voluntary STIR/SHAKEN Implementation Exemption

46. Although the TRACED Act directs us to require each voice service provider to implement STIR/SHAKEN in its IP

network, section 4(b)(2) of the TRACED Act frees a voice service provider from this requirement if we determine, by December 30, 2020, that ''such provider of voice service'': (A) ''in [I]nternet [P]rotocol networks''—(i) ''has adopted the STIR/SHAKEN authentication framework for calls on the [I]nternet [P]rotocol networks of the provider of voice service; (ii) has agreed voluntarily to participate with other providers of voice service in the STIR/SHAKEN authentication framework; (iii) has begun to implement the STIR/SHAKEN authentication framework; and (iv) will be capable of fully implementing the STIR/SHAKEN authentication framework'' not later than June 30, 2021; and (B) ''in non-[I]nternet [P]rotocol networks''—(i) ''has taken reasonable measures to implement an effective call authentication framework; and (ii) will be capable of fully implementing an effective call authentication framework'' not later than June 30, 2021. We seek comment on the substantive standards and appropriate processes by which to implement this forward-looking exemption.

47. *Relationship of IP Network and Non-IP Networks Provisions.* We propose to read section 4(b)(2) of the TRACED Act as creating two exemptions: One for IP calls and one for non-IP calls. Thus, in our proposal, a provider may seek the exemption for its ''IP networks'' if it meets all four criteria for all calls it originates or terminates in SIP, and a provider may seek the exemption for its ''non-IP networks'' if it meets both of the criteria for all non-SIP calls it originates or terminates. We seek comment on this proposal and any alternative approaches.

48. We believe that our proposal best implements Congress' policy and is consistent with principles of statutory construction when considering the statute as a whole. First, we believe our reading better limits the portion of the exemption that is at risk of being a nullity. Given the presence of the word ''and'' between the IP and non-IP networks criteria, we recognize that the exemption could potentially be read as applying only if the provider meets both the IP and non-IP networks criteria. Yet, practically speaking, such a reading would render the exemption an empty set or nearly so. As we have discussed, we believe that non-IP caller ID authentication solutions are not likely to be ready for widespread deployment in the near future. We therefore anticipate that few, if any, voice service providers will be able to claim that they will be capable of ''fully implementing'' an effective non-IP caller ID authentication framework by June 30, 2021. If we require any party seeking the exemption to attest to this requirement, we risk rendering the exemption in its entirety a near-nullity. We believe our proposed reading cabins the nullity risk more narrowly, thus better effectuating Congress's goal of creating a meaningful exemption. We seek comment on this interpretation, and again invite comment on the likely state of development of non-IP caller ID authentication solutions in the next year and a half. Must ''and'' be read as creating only one exemption, or are we correct in assuming that such a reading would essentially nullify the exemption, thus reading it out of the statute and negating Congress's intent?

49. Second, we believe our proposal encourages prompt deployment of STIR/SHAKEN. The statutory exemption rewards early progress in deployment. Therefore, by giving providers a path to exemption solely for their IP networks, we anticipate that we would encourage faster progress in STIR/SHAKEN deployment. We seek comment on this view.

50. Third, our proposal here would align our interpretation of the exemption with our proposal to read requirements in the TRACED Act applying to voice service providers as applying on a call-by-call basis. Because networks are often mixed and capable of transmitting both in IP and non-IP, we preliminarily believe that reading the word ''networks'' in the statute to refer to the transmission technology of a particular call is the best interpretation of the statute. We thus preliminarily believe we could distinguish the duty that applies to ''such provider of voice service in [I]nternet [P]rotocol networks'' and ''such provider of voice service in non-[I]nternet [P]rotocol networks'' on the basis of the call in question. We seek comment on this proposal and of our proposed reading of section 4(b)(2) as creating two distinct exemptions.

51. *Threshold for IP Networks Exemption.* To ensure that the exemption only applies where warranted and to provide parties with adequate guidance, we propose expanding on each of the four substantive prongs that a voice service provider must meet to obtain an exemption. With respect to prong (A)(i), we propose interpreting the phrase ''has adopted the STIR/SHAKEN authentication framework for calls on the [I]nternet [P]rotocol networks of the provider of voice service'' to mean that the voice service provider has publicly committed, via a certification, to complete implementation of STIR/SHAKEN by June 30, 2021. Because the exemption in section 4(b)(2)(A) requires a voice service provider to have ''adopted'' STIR/SHAKEN for calls on the IP portions of their networks prior to obtaining an exemption, but does not require full implementation of STIR/SHAKEN until not later than June 30, 2021, we believe that the best approach is to interpret section 4(b)(2)(A) as requiring a provider, prior to obtaining an exemption, to make a public commitment to completely implement STIR/SHAKEN by June 30, 2021. We seek comment on this proposed interpretation. What are the potential benefits and drawbacks to this approach? Does our proposed interpretation align with the language and intended purpose of the statute? Are there any plausible alternative interpretations of this subsection of the TRACED Act that would account for both the stated requirement that a voice service provider ''has adopted'' STIR/SHAKEN for calls on the IP portions of its network prior to receiving an exemption, with the later ''capable of fully implementing'' date? For example, should we consider prong (A)(i) to be satisfied to the extent a provider has undertaken network preparations necessary to operationalize the STIR/SHAKEN protocols on its network, including, but not limited to, by participating in test beds and lab testing or completing the commensurate network adjustments to enable the authentication and validation of calls on its network consistent with the STIR/SHAKEN framework?

52. We propose reading the phrase ''has agreed voluntarily to participate with other providers of voice service in the STIR/SHAKEN authentication framework'' in prong (A)(ii) to mean that the voice service provider has written, signed agreements with at least two other voice service providers to exchange calls with authenticated caller ID information. We seek comment on this approach. What are the potential benefits and drawbacks attendant in this interpretation? Does our proposed interpretation align with the language and intended purpose of the statute? Should we mandate that a voice service provider seeking to qualify for the exemption have agreements with more than two other voice service providers? If so, how many agreements should we require before a voice service provider may qualify for the exemption under section 4(b)(2)(A)? Should the ''other providers of voice service'' be unaffiliated with the provider seeking the exemption? Should voice service providers be required to establish such

agreements only with those voice service providers with which they interconnect directly? Must these agreements include specific terms? Should we go further and require voice service providers to have reached agreements with all others with which they directly interconnect? We preliminarily are disinclined to adopt such a stringent requirement because, pursuant to the statute, voice service providers will have time between December 30, 2020, and June 30, 2021, to complete full implementation. Are there consortia or industry groups that would allow voice service providers to reach agreements with numerous other voice service providers at once and, if so, should meeting prong (A)(ii) require participation in such an entity? Should we impose specific recordkeeping requirements so that we can verify that such agreements are in place? Should voice service providers be required to provide proof of such agreements directly to the Commission upon request? Are there any plausible alternatives to our proposed interpretation of prong (A)(ii)? For example, should we consider prong (A)(ii) to be satisfied if a service provider has registered with and been approved by the Policy Administrator? Why or why not?

53. We propose interpreting the phrase ''has begun to implement the STIR/SHAKEN authentication framework'' in prong (A)(iii) to mean that the voice service provider has completed the necessary network upgrades to at least one network element (*e.g.,* a single switch or session border controller) to enable the authentication and verification of caller ID information consistent with the STIR/SHAKEN standards. This proposal would require a voice service provider to make meaningful progress on implementation by the time of certification, while taking into account that voice service providers will have limited time between adoption of a Report and Order and the December 30, 2020 deadline for exemption determinations. We seek comment on this proposed interpretation and on potential alternatives. Is this proposed standard too lenient and, if so, what standard should we adopt? We recognize that the standard we propose may be more challenging for smaller voice service providers than larger voice service providers. Should we vary our expectations by voice service provider size and, if so, how? Alternatively, should we consider prong (A)(iii) to be satisfied if a provider has established the capability to authenticate originated traffic and/or validate such traffic terminating on its network?

54. Lastly, we propose interpreting the phrase ''will be capable of fully implementing the STIR/SHAKEN authentication framework'' in prong (A)(iv) to mean that the voice service provider reasonably foresees that it will have completed all necessary network upgrades to its network infrastructure to be able to authenticate and verify caller ID information for all SIP calls exchanged with STIR/SHAKEN-enabled partners, by June 30, 2021. We seek comment on this proposed interpretation. Are there any plausible alternatives to our proposed interpretation of this prong of the section 4(b)(2)(A) exemption? For example, should we interpret this prong to require only that a provider reasonably foresees that it will have the capability to fully implement STIR/SHAKEN by June 30, 2021? How would such a reading align with Congress's goal of broad STIR/SHAKEN deployment? Would a standard other than reasonable foreseeability be appropriate and, if so, how can we account for the statute's requirement that voice service providers must make a prediction about the future? Alternatively, should we consider prong (A)(iv) to be satisfied if a provider certifies only that its consumer VoIP and Voice over LTE networks are capable of authentication and verification, or will be so capable by June 30, 2021? What would be the benefits and drawbacks of such a narrower requirement, and one that does not require exchange of authenticated traffic? We encourage commenters to support any alternative interpretation of the implementation requirements in section 4(b)(2)(A) with reference not only to the statutory language of each provision, but specific technological and marketplace realities of how voice service providers can expect to foreseeably meet the qualifications that Congress has established.

55. *Threshold for Non-IP Networks Exemption.* A voice service provider is excused from the requirement to take reasonable measures to implement an effective caller ID authentication framework in the non-IP portions of its network if we find that it has: (1) Taken reasonable measures to implement an effective caller ID authentication framework in the non-IP portions of its network; and (2) will be capable of fully implementing an effective caller ID authentication framework in the non-IP portions of its network not later than June 30, 2021. As we have stated, we anticipate that in the non-IP context, few if any voice service providers will seek to take advantage of this exemption because of the difficulties in ''fully implementing'' an effective caller ID authentication framework. We seek comment on this view and whether there is an acceptable interpretation of the ''fully implementing'' prong that would make it more achievable for voice service providers to qualify for the exemption. What constitutes an ''effective'' call authentication framework? Must such a framework be comparable to STIR/SHAKEN? We also seek comment on how to interpret ''reasonable measures'' under prong (B)(i). How do ''reasonable measures'' under this prong differ from the ''reasonable measures'' required under section 4(b)(1)(B)?

56. *Compliance Certifications.* We propose to implement the TRACED Act exemption provision using a certification process. Specifically, we propose requiring a voice service provider that wishes to receive an exemption to submit a certification that it meets the criteria for the IP networks exemption that we propose to establish pursuant section 4(b)(2)(A); the criteria for the non-IP networks exemption that we propose to establish pursuant section 4(b)(2)(B); or both. Under this proposal, each voice service provider who wishes to qualify for the section 4(b)(2)(A) and/or (B) exemption must have an officer, as an agent of the voice service provider, sign a compliance certificate stating that the officer has personal knowledge that the company meets each of the stated criteria. We also propose requiring the voice service provider to submit an accompanying statement explaining, in detail, how the company is working to accomplish the four prongs of the exemption. We believe a certification process is necessary to allow us to meet Congress's deadline for completion of exemption determinations by December 30, 2020.

57. We propose requiring these certifications to be filed no later than December 1, 2020. We propose requiring all certifications and supporting statements to be filed electronically in a new docket established specifically for such filings in the Commission's Electronic Comment Filing System (ECFS). We propose directing the Bureau to provide additional directions and filing information regarding the certifications in the Public Notice announcing OMB approval. And we propose directing the Bureau to review the certifications and accompanying documents for completeness and to determine whether the certifying party has met the standard we establish. We further propose directing the Bureau to

issue a list of parties that have filed compliant certifications and thus receive the exemption(s) on or before December 30, 2020. Because of the limited time for review of certifications, we propose that any voice service providers that file inadequate certifications will not receive an opportunity to cure and will, instead, be subject to the general duty we establish in the Report and Order to implement STIR/SHAKEN by June 30, 2021. We preliminarily view this consequence as reasonable and appropriate because the purpose of the certification is merely to determine which voice service providers would, in the absence of the STIR/SHAKEN obligation, nonetheless be able to implement STIR/SHAKEN in a timely manner.

58. We seek comment on this proposed certification process. Are there ways that we can streamline the process without sacrificing certainty that an exemption is warranted? For instance, should we allow a less senior company official to sign the certification and, if so, who should be allowed to sign? Should we impose any additional requirements? Is there an additional or different way for voice service providers to demonstrate that they have met the implementation requirements in section 4(b)(2)(A) and/or (B) of the TRACED Act that would allow us to reach the determinations required by the statute by December 30, 2020? If so, how should we structure and implement any such process? Should we treat any of the information that voice service providers submit in their accompanying statement as presumptively confidential?

59. *Retrospective Review.* The section 4(b)(2)(A) and (B) exemptions are, by their nature, based on a voice service provider's prediction of its future ability to implement STIR/SHAKEN by June 30, 2021. We preliminarily believe that Congress intended for us to verify, after the fact, that voice service providers claiming the exemption completed full implementation in accordance with their commitments. We believe that such a review is consistent with the TRACED Act both because the broad structure of section 4 aims toward full implementation of caller ID authentication and because section 4(b)(2)(A)(iv) and (B)(ii) each state that a voice service provider may receive the exemption only if it ''will'' be capable of ''fully'' implementing a call authentication framework (STIR/SHAKEN or ''an effective call authentication framework,'' respectively). We seek comment on this view. We are concerned that, absent a look back at whether voice service providers that receive the exemption later fulfill their expectations, voice service providers may receive the exemption but later not implement STIR/SHAKEN or a non-IP call authentication framework completely in a timely manner. This would harm the public because it would create pockets of unauthenticated calls and give the voice service providers that claimed the exemption but fall short a significant loophole—a circumstance that would invite bad actors to claim the exemption without any intent of completing the obligation. We seek comment on this view and whether there are alternatives to looking back at voice service providers claiming the exemption after the compliance deadline that would address the risk of gaps and abusive claims of the exemption.

60. We specifically propose requiring a voice service provider that receives an exemption to file a second certification after June 30, 2021, stating whether it in fact achieved the implementation goal to which it committed. We propose requiring the certification to be filed in ECFS subject to the same allowance for confidentiality and requirements for sworn signatures and detailed support as the initial certifications. We propose directing the Bureau to issue a Public Notice setting a specific deadline no later than three months after June 30, 2021 and providing detailed filing requirements. We propose directing the Bureau to seek public comment on each certification and, following review of the certifications, supporting materials, and responsive comments, to issue a Public Notice identifying which voice service providers remain subject to the exemption. We seek comment on these proposals and on possible alternatives.

61. If a voice service provider cannot certify to full implementation upon retrospective review but demonstrates to the Bureau that it filed its initial certification in good faith and made good faith efforts to complete implementation, we propose that the consequence for such a shortcoming would be loss of the exemption and application of the general rule requiring full STIR/SHAKEN implementation, effective immediately. We believe an immediate effective date would be important to ensure that certain voice service providers do not receive an extension not granted to similarly situated providers simply because they filed a certification they later failed to meet. If the Bureau finds that a voice service provider filed its initial certification in bad faith or failed to take good faith steps toward implementation, we propose to require full implementation immediately and further to direct the Bureau to refer the voice service provider to the Enforcement Bureau for possible enforcement action based on filing a false certification and/or other possible violations. We believe we have legal authority to adopt the foregoing proposals under the TRACED Act, and that we have independent authority to do so under section 251(e). We seek comment on these proposals and on other possible alternatives.

62. *Providers Eligible for Exemption.* We preliminarily do not interpret the TRACED Act's exemption process to include intermediate providers, because its definition of ''voice service'' refers to ''furnish[ing] voice communications to an end user.'' We seek comment on whether and how we should extend the exemption process to intermediate providers, in addition to originating and terminating voice service providers. What would be the benefits and drawbacks of such an approach?

G. Prohibiting Line Item Charges for Caller ID Authentication

63. The TRACED Act explicitly directs us to ''prohibit providers of voice service from adding any additional line item charges to consumer or small business customer subscribers for the effective call authentication technology'' mandated by that Act. Accordingly, we propose prohibiting voice service providers from imposing additional line item charges on consumer or small business subscribers for caller ID authentication. We believe this proposal is a straightforward implementation of Congress's clear direction. We propose to interpret ''consumer'' as used in the TRACED Act to refer to residential mass-market subscribers, and we propose to interpret ''small business'' to refer to business entities that meet the Small Business Administration (SBA) definition of ''small business.'' We note that the record developed in response to the *2019 Robocall Declaratory Ruling and Further Notice* reflects support for such a prohibition. We seek comment on our proposal and proposed interpretation of this section of the TRACED Act. Should we adopt different definitions? For instance, should we define ''small business'' with respect to line count, and if so, what line count limitation is appropriate? We recognize that a line count-based definition would be easier for providers to administer, but would it leave out small businesses that Congress intended to protect from line item charges?

64. To provide additional clarity regarding the prohibition on line item charges, we specifically propose to

prohibit voice service providers from imposing a line-item charge on consumers or small businesses for the cost of upgrading network elements as necessary to implement STIR/SHAKEN, for any recurring costs associated with the authentication and verification of calls, or for any display of STIR/SHAKEN verification information on their subscribers' phones. ITTA argues that ''SHAKEN/STIR implementation costs should be fully recoverable via . . . any line item that recovers government-mandated charges . . . .'' We disagree and propose to reject this suggestion with respect to consumer and small business subscribers, on the basis that Congress directly addressed this issue in the TRACED Act. We seek comment on whether we should extend our prohibition to other types of subscribers. We additionally seek comment on our proposal and whether it has the correct scope. Are there other caller ID authentication-related costs or services we should specifically address in our prohibition? Should we list all categories of prohibited charges, or should our list merely provide examples of the types of charges barred by the general prohibition on line-item charges? Should we address whether voice service providers may recover caller ID authentication costs from consumers and small businesses through rate increases, and if so how and on what legal basis?

H. Call Labeling

65. We seek comment on whether and how to address any risks of consumer confusion or competitive issues stemming from call labeling. Some commenters have expressed concern that terminating voice service providers that have implemented STIR/SHAKEN caller ID authentication may display caller ID authentication information on their subscribers' phones in a manner detrimental to callers whose originating voice service provider has not yet implemented STIR/SHAKEN or is unable to provide the caller with ''full'' or ''A'' level attestation. These commenters assert that displaying when caller ID information has been successfully verified on a subscriber's device may lead subscribers to believe that calls which lack such a display are illegal calls, and that such a result is especially problematic before widespread implementation of STIR/SHAKEN. These commenters similarly identify the lack of a standard approach to displaying caller ID verification results—including whether to treat all attestation levels similarly or provide special treatment for ''A'' level attestation—as creating the potential for discriminatory or anticompetitive labeling. Commenters also express concern about mislabeling. While we decline in the accompanying Report and Order to mandate at this time any specifications that voice service providers must use if they choose to display STIR/SHAKEN verification results, we now seek comment on whether and how to address these concerns related to call labeling. What authority do we possess to regulate call labeling? Would section 10 of the TRACED Act, which establishes redress mechanisms for blocking, provide us authority as one commenter suggests? One group of commenters suggests we should require a voice service provider to provide notice to the caller when it places a ''derogatory'' label on the caller's number; require that a voice service provider offer an effective and prompt redress mechanism for callers whose calls have been mislabeled by the provider; obligate a voice service provider to share information about mislabeled numbers with other providers; and require voice service providers to track and report to us how many lawful calls they are mistakenly mislabeling. Should we adopt any or all of these suggestions? What constitutes a derogatory label? Do commenters have alternative proposals? Further, is existing antitrust law sufficient to address any competitive issues, and if not why?

I. Benefits and Costs

66. The proposals in this Further Notice generally reflect mandates from the TRACED Act, and we have no discretion to ignore such congressional direction. To the extent that we are seeking comment on multiple possible options to implement any given mandate, we urge commenters, where possible, to include an assessment of relative costs and benefits for competing options. We found in the accompanying Report and Order that widespread deployment of STIR/SHAKEN will increase the effectiveness of the framework for both voice service providers and their subscribers. Among the considerable and varied benefits identified in the Report and Order are the reduction in nuisance calls, protection from illegally spoofed calls, and restoration of confidence in incoming calls. The proposals in this Further Notice are intended to, consistent with the TRACED Act, encourage further deployment of this technology and thus expand these benefits. We thus propose to reaffirm our finding of considerable benefit to widespread caller ID authentication implementation, and we propose to conclude that implementation of the TRACED Act provisions and other proposals discussed above will make considerable progress in unlocking those benefits, and that those benefits far exceed the costs. We seek comment on this proposal. We further seek detailed comments on the costs of the proposals in this Further Notice. What are the upfront and recurring costs associated with each? Will these costs vary according to the size of the voice service provider? What costs would specifically burden intermediate providers? We preliminarily believe that intermediate providers would be faced with similar upfront costs as originating and terminating voice service providers, but will not have the recurring costs related to STIR/SHAKEN authentication and verification service. Is this view accurate? Do the benefits of our proposals outweigh the costs in each case?

J. Access to Numbering Resources

67. Section 6(a) of the TRACED Act directs us to examine whether and how our policies regarding access to both toll free and non-toll free numbering resources can be modified to help reduce access to numbers by potential perpetrators of illegal robocalls, and it directs us to prescribe regulations to implement any such policy modifications. In addition, section 6(b) provides a forfeiture penalty, pursuant to section 503(b) of the Act, for a knowing violation of any regulation we prescribe pursuant to section 6(a). Our obligation to examine and implement policy modifications does not extend to the forfeiture provision of section 6(b). In light of this distinction, as well as the forfeiture procedures that the Commission already has in place, *see* 47 CFR 1.80, we do not consider it necessary to seek comment on how section 6(b) of the TRACED Act would be implemented.

68. *Background.* Currently, voice service providers that are telecommunications carriers access non-toll free numbers through the NANP Administrator (NANPA) and the Pooling Administrator (collectively, the ''Numbering Administrators''). Applicants for numbering resources must comply with Commission rules and with guidelines from the Alliance for Telecommunications Industry Solutions (ATIS) Industry Numbering Committee (INC) and the Numbering Administrators. We require the Numbering Administrators to follow ATIS INC guidelines, which, in turn, provides additional requirements for voice service providers accessing numbering resources. *See* 47 CFR

52.13(b)(3). These rules and guidelines require such voice service providers to provide contact information, provide Operating Company Number information, disclose the primary type of business for which the numbers will be used, file a NANP Numbering Resource Utilization/Forecast (NRUF) Report with the NANPA, and disclose the states for which they will request numbering resources. Applicants for initial numbering resources must also include evidence that the applicant is capable of providing service within 60 days of the numbering resources activation date (facilities readiness requirement). Voice service providers must also maintain internal records of numbering resources for reporting purposes.

69. While traditionally only telecommunications carriers were permitted to request and receive numbers from the Numbering Administrators, in 2015 the Commission adopted rules establishing a process for interconnected VoIP providers to request numbers directly from the Numbering Administrators. Direct access to telephone numbers by interconnected VoIP providers is restricted to only those interconnected VoIP providers that can demonstrate that they are authorized to provide service by a state-level certification in a given area for which they are requesting numbers or by a Commission-level authorization. To apply for Commission authorization for direct access to numbers, applicants for direct access authorization must submit applications through the Commission's Electronic Comment Filing System, interconnected VoIP providers must provide contact information; agree to comply with Commission rules, numbering authority delegated to the states, and industry guidelines and practices regarding numbering as applicable to telecommunications carriers; provide 30-day notice to relevant state commission(s) before requesting numbering resources from Numbering Administrators; provide proof of facilities readiness; and certify that the applicant possesses the requisite expertise to provide reliable service, that key personnel are not being nor have been investigated for failure to comply with any law, rule, or order, that the applicant complies with its Universal Service Fund (USF), Telecommunications Relay Services, NANP and local number portability administration contribution obligations, its regulatory fee obligations, and its 911 obligations, and that no party to the application is subject to denial of Federal benefits pursuant to section 5301 of the Anti-Drug Abuse Act. All voice service providers, including interconnected VoIP providers, must comply with a number of obligations in order to maintain their authorization to access numbers, including USF reporting and contributions, 911 service obligations, and maintaining sufficient and auditable data to demonstrate compliance with applicable guidelines, among other obligations in the Commission's rules and industry guidelines.

70. A Responsible Organization (RespOrg) obtains toll free numbers, on a toll free subscriber's behalf, by reserving and assigning a number from the SMS/800 Toll Free Number Registry (TFN Registry). The Commission-designated Toll Free Numbering Administrator (TFNA) manages the TFN Registry and certifies RespOrgs. To access the TFN Registry, RespOrgs must complete a Service Establishment Application; obtain a logon identification code from the TFNA requiring the disclosure of information including general contact information, type of access sought, and the interexchange carrier providing the connection; demonstrate that one or more employees possess adequate TFN Registry training; and pass a TFN Registry certification test. RespOrgs must also follow the *ATIS Toll Free Guidelines,* adhere to agreements established through the ATIS industry forum process, and acknowledge that the RespOrg is bound by the terms and conditions contained in TFN Registry Functions Tariff. RespOrgs have sole responsibility for the accuracy of subscriber records and information in the TFN Registry. Toll free numbers must be available to RespOrgs and subscribers on an equitable basis, and typically are assigned first-come, first-served. The Commission may use competitive bidding and/or other alternative assignment methodologies for toll free numbers. In 2019, the TFNA held an auction of toll-free numbers in the 833 code for which there were two or more requests for assignment. Individual bidders and RespOrgs bid on specific numbers through a competitive bidding process and, unlike other toll free numbers, are able to sell those numbers won at auction in a secondary market.

71. *Discussion.* We seek comment on whether and how we should modify our policies regarding access to toll free and non-toll free numbering resources to help reduce illegal robocallers' access to numbering resources. Specifically, we seek comment on whether any new or modified registration and compliance obligations would be appropriate to help reduce illegal robocallers' access to numbering resources. We ask commenters to identify specific modifications to our rules and Numbering Administrator policies. For example, should we require applicants for numbering resources to provide a certification that they ''know their customers'' through some sort of customer identity verification, perhaps explaining the steps that they take to do so? Should we require voice service providers to provide information about their customers to the Numbering Administrators? Should we modify our NRUF reporting requirements concerning carriers that assign numbering resources to intermediate providers, and if so, in what way? Should we impose U.S. residency requirements for access to U.S. telephone numbers? Would imposing U.S. residency requirements reduce the likelihood of bad actors generating large-scale robocall campaigns beyond the reach of U.S. law enforcement? Further, would U.S. residency requirements increase accuracy and efficiency regarding attestation levels under the STIR/SHAKEN protocols? If we did impose U.S. residency requirements, would it reduce the number of voice service providers in the international voice market, thus reducing downward competitive pressure on international voice calling rates? Would imposing residency requirements harm domestic voice communications? Should we require minimal state contacts to obtain numbering resources in a particular state? Should we delegate enforcement of any modifications to our policies to the states, at least in the first instance? We invite parties to comment on these or other potential policy modifications that might limit illegal robocalling.

72. We seek comment on the potential costs that would be imposed by any changes that commenters recommend to our policies regarding access to numbering resources. What costs do specific changes impose on entities that use numbers, Numbering Administrators, and consumers? Would any modifications to our policies unreasonably increase the difficulty for consumers and businesses (and their voice service providers) that are not perpetrators of illegal robocalling to obtain U.S. telephone numbers? We seek specific comment on the burdens of imposing potential certification requirements on applicants for numbering resources, particularly on small businesses. Additionally, we seek comment on how we can ensure that

any ''know your customer'' requirements do not harm consumer privacy.

73. We also seek comment on the effects that any proposed modifications to our policies for access to numbering resourcing could have on competition and innovation in the voice marketplace. Could any market-distorting differential effects on voice service providers result? We seek comment on whether any suggested modifications could provide an unreasonable advantage to one type of technology or business model over another. For example, would modifications such as ''in-person presentation of documents or identity verification tend to favor non-internet-based companies or those with physical lines over those who do business via the internet or use newer technologies?'' How could we minimize any negative ramifications for competition in the voice services market?

74. We recognize that any potential modifications to our rules and policies may need to be uniquely tailored to particular industry segments in order to reduce access to numbers by bad actors while avoiding undesirable consequences. How could modifications be tailored to providers of toll free service, voice service providers that are telecommunications carriers, and interconnected VoIP providers in order to effectively prevent bad actors from accessing numbering resources while avoiding undesirable consequences? For example, would adding a ''know your customer'' certification to the application for numbering resources work better for one industry than another (such as, for example, non-toll-free versus toll-free service)? Should we require that subscriber information be included in the TFN Registry, as opposed to RespOrg information alone? Should rules for any future Commission auctions of toll-free numbers also include these requirements? Further, are there specific policy modifications that we can adopt in the voice services wholesale market that will achieve the Commission's goal to reduce access to numbers by potential perpetrators of illegal robocalls?

II. Procedural Matters

75. *Paperwork Reduction Act.* This document contains proposed new or modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, will invite the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

76. *Ex Parte Rules.* This proceeding shall be treated as a ''permit-but-disclose'' proceeding in accordance with the Commission's *ex parte* rules. Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.,* .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

77. *Initial Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Further Notice of Proposed Rulemaking* (*Further Notice*). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the *Further Notice.* The Commission will send a copy of the *Further Notice,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).

A. Need for, and Objectives of, the Proposed Rules

78. The *Further Notice* continues the Commission's efforts to combat illegal spoofed robocalls. Specifically, the *Further Notice* proposes to require intermediate providers to pass unaltered any STIR/SHAKEN Identity header they receive to the subsequent provider in the call path., and authenticate caller ID information for all SIP calls it receives for which the caller ID information has not been authenticated and which it will exchange with another provider as a SIP call. The *Further Notice* also proposes implementing provisions of section 4 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act as follows: Prohibiting providers from imposing additional line item charges on consumer and small business subscribers for caller ID authentication technology; granting an exemption from our implementation mandate for providers which have certified that they have reached certain implementation goals; granting an extension in compliance with our implementation mandate for small providers; and requiring providers to take ''reasonable measures'' to implement an effective caller ID authentication framework in their non-IP networks by either upgrading non-IP networks to IP or by actively working to develop a non-IP authentication solution. The *Further Notice* seeks comment on all of these proposals, and on how we should implement section 6(a) of the TRACED Act. The proposals in the *Further Notice* will help promote effective caller ID authentication and fulfill our obligations under the TRACED Act.

B. Legal Basis

79. The *Further Notice* proposes to find authority for these proposed rules under section 251(e) of the Communications Act of 1934, as amended (the Act), and section 4 of the TRACED Act. Section 251(e) gives us exclusive jurisdiction over numbering policy and the TRACED Act directs us to make rules to ensure the implementation of caller ID authentication frameworks by all voice

service providers. We propose that section 251(e) grants us the authority to require intermediate providers to pass STIR/SHAKEN information unaltered because such an action would prevent the fraudulent abuse of North American Numbering Plan resources by callers making calls which transit intermediate providers' networks. We propose that the TRACED Act authorizes the remaining proposed rules because they implement the TRACED Act's language. We solicit comment on these proposals, and whether section 227(e) of the Act, as amended by the Truth in Caller ID Act, or the TRACED Act, would provide additional authority for our proposal to extend our mandate to intermediate providers.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

80. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the Notice seeks comment, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small-business concern'' under the Small Business Act. A ''small-business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

1. Wireline Carriers

81. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as ''establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.'' The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

82. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year. Of that total, 3,083 operated with fewer than 1,000 employees. Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

83. *Incumbent LECs.* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500 or fewer employees. Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

84. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers and under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees. Also, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

85. We have included small incumbent LECs in this present RFA analysis. As noted above, a ''small business'' under the RFA is one that, *inter alia,* meets the pertinent small-business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees) and ''is not dominant in its field of operation.'' The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not ''national'' in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

86. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.

Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

87. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is ''a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.'' As of 2018, there were approximately 50,504,624 cable video subscribers in the United States. Accordingly, an operator serving fewer than 505,046 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. Therefore we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

2. Wireless Carriers

88. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed of 1,000 employees or more. Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

89. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions. The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services. Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

90. *Satellite Telecommunications.* This category comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of $35 million or less in average annual receipts, under SBA rules. For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year. Of this total, 299 firms had annual receipts of less than $25 million. Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

3. Resellers

91. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICs code category for local resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data from 2012 show that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services. Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees. Consequently, the Commission estimates that the majority of local resellers are small entities.

92. *Toll Resellers.* The Commission has not developed a definition for Toll Resellers. The closest NAICS Code Category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. MVNOs are included in this industry. The SBA has developed a small business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. 2012 Census Bureau data show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

93. *Prepaid Calling Card Providers.* Neither the Commission nor the SBA has developed a small business definition specifically for prepaid calling card providers. The most appropriate NAICS code-based category for defining prepaid calling card providers is Telecommunications Resellers. This industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.

Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual networks operators (MVNOs) are included in this industry. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 show that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to Commission data, 193 carriers have reported that they are engaged in the provision of prepaid calling cards. All 193 carriers have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of prepaid calling card providers are small entities that may be affected by these rules.

4. Other Entities

94. *All Other Telecommunications.* The ''All Other Telecommunications'' category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing internet services or voice over internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small business size standard for ''All Other Telecommunications'', which consists of all such firms with annual receipts of $35 million or less. For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 15 firms had annual receipts of $25 million to $49,999,999. Thus, the Commission estimates that the majority of ''All Other Telecommunications'' firms potentially affected by our action can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

95. The *Further Notice* seeks comment on a proposed requirement that, in order to receive a voluntary exemption from our implementation mandate, a provider must file a certification reflecting that it is in a reasonably foreseeable position to meet certain implementation goals; and that, in order to maintain that exemption, a provider must make a later filing reflecting its achievement of those goals it stated it was in a reasonably foreseeable position to meet. If the Commission were to move forward with this proposal, providers would have new reporting, recordkeeping, and other compliance requirements with regard to these certifications. Specifically, we propose that each voice service provider that wishes to qualify for the exemption must have an officer, as an agent of the voice service provider, sign a compliance certificate stating that the officer has personal knowledge that the company meets each of the stated criteria. We also propose requiring the voice service provider to submit an accompanying statement explaining, in detail, how the company is working to accomplish the four prongs of the exemption. We also propose requiring these certifications to be filed no later than December 1, 2020. Finally, we propose requiring all certifications and supporting statements to be filed electronically in a new docket established specifically for such filings in the Commission's Electronic Comment Filing System (ECFS). We seek comment on these proposed requirements.

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

96. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.

97. We seek comment on our proposal in the *Further Notice* to extend the STIR/SHAKEN implementation deadline for small voice service providers to June 30, 2022 and on other ways our proposed rules would impact such voice service providers; and on proposals to lessen that impact. We expect to take into account the economic impact on small entities, as identified in comments filed in response to the *Further Notice* and this IRFA, in reaching our final conclusions and promulgating rules in this proceeding.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

98. None.

III. Ordering Clauses

99. *It is ordered*, pursuant to sections 4(i), 4(j), 227(e), 227b, 227b–1, 251(e), and 303(r), of the Act, 47 U.S.C. 154(i), 154(j), 227(e), 227b, 227(b)–1, 251(e), and 303(r), that that this *Further Notice of Proposed Rulemaking is adopted*.

100. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order,* including the Final Regulatory Flexibility Analysis (FRFA), and *Further Notice of Proposed Rulemaking,* including the Initial Regulatory Flexibility Analysis (IRFA), to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 64

Carrier equipment, Communications common carriers, Reporting and recordkeeping requirements, Telecommunications, Telephone.

Federal Communications Commission.

Cecilia Sigmund,

Federal Register Liaison Officer, Office of the Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 64 as follows:

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

■ 1. The authority citation for part 64 is revised to read as follows:

Authority: 47 U.S.C. 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 403(b)(2)(B), (c), 616, 620, 1401–1473, unless otherwise noted; Pub. L. 115–141, Div. P, sec. 503, 132 Stat. 348, 1091.

■ 2. Amend § 64.6300 by redesignating paragraphs (b) through (g) as paragraphs (c) through (h) and adding new paragraph (b) to read as follows:

§ 64.6300 Definitions.

* * * * *

(b) *Caller identification authentication information.* The term ''caller identification authentication information'' refers to the information

transmitted along with a call that represents the originating voice service provider's attestation to the accuracy of the caller identification information.

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■ 3. Amend § 64.6301 by revising the introductory text of paragraph (a) and adding paragraphs (b) through (f) to read as follows:

§ 64.6301 Caller ID authentication.

(a) *STIR/SHAKEN implementation by voice service providers.* Except as provided in paragraphs (d) and (e) of this section, not later than June 30, 2021, a voice service provider shall fully implement the STIR/SHAKEN authentication framework in its internet Protocol networks. To fulfill this obligation, a voice service provider shall:

* * * * *

(b) *STIR/SHAKEN implementation by intermediate providers.* Not later than June 30, 2021, an intermediate provider shall fully implement the STIR/SHAKEN authentication framework in its internet Protocol networks. To fulfill this obligation, a voice service provider:

(1) Shall pass unaltered to subsequent providers in the call path any caller identification authentication information it receives with a SIP call; and

(2) Shall authenticate caller identification information for all SIP calls it receives for which the caller identification information has not been authenticated and which it will exchange with another provider as a SIP call.

(c) *Call authentication in non-IP networks.* Except as provided in paragraph (e) of this section, not later than June 30, 2021, a voice service provider shall either:

(1) Upgrade its entire network to allow for the initiation, maintenance, and termination of SIP calls and fully implement the STIR/SHAKEN framework as required in paragraph (a) of this section throughout its network; or

(2) Maintain and be ready to provide the Commission on request documented proof that it is participating, either on its own or through a representative, as a member of a working group or consortium that is working to develop a non-IP call authentication solution, or actively testing such a solution.

(d) *Extension of implementation deadline.* (1) Small providers are exempt from the requirements of paragraph (a) of this section until June 30, 2022.

(i) For purposes of this paragraph, ''small provider'' means a provider that has 100,000 or fewer voice service subscriber lines (counting the total of all business and residential fixed subscriber lines and mobile phones and aggregated over all of the provider's affiliates).

(ii) Reserved.

(2) The Wireline Competition Bureau may, upon a public finding of undue hardship, provide an extension for compliance with paragraph (a) of this section, for a reasonable period of time, for a voice service provider or class of voice service providers, or type of voice calls, as necessary for that voice service provider or class of voice service providers or type of calls to address identified burdens and barriers to implementation of caller ID authentication technology.

(3) The Wireline Competition Bureau shall annually review the scope of any extension and, after notice and an opportunity for comment, may extend it or terminate it and may expand or contract the scope of entities subject to the extension.

(4) During the period of extension, any provider subject to such extension shall implement an appropriate robocall mitigation program to prevent unlawful robocalls from originating on the network of the provider.

(e) *Exemption.* (1) A voice service provider may seek an exemption from the requirements of paragraph (a) of this section by, before December 1, 2020, certifying that for those portions of its network served by technology that allows for the transmission of SIP calls, it:

(i) Has adopted the STIR/SHAKEN authentication framework for calls on the internet Protocol networks of the voice service provider, by publicly committing to complete implementation of the STIR/SHAKEN authentication framework by June 30, 2021;

(ii) Has agreed voluntarily to participate with other voice service providers in the STIR/SHAKEN authentication framework, by having written, signed agreements with at least two other voice service provides to exchange SIP calls with authenticated caller ID information;

(iii) Has begun to implement the STIR/SHAKEN authentication framework, by completing the necessary network upgrades to at least one network element to enable the authentication and verification of caller ID information for SIP calls; and

(iv) Will be capable of fully implementing the STIR/SHAKEN authentication framework not later than June 30, 2021, because it reasonably foresees that it will have completed all necessary network upgrades to its network infrastructure to enable the authentication and verification of caller ID information and authenticate and verify all SIP calls exchanged with STIR/SHAKEN-enabled partners by June 30, 2021.

(2) A voice service provider may seek an exemption from the requirements of paragraph (c) of this section by, before December 1, 2020, certifying that for those portions of its network that do not allow for the transmission of SIP calls, it:

(i) Has taken reasonable measures to implement an effective call authentication framework; and

(ii) Will be capable of fully implementing an effective call authentication framework not later than June 30, 2021.

(3) All certifications shall be filed in ECFS in WC Docket No. 20–68, shall be signed by an officer in conformity with section 1.16 of the Commission's rules, and shall be accompanied by detailed support as to the assertions in the certification.

(4) The Wireline Competition Bureau shall determine whether to grant or deny timely requests for exemption on or before December 30, 2020.

(5) All voice service providers granted an exemption under paragraph (e)(1) of this section shall file an additional certification on or before a date specified by the Wireline Competition Bureau, and consistent with the requirements of paragraph (e)(3) of this section, attesting to whether the voice service provider fully implemented the STIR/SHAKEN authentication framework not later than June 30, 2021. The Wireline Competition Bureau, after notice and an opportunity for comment on the certifications, will determine whether to revoke the exemption for each certifying voice service provider based on whether it completed implementation.

(f) *Line-item charges.* Providers of voice service are prohibited from adding any additional line item charges to consumer customer subscribers or small business customer subscribers for the effective call authentication technology required by paragraphs (a) and (c) of this section.

(1) For purposes of this paragraph, ''consumer customer subscribers'' means residential mass-market subscribers.

(2) For purposes of this paragraph, ''small business customer subscribers'' means subscribers that are business entities that meet the size standards established in 13 CFR part 121, subpart

A, as they currently exist or may hereafter be amended.

[FR Doc. 2020–07629 Filed 4–20–20; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 200408–0104]

RIN 0648–BI81

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Snapper-Grouper Fishery of the South Atlantic Region; Regulatory Amendment 29

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to implement management measures described in Regulatory Amendment 29 to the Fishery Management Plan for the Snapper-Grouper Fishery of the South Atlantic Region (Snapper-Grouper FMP), as prepared and submitted by the South Atlantic Fishery Management Council (Council). If implemented, this proposed rule would require descending devices be on board vessels and require the use of specific fish hook types while fishing for or possessing snapper-grouper species. The proposed rule would also allow the use of powerheads in Federal waters off South Carolina to harvest snapper-grouper species. The purpose of this proposed rule is to modify fishing gear requirements to promote best fishing practices and to ensure consistent regulations for the dive component of the snapper-grouper fishery.

DATES: Written comments on the proposed rule must be received by May 6, 2020.

ADDRESSES: You may submit comments on the proposed rule, identified by ''NOAA–NMFS–2020–0008,'' by either of the following methods:

- *Electronic submission:* Submit all electronic comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/docket?D=NOAA-NMFS-2020-0008, click the ''Comment Now!''* icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit all written comments to Frank Helies, NMFS Southeast Regional Office, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in required fields if you wish to remain anonymous).

Electronic copies of Regulatory Amendment 29 may be obtained from *www.regulations.gov* or the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/regulatory-amendment-29-gear-requirements-south-atlantic-snapper-grouper-species* includes an environmental assessment, regulatory impact review, and Regulatory Flexibility Analysis (RFA).

FOR FURTHER INFORMATION CONTACT: Frank Helies, NMFS Southeast Regional Office, telephone: 727–824–5305, or email: *frank.helies@noaa.gov.*

SUPPLEMENTARY INFORMATION: NMFS and the Council manage the snapper-grouper fishery under the Snapper-Grouper FMP. The Snapper-Grouper FMP was prepared by the Council and is implemented by NMFS through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*).

Background

Commercial and recreational fishermen have expressed concern to the Council at their public meetings about regulations that result in released snapper-grouper species that do not survive, particularly South Atlantic red snapper. Fishermen have reported that some released fish die due to foul-hooking, *e.g.,* when hooked in the stomach or outside of the mouth, or through barotrauma, which is injury caused by internal gas expansion when reeled up from depth. To improve the survivorship of released snapper-grouper species, the Council considered measures that would encourage the use of best fishing practices that aim to reduce the negative impacts to live fish released after capture. An example of a best fishing practice considered by the Council includes utilizing a barotrauma mitigation device such as a descending device or venting tool. Though venting tools may be faster to use than descending devices, venting tools have the potential to damage vital organs because they penetrate the abdomen of the fish, and therefore because it could cause additional stress to fish if not used correctly, the Council chose not to require venting tools in Regulatory Amendment 29.

Regulatory Amendment 29 proposes measures that would apply to any commercial or recreational fishermen fishing for or possessing South Atlantic snapper-grouper, and include requiring that descending devices be on board vessels and encouraging their use when appropriate, as well as requiring the use of fish hooks that reduce or minimize gut-hooking or foul-hooking and increase the survivability of fish after release.

As described in Regulatory Amendment 29, studies have shown that if properly used and maintained, descending devices relieve symptoms of barotrauma, and can decrease potential discard mortality of released fish. The proposed rule would not require the use of a descending device because it may not be needed every time; however, the gear would be required to be readily available on a vessel for use when fishing for or possessing snapper-grouper species. It is the Council's intent that fishermen use a descending device only when a fish may be experiencing barotrauma.

Currently, fishermen must use non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N latitude, which is the latitude line running east to west approximately 25 miles south of Cape Canaveral, Florida; fishermen are allowed to use either offset or non-offset circle hooks (50 CFR 622.188(a)(2)). A fish hook is offset if the front of the hook, which includes the hook point and barb, is not in-line with the hook shank. A non-offset hook has the point and barb in-line with the hook shank. The existing regulations require that circle hooks must be made of non-stainless steel, but other hook types, such as J-hooks, may be either stainless steel or non-stainless steel. Non-offset circle hooks can reduce the occurrence of hooking-related mortality (when compared to offset circle hooks and J-hooks) and can improve survivorship of released fish. Requiring their use as opposed to just requiring them to be on board ensures that full potential benefits of using this gear type are realized. Also, non-stainless steel hooks degrade faster than stainless steel hooks, so any fish released with an

embedded non-stainless steel hook would likely have a greater chance of survival.

The final rule implementing Amendment 7 to the Snapper-Grouper FMP prohibited the use of powerheads to harvest snapper-grouper species in Federal waters off South Carolina due to concern for potential localized depletion of these species from divers using powerheads (59 FR 66270, December 23, 1994); however, the use of powerheads is allowed in Federal waters off North Carolina, Georgia, and the east coast of Florida. A powerhead is a type of fishing gear that includes any device with an explosive charge, usually attached to a spear gun, spear, pole, or stick that fires a projectile upon contact with the fish. Fishermen have expressed concern to the Council at public meetings regarding inequitable access for the dive component of the snapper-grouper fishery off South Carolina because they are prohibited from using powerheads. The Council determined that because the commercial and recreational dive components of the snapper-grouper fishery only constitute approximately 5 percent landings from South Atlantic Federal waters, any impacts on snapper-grouper species from removing the powerhead prohibition would be minimal.

Management Measures Contained in This Proposed Rule

This proposed rule would require descending devices be on board all commercial, charter vessels and headboats (for-hire), and private recreational vessels while fishing for or possessing snapper-grouper species, require the use of non-offset, non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N latitude, require all hooks be non-stainless steel when fishing for snapper-grouper species with hook-and-line gear and natural baits throughout the South Atlantic Federal waters, and allow the use of powerheads in Federal waters off South Carolina to harvest snapper-grouper species.

Descending Devices

This proposed rule would require at least one descending device to be on board and ready for use on commercial, for-hire, and private recreational vessels while fishing for or possessing snapper-grouper species. Regulatory Amendment 29 describes a descending device as a tool to release a fish at the depth from which the fish was caught or at a minimum depth of 50 ft (15.2 m). Additionally, a 16-ounce (454-g) or heavier weight must be attached to the descending device. Because releasing a fish at a specific minimum depth would be difficult to comply with and enforce, this proposed rule defines a descending device as an instrument capable of releasing the fish at the depth from which the fish was caught and to which is attached a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (18.3-m) length of line. A 16-ounce weight is available at many tackle shops and is heavy enough to descend a majority of snapper-grouper species subject to barotrauma. A minimum line length of 50 ft (15.2-m) was discussed by the Council because 50 ft is the standard minimum release depth setting on commercially available descending devices. After further consideration, and to achieve the Council's intent for depth of release, NMFS proposes that a minimum of 60 ft (18.3 m) of line be attached to a descending device to ensure fish are released at a minimum depth of 50 ft (15.2-m) while someone using the descending device is standing on the deck of a vessel, as well as to account for possible ocean current or swell.

The descending device may either attach to the fish's mouth or it may be a container that will retain the fish while it is lowered to depth. The device must be capable of releasing the fish at depth automatically, by actions of the device operator, or by allowing the fish to escape on its own when at depth.

Non-Offset, Non-Stainless Steel Circle Hooks

Currently, the use of non-stainless steel circle hooks is required when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N latitude. This proposed rule would prohibit the use of offset circle hooks north of 28° N latitude, and require the use of non-offset and non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits north of 28° N latitude.

As a result of public comment during the development of Regulatory Amendment 29, the Council determined that requiring non-offset circle hooks south of 28° N latitude would result in negative economic and social effects to the for-hire industry because of the fishing methods in that area that rely on using J-hooks. For-hire fishermen were concerned that a requirement to use circle hooks south of 28° N latitude would hinder their ability to produce fish for customers.

Non-Stainless Steel Hooks

This proposed rule would require the use of non-stainless steel hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits throughout Federal waters in the South Atlantic region. Similar to the proposed requirement to use non-offset, non-stainless steel circle hooks north of 28° N latitude, this proposed measure is expected to provide biological benefits as stated earlier to snapper-grouper species in South Atlantic Federal waters.

Powerhead Use Off South Carolina

Currently, a powerhead may not be used to harvest snapper-grouper in Federal waters off South Carolina, but is allowed in Federal waters off North Carolina, Georgia, and the east coast of Florida. This proposed rule would remove the powerhead prohibition in Federal waters off South Carolina. The proposed rule would increase consistency in regulations throughout South Atlantic Federal waters, would be expected to reduce regulatory confusion among commercial and recreational dive fishermen, and aid in compliance and enforcement efforts.

NMFS is also seeking public comment on an appropriate effective date for the measures proposed in this rule, if implemented via final rule. NMFS usually has the measures implemented in a final rule effective 30 days after publication of the rule in the **Federal Register**, and is seeking comment on whether this same delay in effectiveness would provide sufficient time to comply with the requirements as proposed in this rule.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this proposed rule is consistent with Regulatory Amendment 29, the Snapper-Grouper FMP, other provisions of the Magnuson-Stevens Act, and other applicable laws, subject to further consideration after public comment.

This proposed rule has been determined to be not significant for purposes of Executive Order 12866. This proposed rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866.

NMFS prepared an initial regulatory flexibility analysis (IRFA) for this proposed rule, as required by section 603 of the RFA (5 U.S.C. 603). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of this proposed rule, why it is being considered, and the objectives of this proposed rule are contained in the preamble. The Magnuson-Stevens Act

provides the statutory basis for this proposed rule. A copy of the full analysis is available from NMFS (see **ADDRESSES**). A summary of the IRFA follows.

This proposed rule would apply to all commercial vessels, for-hire vessels, and private recreational anglers that fish for or harvest snapper-grouper species in Federal waters of the South Atlantic. The RFA does not consider recreational anglers to be small entities, so they are outside the scope of this analysis and only the impacts on commercial and for-hire fishing businesses will be discussed.

As of October 2, 2019, there were 527 valid or renewable South Atlantic snapper-grouper unlimited permits and 104 valid or renewable 225-lb trip-limited permits. On average from 2013 through 2017, there were 568 federally permitted commercial vessels with reported landings of snapper-grouper species in the South Atlantic. Their average annual vessel-level gross revenue from all species for 2013 through 2017 was approximately $47,000 (2018 dollars) and snapper-grouper species accounted for 68 percent of this revenue. The maximum annual revenue from all species reported by a single one of the commercial vessels that landed South Atlantic snapper-grouper species from 2013 through 2017 was approximately $1.5 million (2018 dollars).

As of October 2, 2019, there were 1,751 vessels with valid Federal charter vessel/headboat permits for South Atlantic snapper-grouper. Although the for-hire permit application collects information on the primary method of operation, the permit itself does not identify the permitted vessel as either a charter vessel or a headboat. Operation as either a charter vessel or headboat is not restricted by permitting regulations and vessels may operate in both capacities on separate trips. However, only selected headboats are required to submit harvest and effort information to the NMFS Southeast Region Headboat Survey (SRHS). Participation in the SRHS is based on determination by the NMFS Southeast Fisheries Science Center (SEFSC) that the vessel primarily operates as a headboat. As of August 20, 2019, 65 South Atlantic headboats were registered in the SRHS. As a result, of the 1,751 vessels with Federal snapper-grouper for-hire permits, up to 65 may primarily operate as headboats and the remainder as charter vessels. The average South Atlantic charter vessel is estimated to receive approximately $123,000 (2018 dollars) in annual gross revenue. The average South Atlantic headboat is estimated to receive approximately $218,000 (2018 dollars) in annual gross revenue.

For RFA purposes only, NMFS has established a small business size standard for businesses, including their affiliates, whose primary industry is commercial fishing (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. All of the commercial fishing businesses directly regulated by this proposed rule are believed to be small entities based on the NMFS size standard.

The Small Business Administration (SBA) has established size standards for all major industry sectors in the U.S. including for-hire businesses (NAICS code 487210). A business primarily involved in the for-hire fishing industry is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $8 million for all its affiliated operations worldwide. All of the for-hire fishing businesses that would be directly regulated by this proposed rule are believed to be small entities based on the SBA size criteria.

No other small entities that would be directly affected by this propose rule have been identified.

This proposed rule would not establish any new reporting or record-keeping requirements. It would, however, require owners or operators of commercial and for-hire vessels to have a descending device on board when fishing for or possessing species in the snapper-grouper fishery management unit (FMU). It would also require that commercial fishermen and for-hire anglers use non-offset, non-stainless steel circle hooks when fishing for species in the snapper-grouper FMU with hook-and-line gear and natural baits in the South Atlantic exclusive economic zone (EEZ) north of 28° N latitude (which is the latitude line running east to west approximately 25 miles south of Cape Canaveral, Florida). Finally, it would require that commercial fishermen and for-hire anglers use non-stainless steel hooks when fishing for species in the snapper-grouper FMU with hook-and-line gear and natural baits throughout the South Atlantic EEZ. To the extent that for-hire fishing businesses supply fishing tackle such as hooks to their customers, this proposed action would require for-hire businesses to purchase, and ensure the use of, such hooks as described above. No special professional skills would be necessary for compliance with this proposed rule.

The estimated lower bound cost per vessel to purchase a descending device, based on advertised retail prices, plus the cost of a qualifying weight and line, would be approximately $19 (2018 dollars). Commercial and for-hire businesses that already own suitable descending devices would not need to purchase new ones.

The proposed requirement for commercial fishermen and for-hire anglers to use non-offset, non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits in the EEZ north of 28° N latitude (approximately 25 miles south of Cape Canaveral, Florida) would require some commercial fishing businesses and potentially some for-hire vessels to purchase these hooks. The cost of purchasing circle hooks is highly variable and would depend on how many hooks each commercial or for-hire fishing business would need, as well as the quantity of hooks included in each purchase. In general, the cost per hook may vary from approximately $0.30 per hook to $1.00 per hook. If for-hire anglers supply their own hooks, then the impact to for-hire fishing businesses would be reduced. Additionally, non-offset circle hooks may reduce the catchability of some species, which could negatively affect catch efficiency on some fishing trips. In turn, this could lead to a reduction in commercial ex-vessel revenue or increased trip costs. It is not possible to estimate the specific costs that each business would face as a result of the proposed circle hook requirement. Any change in for-hire anglers' demand for for-hire fishing trips (and associated economic effects) as a result of the proposed circle hook requirement would be secondary to any direct effect on anglers and, therefore, would be an indirect effect of the proposed rule. Indirect effects are not relevant to the RFA.

In addition, this proposed rule would require the use of non-stainless steel hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits throughout the South Atlantic EEZ. Commercial and for-hire vessels fishing north of the 28° N latitude would not be affected because there is already a non-stainless steel hook requirement in place there. The cost of purchasing non-stainless steel hooks is highly variable and would depend on how many hooks each commercial or for-hire fishing business

would need as well as the quantity of hooks in each purchase. In general, the cost per non-stainless steel hook may vary from approximately $0.30 per hook to $1.00 per hook. Switching from stainless to non-stainless steel would likely decrease the useful lifespan of hooks, leading to a small increase in operating costs in the long term for commercial and for-hire businesses. If for-hire anglers supply their own hooks, then the impact to for-hire fishing businesses would be reduced. Changing from stainless to non-stainless steel hooks would not be expected to affect the harvest of snapper-grouper species and, therefore, no reduction in commercial ex-vessel revenue would be expected.

Finally, this proposed rule would allow federally permitted commercial fishermen and for-hire anglers to use powerheads to harvest snapper-grouper species in the EEZ off South Carolina. This would increase the opportunity for harvest in some circumstances, potentially leading to greater commercial ex-vessel revenue or lower harvest costs. It is not possible to meaningfully estimate these potential economic effects with available data. Any economic effects on for-hire fishing businesses would be indirect and would depend on how anglers' demand for for-hire trips changes as a result of removing the restriction on powerhead usage. Again, indirect effects are not relevant to the RFA.

The following discussion describes the alternatives that were not selected as preferred by the South Atlantic Council.

Three alternatives were considered for the action to specify requirements for the use of descending devices or venting devices when fishing for or possessing snapper-grouper species. The first alternative, the no action alternative, would not require descending or venting devices to be on board when fishing for or possessing snapper-grouper species. This alternative would not be expected to result in direct costs to any small entities. It was not selected by the Council because it would forgo any improvements to snapper-grouper fish stocks that could be achieved through the increased usage of descending or venting devices and resultant decreases in release mortality.

The second alternative and three sub-alternatives, which were all selected as preferred by the Council, would require a descending device be on board private recreational, for-hire, and commercial vessels, respectively, when fishing for or possessing snapper-grouper species.

The third alternative would require a venting device be on board a vessel when fishing for or possessing snapper-grouper species. The third alternative contained three sub-alternatives that would apply the venting device requirement to private recreational vessels, for-hire vessels, and commercial vessels, respectively. The estimated lower bound cost of purchasing a venting device, based on advertised retail prices, would be $6 (2018 dollars). This is slightly cheaper than the estimated cost of the preferred alternative. The third alternative was not selected by the Council because of the higher mortality risk to released fish associated with using venting devices incorrectly, versus using descending devices.

Four alternatives were considered for the action to modify the requirement for the use of non-stainless steel circle hooks when fishing for or possessing snapper-grouper species with hook-and-line gear. The first alternative, the no action alternative, would not modify current gear requirements and therefore would not be expected to result in direct costs to any small entities. This alternative was not selected by the Council because it would forgo any improvements to snapper-grouper fish stocks that could be achieved through the use of non-offset, non-stainless steel circle hooks north of 28° N latitude or increased usage of non-stainless steel hooks in general and resultant decreases in release mortality.

The second alternative, selected as preferred by the Council, would require the use of non-offset, non-stainless steel circle hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits within certain areas of the South Atlantic EEZ. The second alternative contained two sub-alternatives. The first sub-alternative, which was selected as preferred, would apply the non-offset, non-stainless steel circle hook fishing requirement to South Atlantic Federal waters north of 28° N latitude. The second sub-alternative would apply the non-offset, non-stainless steel circle hook fishing requirement throughout the extent of the Council's jurisdiction (from the North Carolina and Virginia border through Key West, Florida), except that other non-stainless steel hook types would be allowed to be used when fishing for yellowtail snapper with natural baits. The second sub-alternative would be expected to affect a greater number of commercial and for-hire fishing businesses because of the larger area to which it would apply and because there is currently no circle hook requirement in place when fishing for snapper-grouper species south of 28° N latitude. As discussed under the effects of the preferred sub-alternative, the cost of purchasing circle hooks would depend on how many hooks each commercial or for-hire fishing business would need, as well as the quantity of hooks included in each purchase. The effect of switching to circle hooks in the area south of 28° N latitude may have a more pronounced effect on catch efficiency there than in the rest of the South Atlantic EEZ. Stakeholders have indicated that a circle hook requirement would negatively affect their ability to catch snapper-grouper species when drift fishing, which is a common practice in South Florida and the Florida Keys. The second sub-alternative was not selected because it would be expected to result in substantial negative economic and social effects, specifically to the for-hire industry that operates south of 28° N latitude.

The third alternative would require non-offset, non-stainless steel circle hooks be on board a vessel possessing snapper-grouper species when fishing with hook-and-line gear and natural baits within certain areas of the EEZ. The third alternative contained two sub-alternatives. The first sub-alternative would apply the non-offset, non-stainless steel circle hook on board requirement to vessels in Federal waters north of 28° N latitude. Under this sub-alternative, some commercial and for-hire fishing businesses that fish for snapper-grouper species north of 28° N latitude would need to purchase non-offset, non-stainless steel circle hooks to have on board. This sub-alternative would be expected to result in lower direct costs to fishing businesses than the preferred alternative, as non-offset, non-stainless steel circle hooks would only need to be on board the vessel and would likely not be used to the same extent as under the preferred alternative. Under such circumstances, multiple circle hook types and sizes would not be necessary to satisfy the circle hook requirement. Additionally, J-hooks or treble hooks could be used to harvest snapper-grouper species, which may increase the catchability of some species in comparison to circle hooks. To the extent that catch efficiency increases on commercial fishing trips, this could result in an increase in commercial trip profitability. The second sub-alternative would apply the non-offset, non-stainless steel circle hook on board requirement throughout the extent of the Council's jurisdiction, except that other non-stainless steel hook types would be allowed to be used when fishing for yellowtail snapper with natural baits. The second sub-alternative would require that

commercial and for-hire fishing businesses that fish for snapper-grouper species anywhere in the South Atlantic EEZ purchase non-offset, non-stainless steel circle hooks to have on board. Because J-hooks and treble hooks may already be used while fishing for snapper-grouper species with natural bait south of 28° N latitude, the second sub-alternative would be expected to have comparable effects on catch efficiency as the first sub-alternative. The third alternative and two sub-alternatives were not selected by the Council, because they were expected to be less likely than the preferred alternative to reduce release mortality.

The fourth alternative, also selected as preferred, would require the use of non-stainless steel hooks when fishing for snapper-grouper species with hook-and-line gear and natural baits in the South Atlantic EEZ.

Three alternatives were considered for the action to adjust powerhead prohibitions in the South Atlantic region. The first alternative, the no action alternative, would not modify existing powerhead regulations or restrictions, and therefore, would not be expected to have direct economic effects on any small entities. Under the no action alternative, harvest of snapper-grouper species by powerhead in the EEZ off South Carolina would continue to be prohibited. This alternative was not selected by the Council because it would fail to ensure consistent regulations for the dive component of the South Atlantic snapper-grouper fishery.

The second alternative and two sub-alternatives were selected as preferred and would allow private recreational, for-hire, and commercial vessels to use powerheads for harvest of snapper-grouper species in the EEZ off South Carolina.

The third alternative would prohibit the use of a powerhead for harvest of snapper-grouper species in the EEZ of the entire South Atlantic region. The third alternative contained two sub-alternatives. The first sub-alternative would apply the prohibition of powerheads in the EEZ to private recreational and for-hire vessels. This sub-alternative would remove some opportunities to recreationally harvest snapper-grouper species in the EEZ of the South Atlantic, but would not be expected to have any direct effects on for-hire fishing businesses. Any effects on for-hire fishing businesses would be indirect and would depend on how anglers' demand for for-hire trips changes as a result of powerhead restrictions. The second sub-alternative would apply the prohibition of powerheads in the EEZ to commercial vessels. This would remove some opportunities to commercially harvest snapper-grouper species in the EEZ of the South Atlantic, which may lead to decreased trip profits for some commercial businesses. Using the average annual ex-vessel revenue estimates from powerhead fishing in the South Atlantic EEZ from 2013 through 2017, NMFS estimates the upper bound cost of this sub-alternative would be $261,000 (2018 dollars) per year or approximately $460 per commercial vessel. The true cost of this sub-alternative would likely be much less, because commercial fishermen could substitute powerhead landings with landings by other gear types or in other areas. The third alternative and two sub-alternatives were not selected by the Council because they would unnecessarily reduce fishing opportunities in the South Atlantic EEZ and potentially result in negative economic effects to fishermen.

No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, because no new reporting or record-keeping requirements are introduced by this proposed rule, the Paperwork Reduction Act does not apply to this proposed rule.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Grouper, Snapper, South Atlantic.

Dated: April 13, 2020.

Samuel D. Rauch III,

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

For the reasons set out in the preamble, 50 CFR part 622 is proposed to be amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

§ 622.182 [Amended]

■ 2. In § 622.182, remove and reserve paragraph (c).

■ 3. In § 622.188, revise paragraph (a)(2) and add paragraphs (a)(3) and (4) to read as follows:

§ 622.188 Required gear, authorized gear, and unauthorized gear.

(a) * * *

(2) *Non-offset, non-stainless steel circle hooks.* Non-offset, non-stainless steel circle hooks are required to be used when fishing for South Atlantic snapper-grouper with hook-and-line gear and natural baits north of 28° N. lat.

(3) *Non-stainless steel hooks.* Non-stainless steel hooks are required to be used when fishing for South Atlantic snapper-grouper with hook-and-line gear and natural baits south of 28° N. lat.

(4) *Descending device.* At least one descending device is required to be on board a vessel and be ready for use while fishing for or possessing South Atlantic snapper-grouper. Descending device means an instrument capable of releasing the fish at the depth from which the fish was caught and to which is attached a minimum of a 16-ounce (454-gram) weight and a minimum of a 60-ft (15.2-m) length of line. The descending device may either attach to the fish's mouth or be a container that will retain the fish while it is lowered to depth. The device must be capable of releasing the fish automatically, by actions of the operator of the device, or by allowing the fish to escape on its own when at depth.

* * * * *

[FR Doc. 2020–08093 Filed 4–17–20; 4:15 pm]

BILLING CODE 3510–22–P

Notices

Federal Register

Vol. 85, No. 77

Tuesday, April 21, 2020

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

Submission for OMB Review; Comment Request

April 15, 2020.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are requested regarding; whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; ways to enhance the quality, utility and clarity of the information to be collected; and ways to 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.

Comments regarding this information collection received by May 21, 2020 will be considered. Written comments and recommendations for the proposed information collection should be submitted within 30 days of the publication of this notice on the following website *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Animal and Plant Health Inspection Service

Title: Phytosanitary Export Certification.

OMB Control Number: 0579–0052.

Summary of Collection: The Animal and Plant Health Inspection Service (APHIS) is responsible for preventing plant diseases or insect pests from entering the United States, preventing the spread of pests and noxious weeds not widely distributed within the United States, and eradicating those imported pests when eradication is feasible. The Plant Protection Act authorizes USDA to carry out this mission. APHIS will collect information using several forms and other information activities.

Need and Use of the Information: APHIS will use the information collected to locate shipments, guide inspection, and issue a certificate to meet the requirements of the importing country. Failure to provide this information would have an impact on many U.S. exporters who would no longer be able to engage in the business of exporting plants and plant products overseas.

Description of Respondents: Business or other for-profit; State, and Local or Tribal Government.

Number of Respondents: 9,102.

Frequency of Responses: Recordkeeping; Reporting: On occasion.

Total Burden Hours: 412,986.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2020–08360 Filed 4–20–20; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

[Docket No. USDA–2020–0002]

Notice of Request for Public Comment on Updates to Technical Guidelines for Quantifying Greenhouse Gas (GHG) Emissions and Carbon Sequestration at the Entity-scale for Agriculture and Forestry

AGENCY: Office of the Chief Economist, U.S. Department of Agriculture.

ACTION: Request for public comment; extension of comment period.

SUMMARY: We are extending the comment period for our notice seeking input from the public as we prepare an update to our technical guidelines and science-based methods to quantify greenhouse gas sources and sinks from the agriculture and forest sectors at the entity-scale This action will allow interested persons additional time to prepare and submit comments.

DATES: The comment period of the request for information, published March 4, 2020 at 85 FR 12760 is extended until May 15, 2020. To be assured of consideration, comments must be received on or before May 15, 2020.

ADDRESSES: Comments submitted in response to this notice may be submitted online via the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and search for the Docket number USDA–2020–0002. Follow the online instructions for submitting comments. All comments received will be posted without change and publicly available on *www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: William Hohenstein, Director, USDA Office of Energy and Environmental Policy, telephone: 202–720–6698, email: *William.hohenstein@usda.gov.*

SUPPLEMENTARY INFORMATION: On March 4, 2020, we published in the **Federal Register** (85 FR 12760–12761, Docket No. USDA–2020–0002) a notice seeking input from the public as we prepare an update to our technical guidelines and science-based methods to quantify greenhouse gas sources and sinks from the agriculture and forest sectors at the entity-scale. Public input will help to ensure that relevant information and data are considered, improve the rigor of the guidelines, and enhance the usability of the methods in the updated technical guidelines.

Comments on the notice were required to be received on or before April 20, 2020. We are extending the comment period on Docket No. USDA–2020–0002 until May 15, 2020. This action will allow interested persons additional time to prepare and submit comments.

Robert Johansson,

Chief Economist.

[FR Doc. 2020–08472 Filed 4–17–20; 8:45 am]

BILLING CODE 3410–GL–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. APHIS–2020–0008]

Notice of Request for Extension of Approval of an Information Collection; Importation of Live Fish, Fertilized Eggs, and Gametes From Tilapia Lake Virus-Susceptible Species

ACTION: Extension of approval of an information collection; comment request.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Animal and Plant Health Inspection Service's intention to request an extension of approval of an information collection associated with the importation of live fish, fertilized eggs, and gametes from tilapia lake virus-susceptible species into the United States.

DATES: We will consider all comments that we receive on or before June 22, 2020.

ADDRESSES: You may submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov/#!docketDetail;D=APHIS-2020-0008.*
- *Postal Mail/Commercial Delivery:* Send your comment to Docket No. APHIS–2020–0008, Regulatory Analysis and Development, PPD, APHIS, Station 3A–03.8, 4700 River Road Unit 118, Riverdale, MD 20737–1238.

Supporting documents and any comments we receive on this docket may be viewed at *http://www.regulations.gov/#!docketDetail;D=APHI-2020-0008* or in our reading room, which is located in Room 1141 of the USDA South Building, 14th Street and Independence Avenue SW, Washington, DC. Normal reading room hours are 8 a.m. to 4:30 p.m., Monday through Friday, except holidays. To be sure someone is there to help you, please call (202) 799–7039 before coming.

FOR FURTHER INFORMATION CONTACT: For information on the regulations for the importation of live fish, fertilized eggs, and gametes from tilapia lake virus-susceptible species, contact Dr. Alicia Marston, Senior Staff Veterinary Medical Officer, Live Animal Imports and Exports, APHIS Veterinary Services, 4700 River Road Unit 39, Riverdale, MD 20737; (301) 851–3361. For additional information about the information collection process, contact Mr. Joseph Moxey, APHIS' Information Collection Coordinator, at (301) 851–2483.

SUPPLEMENTARY INFORMATION:

Title: Importation of Live Fish, Fertilized Eggs, and Gametes From Tilapia Lake Virus-Susceptible Species.

OMB Control Number: 0579–0473.

Type of Request: Extension of approval of an information collection.

Abstract: Under the Animal Health Protection Act (7 U.S.C. 8301 *et seq.*), the Animal and Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture is authorized, among other things, to prohibit or restrict the importation and interstate movement of animals and animal products to prevent the introduction into and dissemination within the United States of livestock diseases and pests. To carry out this mission, APHIS regulates the importation of animals and animal products into the United States.

In March 2019, the U.S. aquaculture industry experienced an outbreak of Tilapia Lake Virus (TiLV). APHIS determined that the introduction and establishment of TiLV posed a serious threat to U.S. agriculture, and as a result, published a Federal Order [1] on November 12, 2019, placing certain requirements on the importation of all live fish, fertilized eggs, and gametes from TiLV-susceptible species imported from all countries. Based on the Federal Order, these imported items must be accompanied by a U.S. Department of Agriculture-issued import permit, an official veterinary health certificate, and evidence of a veterinary inspection at a designated U.S. port of entry before being allowed entry into the United States.

We are asking the Office of Management and Budget (OMB) to approve our use of these information collection activities, as described, for an additional 3 years.

The purpose of this notice is to solicit comments from the public (as well as affected agencies) concerning our information collection. These comments will help us:

(1) Evaluate whether the 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 our estimate of the burden of the 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, through use, as appropriate, of automated, electronic, mechanical, and other collection technologies; *e.g.,* permitting electronic submission of responses.

Estimate of burden: The public burden for this collection of information is estimated to average 0.84 hours per response.

Respondents: State animal health officials, importers, and veterinarians.

Estimated annual number of respondents: 57.

Estimated annual number of responses per respondent: 2.

Estimated annual number of responses: 114.

Estimated total annual burden on respondents: 96 hours. (Due to averaging, the total annual burden hours may not equal the product of the annual number of responses multiplied by the reporting burden per response.)

All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Done in Washington, DC, this 16th day of April 2020.

Mark Davidson,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 2020–08422 Filed 4–20–20; 8:45 am]

BILLING CODE 3410–34–P

[1] *https://www.aphis.usda.gov/animal_health/downloads/import/tilv-federal-order.pdf.*

DEPARTMENT OF AGRICULTURE

National Institute of Food and Agriculture

Solicitation of Stakeholder Input for Urban, Indoor, and Other Emerging Agricultural Production Research, Education, and Extension Initiative

AGENCY: National Institute of Food and Agriculture.

ACTION: Request for written stakeholder input.

SUMMARY: The National Institute of Food and Agriculture (NIFA) is requesting written stakeholder input on the Urban, Indoor and other Emerging Agricultural Production Research, Education and Extension Initiative. The purpose of this Notice is to assist NIFA in developing the fiscal year 2020 Request for Applications for the Urban, Indoor and other Emerging Agricultural Production Research, Education and Extension Initiative.

DATES: Written comments on this Notice must be received by June 22, 2020, to be assured of consideration. Comments received after that date will be considered to the extent practicable.

ADDRESSES: You may submit comments, identified by NIFA–2020–0001, through

the Federal eRulemaking Portal: *www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All comments received will be posted to *http://www.regulations.gov,* including any personal information provided.

FOR FURTHER INFORMATION CONTACT: Bradley Rein, Agricultural Division Director; Phone: 202–445–5442; Email: *brein@usda.gov.*

SUPPLEMENTARY INFORMATION: NIFA is moving forward to implement Section 7212 of the Agriculture Improvement Act of 2018. This section ''authorizes the Agency, in consultation with the Urban Agriculture and Innovative Production Advisory Committee established under section 222(b) of the Department of Agriculture Reorganization Act of 1994, to make competitive grants to support research, education, and extension activities for the purposes of facilitating the development of urban, indoor, and other emerging agricultural production, harvesting, transportation, aggregation, packaging, distribution and markets, including:

(1) Assessing and developing strategies to remediate contaminated sites;

(2) determining and developing the best production management and integrated pest management practices;

(3) identifying and promoting the horticultural, social, and economic factors that contribute to successful urban, indoor, and other emerging agricultural production;

(4) analyzing the means by which new agricultural sites are determined, including an evaluation of soil quality, condition of a building, or local community needs;

(5) exploring new technologies that minimize energy, lighting systems, water, and other inputs for increased food production;

(6) examining building material efficiencies and structural upgrades for the purpose of optimizing growth of agricultural products;

(7) developing new crop varieties and agricultural products to connect to new markets; or

(8) examining the impacts of crop exposure to urban elements on environmental quality and food safety.

It also authorizes the Agency to give priority consideration to grant proposals that involve—

(1) the cooperation of multiple entities; or

(2) States or regions with a high concentration of or significant interest in urban farms, rooftop farms, and indoor production facilities.

The intent of this Notice is to gather stakeholder input on the most urgent and highest priorities for research, education and extension (REE) funding authorized under the Urban, Indoor and other Emerging Agricultural Production Research, Education and Extension Initiative. NIFA seeks written feedback in response to the following two questions:

(1) Considering agricultural production through marketing; which phase has the greatest and most urgent REE needs in developing urban and indoor agriculture?

(a) Agricultural Production
(b) Harvesting
(c) Transportation
(d) Aggregation
(e) Packaging
(f) Distribution
(g) Markets

(2) Of the eight priorities listed below, which priority has the greatest and most urgent REE need in developing urban and indoor agriculture that is not being adequately addressed in other Federal REE programs:

(a) Assessing and developing strategies to remediate contaminated sites;

(b) determining and developing the best production management and integrated pest management practices;

(c) identifying and promoting the horticultural, social, and economic factors that contribute to successful urban, indoor, and other emerging agricultural production;

(d) analyzing the means by which new agricultural sites are determined, including an evaluation of soil quality, condition of a building, or local community needs;

(e) exploring new technologies that minimize energy, lighting systems, water, and other inputs for increased food production;

(f) examining building material efficiencies and structural upgrades for the purpose of optimizing growth of agricultural products;

(g) developing new crop varieties and agricultural products to connect to new markets; or

(h) examining the impacts of crop exposure to urban elements on environmental quality and food safety.

NIFA invests in Urban Agriculture research and education through its Beginning Farmers and Ranchers Development Program, AFRI Foundational Knowledge of Agriculture Production Systems, Specialty Crop Research Initiative, AFRI Small and Medium Sized Farms, Community Food Projects, and the Organic Agriculture Research and Extension Initiative. Information on these programs and how they help address urban, indoor and emerging agricultural production priorities can be found in NIFA's website through the following address: *https://nifa.usda.gov/program/uie-ag.*

Stephen L. Censky,

Deputy Secretary, U.S. Department of Agriculture.

[FR Doc. 2020–08402 Filed 4–20–20; 8:45 am]

BILLING CODE 3410–22–P

COMMISSION ON CIVIL RIGHTS

Notice of Public Meeting of the Kentucky Advisory Committee

AGENCY: U.S. Commission on Civil Rights.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights and the Federal Advisory Committee Act that the Kentucky Advisory Committee will hold a meeting on Tuesday, May 19, 2020, the purpose of the meeting is to continue project planning.

DATES: The meeting will be held on Tuesday, May 19, 2020, 12:00 p.m. EST.

Public Call Information: Dial: 888–220–8474; Conference ID: 9446065.

FOR FURTHER INFORMATION CONTACT: Barbara Delaviez at *bdelaviez@usccr.gov* or 1–202–376–8473.

SUPPLEMENTARY INFORMATION: Members of the public can listen to the discussion. This meeting is available to the public through the following toll-free call-in number. An open comment period will be provided to allow members of the public to make a statement as time allows. The conference operator will ask callers to identify themselves, the organizations they are affiliated with (if any), and an email address prior to placing callers into the conference call. Callers can expect to incur charges for calls they initiate over wireless lines, and the Commission will not refund any incurred charges. Callers will incur no charge for calls they initiate over land-line connections to the toll-free telephone number. Persons with hearing impairments may also follow the proceedings by first calling the Federal Relay Service at 1–800–977–8339 and providing the Service with the conference call number and conference ID number.

Members of the public are also entitled to submit written comments; the comments must be received in the regional office within 30 days following

the meeting. Written comments may be mailed to the Regional Program Unit Office, U.S. Commission on Civil Rights, 230 S Dearborn, Suite 2120, Chicago, IL 60604. They may also be emailed to Carolyn Allen at *callen@usccr.gov.* Persons who desire additional information may contact the Regional Program Unit Office at (312) 353–8311.

Records generated from this meeting may be inspected and reproduced at the Regional Program Unit, as they become available, both before and after the meeting. Records of the meeting will be available via *www.facadatabase.gov* under the Commission on Civil Rights, South Carolina Advisory Committee link. Persons interested in the work of this Committee are directed to the Commission's website, *http://www.usccr.gov,* or may contact the Regional Program Unit at the above email or street address.

Agenda

Welcome
Approval of April 14, 2020 Minutes
Project Planning
Public Comment
Adjournment

Dated: April 16, 2020.

David Mussatt,

Supervisory Chief, Regional Programs Unit.

[FR Doc. 2020–08430 Filed 4–20–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–106]

Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Antidumping Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing an antidumping duty order on wooden cabinets and vanities and components thereof (wooden cabinets and vanities) from the People's Republic of China (China).

DATES: Applicable April 21, 2020.

FOR FURTHER INFORMATION CONTACT: Rachel Greenberg, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0652.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 735(d) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.210(c), Commerce published its affirmative final determination in the less-than-fair-value (LTFV) investigation of wooden cabinets and vanities from China.[1] On April 13, 2020, the ITC notified Commerce of its final determination that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of LTFV imports of wooden cabinets and vanities from China.[2]

Scope of the Order

The products covered by this order are wooden cabinets and vanities from China. For a complete description of the scope of this order, *see* the Appendix to this notice.

Antidumping Duty Order

On April 13, 2020, in accordance with section 735(d) of the Act, the ITC notified Commerce of its final determination in this investigation, in which it found that an industry in the United States is materially injured within the meaning of section 735(b)(1)(A)(i) of the Act by reason of imports of wooden cabinets and vanities from China sold at LTFV. Therefore, in accordance with sections 735(c)(2) and 736 of the Act, Commerce is issuing this antidumping duty order. Because the ITC determined that imports of wooden cabinets and vanities from China are materially injuring a U.S. industry, unliquidated entries of such merchandise from China, entered or withdrawn from warehouse for consumption, are subject to the assessment of antidumping duties.

Therefore, in accordance with section 736(b)(1) of the Act, Commerce will instruct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, antidumping duties equal to the amount by which the normal value of the wooden cabinets and vanities from China exceeds the export price (or constructed export price) of the subject merchandise, for all relevant entries of wooden cabinets and vanities from China which are entered, or withdrawn from warehouse, for consumption on or after October 9, 2019, the date of publication of the *Preliminary Determination,* but will not include entries occurring after the expiration of the provisional measures period and before the date of publication of the ITC's final affirmative determination under section 735(b) of the Act as further described below.[3]

Suspension of Liquidation

In accordance with section 736 of the Act, Commerce will instruct CBP to suspend liquidation of all appropriate entries of wooden cabinets and vanities from China as described in the Appendix to this notice which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the **Federal Register**. We will also instruct CBP to require, at the same time as importers would normally deposit estimated customs duties on the subject merchandise, a cash deposit of antidumping duties based on the rates listed below. These instructions suspending liquidation will remain in effect until further notice. The China-wide entity rate applies to all producers or exporters not specifically listed below. As stated in the *Final Determination,* Commerce made certain adjustments to the estimated weighted-average dumping margin for export subsidies from the companion countervailing duty investigation final determination to determine each of the cash deposit rates.[4]

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[1] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value,* 85 FR 11953 (February 28, 2020) (*Final Determination*) as corrected by *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Corrected Notice of Final Affirmative Determination of Sales at Less Than Fair Value,* 85 FR 17855 (March 31, 2020).

[2] *See* Letter to Jeffrey Kessler, Assistant Secretary of Commerce for Enforcement and Compliance, from David S. Johanson, Chairman of the U.S. International Trade Commission, dated April 13, 2020 (ITC Letter).

[3] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures,* 84 FR 54106 (October 9, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum, as corrected by *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures,* 84 FR 56420 (October 22, 2019) as amended by *Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value,* 84 FR 61875 (November 14, 2019).

[4] *See Final Determination,* 85 FR at 11961.

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
The Ancientree Cabinet Co., Ltd	The Ancientree Cabinet Co., Ltd	4.37	0.00
Dalian Meisen Woodworking Co., Ltd	Dalian Meisen Woodworking Co., Ltd	262.18	251.64
Foremost Worldwide Company Limited	Rizhao Foremost Woodwork Manufacturing Company, Ltd.	101.46	90.92
Foremost Worldwide Company Limited	Henan AiDiJia Furniture Co., Ltd	101.46	90.92
Foremost Worldwide Company Limited	Suzhou Weiye Furniture Co., Ltd	101.46	90.92
Foremost Worldwide Company Limited	Changsha Minwan Furniture Manufacturing Co., Ltd	101.46	90.92
ANHUI JIANLIAN WOOD PRODUCTS CO., LTD	ANHUI JIANLIAN WOOD PRODUCTS CO., LTD	48.50	37.96
Anhui Swanch Cabinetry Co., Ltd	Anhui Swanch Cabinetry Co., Ltd	48.50	37.96
ANHUI XINYUANDA CUPBOARD CO., LTD	ANHUI XINYUANDA CUPBOARD CO., LTD	48.50	37.96
Beijing Oulu Jinxin International Trade Co., Ltd	Beijing Oulu Jinxin International Trade Co., Ltd	48.50	37.96
Boloni Smart Home Decor (Beijing) Co., LTD	Boloni Smart Home Decor (Beijing) Co., LTD	48.50	37.96
BRENTRIDGE HOLDING CO., LTD	ZHOUSHAN FOR–STRONG WOOD CO., LTD	48.50	37.96
Caoxian Brothers Hengxin Wood Industry Co., Ltd	Caoxian Brothers Hengxin Wood Industry Co., Ltd	48.50	37.96
Changyi Zhengheng Woodwork Co., Ltd	Changyi Zhengheng Woodwork Co., Ltd	48.50	37.96
CHAOZHOU YAFENG BATHROOM EQUIPMENT CO., LTD.	CHAOZHOU YAFENG BATHROOM EQUIPMENT CO., LTD.	48.50	37.96
China Friend Limited	Dongming Sanxin Wood Industry Co., Ltd	48.50	37.96
Dalian Jiaye Wood Products Co., Ltd	Dalian Jiaye Wood Products Co., Ltd	48.50	37.96
Dalian Xingsen Wooden Products Co., Ltd	Dalian Xingsen Wooden Products Co., Ltd	48.50	37.96
Dandong City Anmin Wooden Products Group Co., Ltd.	Dandong City Anmin Wooden Products Group Co., Ltd.	48.50	37.96
Dandong Laroyal Cabinetry Co., Ltd	Dandong Laroyal Cabinetry Co., Ltd	48.50	37.96
DEHK LIMITED	DIAM DISPLAY (CHINA) CO., LTD	48.50	37.96
Deqing China-Africa Foreign Trade Port Co., Ltd	Suqian Welcomewood Products Co., Ltd	48.50	37.96
Dewell Wooden Products Haian Co., Ltd	Dewell Wooden Products Haian Co., Ltd	48.50	37.96
Dongguan American Parts Supplier Co., Ltd	Dongguan American Parts Supplier Co., Ltd	48.50	37.96
Dongguan Niusaiqu Wood Industry Co., Ltd	Dongguan Niusaiqu Wood Industry Co., Ltd	48.50	37.96
Dongguan Unique Life Furniture Co., Ltd. also known as Unique Life Furniture Co., Ltd (trade name).	Dongguan Unique Life Furniture Co., Ltd	48.50	37.96
Dorbest Ltd	Rui Feng Woodwork (Dongguan) Co., Ltd	48.50	37.96
EZIDONE DISPLAY CORPORATION LTD	EZIDONE DISPLAY CORPORATION LTD	48.50	37.96
EZIDONE DISPLAY CORPORATION LTD	EZIDONE DISPLAY INC	48.50	37.96
Forcer International Limited	QUFU XINYU FURNITURE CO., LTD	48.50	37.96
Forcer International Limited	LINYI RUNKANG CABINET CO., LTD	48.50	37.96
Forcer International Limited	BEIJING OULU JINXIN INTERNATIONAL TRADE CO., LTD.	48.50	37.96
Foshan City Shunde District Refined Furniture Co., Ltd. also known as Refined Furniture Co., Ltd. (trade name).	Foshan City Shunde District Refined Furniture Co., Ltd. also known as Refined Furniture Co., Ltd. (trade name).	48.50	37.96
Foshan Liansu building material Trading Co., Ltd	Guangdong Lesso Home Furnishing Co., Ltd	48.50	37.96
FOSHAN NANHAI HONGZHOU WOOD CO., LTD	FOSHAN NANHAI HONGZHOU WOOD CO., LTD	48.50	37.96
Foshan Shunde Yajiasi Kitchen Cabinet Co., Ltd	Foshan Shunde Yajiasi Kitchen Cabinet Co., Ltd	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	FOSHAN DIBIAO BATHROOM CO., LTD	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	FOSHAN MK HOME FURISHING CO., LTD	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	PROUDER INDUSTRIAL LIMITED	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	FOSHAN DEMAX SANITARY WARE CO., LTD	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	HEBEI SHUANGLI FURNITURE CO., LTD	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	ZHANGZHOU GUOHUI INDUSTRIAL & TRADE CO., LTD.	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	SHOUGUANG FUSHI WOOD CO., LTD	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	Foshan Virtu Bathroom Furniture Ltd	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	Guangdong Purefine Kitchen & Bath Technology Co., LTD.	48.50	37.96
FOSHAN SOURCEVER (CN) CO., LIMITED	KAIPING HONGITARYWARE TECHNOLOGY LTD	48.50	37.96
Foshan Sourcever Company Limited	FOSHAN DIBIAO BATHROOM CO., LTD	48.50	37.96
Foshan Sourcever Company Limited	FOSHAN MK HOME FURISHING CO., LTD	48.50	37.96
Foshan Sourcever Company Limited	PROUDER INDUSTRIAL LIMITED	48.50	37.96
Foshan Sourcever Company Limited	FOSHAN DEMAX SANITARY WARE CO., LTD	48.50	37.96
Foshan Sourcever Company Limited	HEBEI SHUANGLI FURNITURE CO., LTD	48.50	37.96
Foshan Sourcever Company Limited	ZHANGZHOU GUOHUI INDUSTRIAL & TRADE CO., LTD.	48.50	37.96
Foshan Sourcever Company Limited	SHOUGUANG FUSHI WOOD CO., LTD	48.50	37.96
Foshan Sourcever Company Limited	Foshan Virtu Bathroom Furniture Ltd	48.50	37.96
Foshan Sourcever Company Limited	Guangdong Purefine Kitchen & Bath Technology Co., LTD.	48.50	37.96
Foshan Sourcever Company Limited	KAIPING HONGITARYWARE TECHNOLOGY LTD	48.50	37.96
Foshan Xinzhongwei Economic & Trade Co., Ltd	Foshan Lihong Furniture Sanitary Ware Co., Ltd	48.50	37.96
FUJIAN DUSHI WOODEN INDUSTRY CO., LTD	FUJIAN DUSHI WOODEN INDUSTRY CO., LTD	48.50	37.96
FUJIAN LEIFENG CABINETRY CO., LTD	FUJIAN LEIFENG CABINETRY CO., LTD	48.50	37.96

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Fujian Panda Home Furnishing Co., Ltd	Fujian Panda Home Furnishing Co., Ltd	48.50	37.96
Fujian Senyi Kitchen Cabinet Co., Ltd	Fujian Senyi Kitchen Cabinet Co., Ltd	48.50	37.96
Fuzhou Biquan Trading Co., Ltd	Biquan (Fujian) Group Co., Ltd	48.50	37.96
Fuzhou CBM Import & Export Co., Ltd	Fuzhou CBM Import & Export Co., Ltd	48.50	37.96
Fuzhou Desource Home Décor Co., Ltd	Fuzhou Desource Home Decor Co., Ltd	48.50	37.96
FUZHOU LIMIN STONE PRODUCTS CO., LTD	Fuzhou YST Cabinet Co., Ltd	48.50	37.96
FUZHOU MASTONE IMPORT & EXPORT CO., LTD	Fuzhou Yuansentai Cabinet Co., Ltd	48.50	37.96
Fuzhou Minlian Wood Industry Co., Ltd	Fuzhou Minlian Wood Industry Co., Ltd	48.50	37.96
FUZHOU SUNRISING HOME DECO MANUFACTURING CO., LTD.	FUZHOU SUNRISING HOME DECO MANUFACTURING CO., LTD.	48.50	37.96
FUZHOU XINRUI CABINET CO., LTD	FUZHOU XINRUI CABINET CO., LTD	48.50	37.96
Gaomi City Haitian Wooden Ware Co., Ltd	Gaomi City Haitian Wooden Ware Co., Ltd	48.50	37.96
GAOMI HONGTAI HOME FURNITURE CO., LTD	GAOMI HONGTAI HOME FURNITURE CO., LTD	48.50	37.96
Guangde Bozhong Trade Company, Ltd	Guangde Bozhong Trade Company, Ltd	48.50	37.96
GUANGDONG CACAR KITCHEN TECHNOLOGY CO., LTD.	GUANGDONG CACAR KITCHEN TECHNOLOGY CO., LTD.	48.50	37.96
Guangdong G-Top Import and Export Co., Ltd	Foshan Shunde Rongao Furniture CO., LTD	48.50	37.96
Guangzhou Nuolande Import and Export Co., Ltd	Guangzhou Nuolande Import and Export Co., Ltd	48.50	37.96
Haiyang Kunlun Wood Co., Ltd	Haiyang Kunlun Wood Co., Ltd	48.50	37.96
Hangzhou Bestcraft Sanitary Equipments Co., Ltd	Hangzhou Bestcraft Sanitary Equipments Co., Ltd	48.50	37.96
Hangzhou Entop Houseware Co., Ltd	Jinhua Aonika Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Entop Houseware Co., Ltd	Hangzhou Bestcraft Sanitary Equipments Co., Ltd	48.50	37.96
Hangzhou Hansen Sanitary Ware Co., Ltd	Hangzhou Hansen Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Hoca Kitchen & Bath Products Co., Ltd	Hangzhou Hoca Kitchen & Bath Products Co., Ltd	48.50	37.96
Hangzhou Home Dee Sanitary Ware Co., Ltd	Hangzhou Home Dee Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Oulang Bathroom Equipment Co., Ltd	Hangzhou Oulang Bathroom Equipment Co., Ltd	48.50	37.96
Hangzhou Royo Import & Export Co., Ltd	Jinhua Aonika Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Royo Import & Export Co., Ltd	Hangzhou Yuxin Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Royo Import & Export Co., Ltd	Hangzhou Fuyang Beautiful Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Sunlight Sanitary Co., Ltd	Hangzhou Sunlight Sanitary Co., Ltd	48.50	37.96
Hangzhou Weinuo Sanitary Ware Co., Ltd	PINGHU AIPA SANITARY WARE CO., LTD	48.50	37.96
Hangzhou Weinuo Sanitary Ware Co., Ltd	HANGZHOU QILONG SANITARY WARE CO., LTD	48.50	37.96
Hangzhou Xinhai Sanitary Ware Co., Ltd	Hangzhou Xinhai Sanitary Ware Co., Ltd	48.50	37.96
Hangzhou Yewlong Import&Export Co., Ltd	Hangzhou Yewlong Industry Co., Ltd	48.50	37.96
Hangzhou Zhuangyu Import & Export Co., Ltd	Hangzhou Zhuangyu Import & Export Co., Ltd	48.50	37.96
Henan Aotin Home Furnishing Co., Ltd	Henan Aotin Home Furnishing Co., Ltd	48.50	37.96
Heyond Cabinet Co., Ltd	Heyond Cabinet Co., Ltd	48.50	37.96
Homestar Corporation	Homestar Corporation	48.50	37.96
HONG KONG JIAN CHENG TRADING CO., LIMITED	ZHONGSHAN YAYUE FURNITURE CO., LTD	48.50	37.96
Xiamen Honglei Imp.&Exp. Co., Ltd. also known as Honglei (Xiamen) Stone Co., Ltd.	Changtai Guanjia Industry & Trade Company Co., Ltd	48.50	37.96
Xiamen Honglei Imp.&Exp. Co., Ltd. also known as Honglei (Xiamen) Stone Co., Ltd.	Zhangzhou Huihua Industry and Trade Co., Ltd	48.50	37.96
Xiamen Honglei Imp.&Exp. Co., Ltd. also known as Honglei (Xiamen) Stone Co., Ltd.	Fujian Xinanlong Wood Industry Co., Ltd	48.50	37.96
Honsoar New Building Material Co., Ltd	Shandong Honsoar Cabinet Materials Co., Ltd	48.50	37.96
Hua Yin Trading Development Co., Ltd of Jiangmen City.	Jianfa Wooden Co., Ltd	48.50	37.96
Hua Yin Trading Development Co., Ltd of Jiangmen City.	Heshan Yingmei Cabinets Co., Ltd	48.50	37.96
Hua Yin Trading Development Co., Ltd of Jiangmen City.	Hesha Feiqiu Cabinet Co., Ltd	48.50	37.96
Huimin Hanlong Furniture Co., Ltd	Huimin Hanlong Furniture Co., Ltd	48.50	37.96
HUISEN FURNITURE (LONG NAN) CO., LTD. also known as HUISEN FURNITURE (LONGNAN) CO., LTD.	HUISEN FURNITURE (LONG NAN) CO., LTD. also known as HUISEN FURNITURE (LONGNAN) CO., LTD.	48.50	37.96
HUIZHOU MANDARIN FURNITURE CO., LTD	HUIZHOU MANDARIN FURNITURE CO., LTD	48.50	37.96
Jiang Su Rongxin Cabinets Ltd	Jiang Su Rongxin Cabinets Ltd	48.50	37.96
Jiangmen Kinwai Furniture Decoration Co., Ltd	Jiangmen Kinwai Furniture Decoration Co., Ltd	48.50	37.96
Jiangmen Kinwai International Furniture Co., Ltd	Jiangmen Kinwai International Furniture Co., Ltd	48.50	37.96
Jiangsu Beichen Wood Co., Ltd	Jiangsu Beichen Wood Co., Ltd	48.50	37.96
Jiangsu Meijun Intelligent Home Co., Ltd	Jiangsu Meijun Intelligent Home Co., Ltd	48.50	37.96
Jiangsu Pusite Furniture Co., Ltd	Jiangsu Pusite Furniture Co., Ltd	48.50	37.96
Jiangsu Roc Furniture Industrial Co., Ltd	Jiangsu Roc Furniture Industrial Co., Ltd	48.50	37.96
JIANGSU SUNWELL CABINETRY CO., LTD	JIANGSU SUNWELL CABINETRY CO., LTD	48.50	37.96
JIANGSU WEISEN HOUSEWARE CO., LTD	JIANGSU WEISEN HOUSEWARE CO., LTD	48.50	37.96
Jiangsu Xiangsheng Bedtime Furniture Co., Ltd	Jiangsu Xiangsheng Bedtime Furniture Co., Ltd	48.50	37.96
Jiayuan (Xiamen) Industrial Co., Ltd	Jiayuan (Xiamen) Industrial Co., Ltd	48.50	37.96
JINJIANG PERFECT GENERATION IMP.&EXP. CO., LTD.	Homebi Technology Co., LTD	48.50	37.96

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
King's Group Furniture (Enterprises) Co., Ltd	Zhongshan King's Group Furniture (ENTERPRISES) Co., Ltd.	48.50	37.96
KM Cabinetry Co., Limited	Zhongshan KM Cabinetry Co., Ltd	48.50	37.96
Kunshan Baiyulan Furniture Co., Ltd	Kunshan Baiyulan Furniture Co., Ltd	48.50	37.96
Kunshan Home Right Trade Corporation	Kunshan Fangs Furniture Co., Ltd	48.50	37.96
LIANYUNGANG SUN RISE TECHNOLOGY CO., LTD.	LIANYUNGANG SUN RISE TECHNOLOGY CO., LTD.	48.50	37.96
Linshu Meibang Furniture Co., Ltd	Linshu Meibang Furniture Co., Ltd	48.50	37.96
Linyi Bomei Furniture Co., Ltd	Linyi Bomei Furniture Co., Ltd	48.50	37.96
LINYI BONN FLOORING MANUFACTURING CO., LTD.	LINYI BONN FLOORING MANUFACTURING CO., LTD.	48.50	37.96
Linyi Kaipu Furniture Co., Ltd	Linyi Kaipu Furniture Co., Ltd	48.50	37.96
Linyi Runkang Cabinet Co., Ltd	Linyi Runkang Cabinet Co., Ltd	48.50	37.96
Liu Shu Woods Product (Huizhou) Co., Ltd also known as Liu Shu Wood Products Co., Ltd (trade name) and Liu Shu Woods Product Co., Ltd (trade name).	Liu Shu Woods Product (Huizhou) Co., Ltd	48.50	37.96
Master Door & Cabinet Co., Ltd	Master Door & Cabinet Co., Ltd	48.50	37.96
Masterwork Cabinetry Company Limited	Shandong Compete Wood Co., Ltd	48.50	37.96
Masterwork Cabinetry Company Limited	Linyi Zhongsheng Jiaju Zhuangshi Co., Ltd	48.50	37.96
MEILIN WOOD PRODUCTS (DALIAN) CO., LTD	MEILIN WOOD PRODUCTS (DALIAN) CO., LTD	48.50	37.96
Minhou Beite Home Decor Co., Ltd	Minhou Beite Home Decor Co., Ltd	48.50	37.96
MJB Supply (Dalian) Co., Ltd	Mulin City Bamiantong Linyeju Jisen Wood	48.50	37.96
MOREWOOD CABINETRY CO., LTD	MOREWOOD CABINETRY CO., LTD	48.50	37.96
Nanjing Kaylang Co., Ltd	Nanjing Kaylang Co., Ltd	48.50	37.96
Nantong Aershin Cabinets Co., Ltd	Nantong Aershin Cabinets Co., Ltd	48.50	37.96
Nantong Ouming Wood Co., Ltd., also known as Nantong Ouming Wood Industry Co., Ltd	Nantong Ouming Wood Co., Ltd., also known as Nantong Ouming Wood Industry Co., Ltd.	48.50	37.96
NANTONG YANGZI FURNITURE CO., LTD	NANTONG YANGZI FURNITURE CO., LTD	48.50	37.96
NINGBO KINGWOOD FURNITURE CO., LTD	NINGBO KINGWOOD FURNITURE CO., LTD	48.50	37.96
NINGBO ROVSA HOME FURNISHING CO., LTD	NINGBO ROVSA HOME FURNISHING CO., LTD	48.50	37.96
Ojans Company Limited	Foshan Shunde Ojans Intelligent Sanitary Ware Co., Ltd.	48.50	37.96
Oppein Home Group Inc	Oppein Home Group Inc	48.50	37.96
PIZHOU OUYME IMPORT&EXPORT TRADE CO., LTD.	XUZHOU OUMEC WOOD–BASED PANEL CO., LTD	48.50	37.96
Pneuma Asia Sourcing & Trading Co. LIMITED	Dalian Tianxin Home Product Co., Ltd	48.50	37.96
Pneuma Asia Sourcing & Trading Co. LIMITED	Qingdao Haiyan Drouot Household Co., Ltd	48.50	37.96
Putian Jinggong Furniture Co., Ltd	Putian Jinggong Furniture Co., Ltd	48.50	37.96
Qingdao Coomex Sources Co., Ltd. also known as Coomex Sources Co., Ltd.	Nantong Aershin Cabinets Co., Ltd	48.50	37.96
Qingdao Haiyan Drouot Household Co., Ltd	Qingdao Haiyan Drouot Household Co., Ltd	48.50	37.96
Qingdao Liangmu Hongye Co., Ltd	Qingdao Liangmu Hongye Co., Ltd	48.50	37.96
Qingdao Liangmu Jinshan Woodwork Co., Ltd	Qingdao Liangmu Jinshan Woodwork Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Lankao Sanqiang Wooden Products Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Linyi Lanshan Chengxinli Woods Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Shouguang Shi Qifeng Woods Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Linyi Mingzhu Woods Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Yichun Senhai Woods Industry Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Linyi Jinde Arts&Crafts Co., Ltd	48.50	37.96
Qingdao Northriver Wooden Resource Industry & Trading Co., Ltd.	Qingdao Ruirong Woods Co., Ltd	48.50	37.96
Qingdao Shousheng Industry Co., Ltd	Qingdao Shousheng Industry Co., Ltd	48.50	37.96
Qingdao Yimei Wood Work Co., Ltd	Qingdao Yimei Wood Work Co., Ltd	48.50	37.96
QINGDAOHONGXINCHENGDA WOOD INDUSTRY CO., LTD.	QINGDAOHONGXINCHENGDA WOOD INDUSTRY CO., LTD.	48.50	37.96
QUFU XINYU FURNITURE CO., LTD	QUFU XINYU FURNITURE CO., LTD	48.50	37.96
Ronbow Hong Kong Limited	Wuxi Yusheng Kitchen-Bathroom Equipment Co., Ltd	48.50	37.96
Sagarit Bathroom Manufacturer Limited	Shouguang Fushi Wood Co., Ltd	48.50	37.96
Sagarit Bathroom Manufacturer Limited	Zhangzhou Guohui Industrial & Trade Co., Ltd	48.50	37.96
Sagarit Bathroom Manufacturer Limited	Qingdao Runpeng Wood Industrial Co., Ltd	48.50	37.96
Sankok Arts Co., Ltd	Sankok Arts Co., Ltd	48.50	37.96
Senke Manufacturing Company	Qindao Yimei Wood Work Co., Ltd	48.50	37.96
Senke Manufacturing Company	Linyi Kaipu Furniture Co., Ltd	48.50	37.96

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Senke Manufacturing Company	Shandon Honsoar Cabinetry Co., Ltd	48.50	37.96
Senke Manufacturing Company	Huimin Hanlong Furniture Co, Ltd	48.50	37.96
Shandong Cubic Alpha Timber Co., Ltd	Shandong Cubic Alpha Timber Co., Ltd	48.50	37.96
Shandong Fusheng Wood Co., Ltd	Shandong Fusheng Wood Co., Ltd	48.50	37.96
Shandong Huanmei Wood Co., Ltd	Shandong Huanmei Wood Co., Ltd	48.50	37.96
SHANDONG JINGYAO HOME DECORATION PRODUCTS CO., LTD.	SHANDONG JINGYAO HOME DECORATION PRODUCTS CO., LTD.	48.50	37.96
Shandong Longsen Woods Co., Ltd	Shandong Longsen Woods Co., Ltd	48.50	37.96
Shandong Sanfortune Home and Furniture Co., Ltd	Shandong Sanfortune Home and Furniture Co., Ltd	48.50	37.96
Shanghai Aiwood Home Supplies Co., Ltd	Jiangsu Gangxing Kitchen Cabinet Co., Ltd	48.50	37.96
Shanghai Aiwood Home Supplies Co., Ltd	Shanghai Homebase SanSheng Household Product Co., Ltd.	48.50	37.96
Shanghai Baiyulan Furniture Co., Ltd	Kunshan Baiyulan Furniture Co., Ltd	48.50	37.96
Shanghai Beautystar Cabinetry Co., Ltd	Jiangsu Sunwell Cabinetry Co., Ltd	48.50	37.96
Shanghai Beautystar Cabinetry Co., Ltd	Nantong Jiegao Furniture Co., Ltd	48.50	37.96
Shanghai Jiang Feng Furniture Co., Ltd	Shanghai Jiang Feng Furniture Co., Ltd	48.50	37.96
SHANGHAI LINE KING INTERNATIONAL TRADING CO., LTD.	SHANGHAI YAZHI WOODEN INDUSTRY CO., LTD	48.50	37.96
Shanghai Mebo Industry Co., Ltd	Shanghai Mebo Industry Co., Ltd	48.50	37.96
Shanghai Qingzhou Woodenware Co., Ltd	Shanghai Qingzhou Woodenware Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Anhui GeLun Wood Industry Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Ning'an City Jiude Wood Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Muling City Bamiantong Forestry Bureau Jisen Wood Co., Ltd.	48.50	37.96
Shanghai S&M Trade Co., Ltd	Dalian Ruiyu Mountain Wood Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Linshu Meibang Furniture Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Jiamusi City Quanhong Wood Industry Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Kunshan Fangs Furniture Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Dalian Chunyao Wood Industry Co., Ltd	48.50	37.96
Shanghai S&M Trade Co., Ltd	Anhui Juxin Wood Industry Co., Ltd	48.50	37.96
Shanghai Wang Lei Industries—Taicang Branch	Shanghai Wang Lei Industries—Taicang Branch	48.50	37.96
Shanghai Wen Bo Industries Co. Ltd	Shanghai Yinbo Manufacturing Co. Ltd	48.50	37.96
Shanghai Wen Bo Industries Co. Ltd	Dalian Jiaye Wood Products Co., Ltd	48.50	37.96
Shanghai Wen Bo Industries Co. Ltd	Shanghai Baiyulan Furniture Co., Ltd	48.50	37.96
Shanghai Xietong (Group) Co., Ltd	Nantong Jiegao Furniture Co., Ltd	48.50	37.96
Shanghai Xietong (Group) Co., Ltd	Jiangsu Senwei Smart Home Co., Ltd	48.50	37.96
SHANGHAI ZIFENG INTERNATIONAL TRADING CO., LTD.	SHANDONG GAINVAST WOODEN PRODUCTS CO., LTD.	48.50	37.96
SHANGHAI ZIFENG INTERNATIONAL TRADING CO., LTD.	SHANGHAI WENYI WOODEN CO., LTD	48.50	37.96
SHANGHAI ZIFENG INTERNATIONAL TRADING CO., LTD.	NAN TONG DI LIN FURNITURE CO., LTD	48.50	37.96
SHANGHAI ZIFENG INTERNATIONAL TRADING CO., LTD.	JIANGSU YANAN WOODEN CO., LTD	48.50	37.96
Sheen Lead International Trading (Shanghai)Co., Ltd	SHANGHAI RUIYING FURNITURE CO., LTD	48.50	37.96
Shouguang Fushi Wood Co., Ltd	Shouguang Fushi Wood Co., Ltd	48.50	37.96
Shouguang Honsoar Imp. & Exp. Trading Co., Ltd	Shandong Honsoar Cabinet Materials Co., Ltd	48.50	37.96
SHOUGUANG JIAXIU WOOD CO., LTD	SHOUGUANG JIAXIU WOOD CO., LTD	48.50	37.96
SHOUGUANG JIAXIU WOOD CO., LTD	SHOUGUANG JIAXIU WOOD CO., LTD	48.50	37.96
Shouguang Jinxiangyuan Home Furnishing Co., Ltd	Shouguang Jinxiangyuan Home Furnishing Co., Ltd	48.50	37.96
Shouguang Sanyang Wood Industry Co., Ltd	Shouguang Sanyang Wood Industry Co., Ltd	48.50	37.96
Silver Stone Group Co., Ltd	QINGDAO FAMILY CRAFTS CO., LTD	48.50	37.96
Silver Stone Group Co., Ltd	QingDao XiuZhen Furniture Co., Ltd	48.50	37.96
Smart Gift International	Anhui GeLun Wood Industry Co., Ltd	48.50	37.96
Smart Gift International	Ning'an City Jiude Wood Co., Ltd	48.50	37.96
Smart Gift International	Muling City Bamiantong Forestry Bureau Jisen Wood Co., Ltd.	48.50	37.96
Smart Gift International	Dalian Ruiyu Mountain Wood Co., Ltd	48.50	37.96
Smart Gift International	Jiamusi City Quanhong Wood Industry Co., Ltd	48.50	37.96
Smart Gift International	Dalian Chunyao Wood Industry Co., Ltd	48.50	37.96
SUNCO TIMBER(KUNSHAN) CO., LTD	SUNCO TIMBER(KUNSHAN) CO., LTD	48.50	37.96
Supree (Fujian) Wood Co., Ltd	Supree (Fujian) Wood Co., Ltd	48.50	37.96
Supree (Fujian) Construction Materials Co., Ltd	Supree (Fujian) Construction Materials Co., Ltd	48.50	37.96
SUZHOU BAOCHENG INDUSTRIES CO., LTD	WALLBEYOND (SHUYANG) HOME DECOR CO., LTD.	48.50	37.96
Suzhou Five Cubic Wood Co., Ltd	Suzhou Geda Office Equipment Manufacturing Co., Ltd.	48.50	37.96
Suzhou Oriental Dragon Import and Export Co., Ltd. also known as Suzhou Oriental Dragon Import and Export Corp., Ltd.	Lingbi Xianghe Wood Co., Ltd	48.50	37.96

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Tai Yuan Trading Co., Ltd also known as Heshan Tai Yuan Trading Co., Ltd.	Heshan Yingmei Cabinet Co., Ltd	48.50	37.96
Taishan Changfa Wood Industry Co., Ltd	Taishan Changfa Wood Industry Co., Ltd	48.50	37.96
TAISHAN HONGXIANG TRADING CO., LTD	Chang He Xing Wood Manufacturer Co., Ltd	48.50	37.96
TAISHAN HONGXIANG TRADING CO., LTD	Heshan Yingmei Cabinets Co., Ltd	48.50	37.96
TAISHAN HONGXIANG TRADING CO., LTD	Heshan Feiqiu Cabinet Co., Ltd	48.50	37.96
TAISHAN HONGXIANG TRADING CO., LTD	Yuanwang Wood Product Factory Dajiang Taishan	48.50	37.96
TAISHAN HONGXIANG TRADING CO., LTD	Can-Am Cabinet Ltd	48.50	37.96
Taishan Hongzhou Cabinet Co., Ltd	Taishan Hongzhou Cabinet Co., Ltd	48.50	37.96
Taishan Jiahong Trade Co., Ltd	Taishan Dajiang Town Dutou Wood Furniture Factory	48.50	37.96
Taishan Jiahong Trade Co., Ltd	Foshan Nanhai Jinwei Cabinet Furniture Co., Ltd	48.50	37.96
Taishan Jiahong Trade Co., Ltd	Taishan Huali Kitchen Cabinet Co., Ltd	48.50	37.96
Taishan Jiahong Trade Co., Ltd	Taishan Empire Wood Co., Ltd	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	TAISHAN GANHUI STONE KITCHEN CO., LTD	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	Can-Am Cabinet Ltd	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	TAISHAN QUANMEI KITCHEN WARE CO., LTD	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	TAISHAN JIAFU CABINET CO., LTD	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	TAISHAN DAJIANG TOWN DUTOU FURNITURE FACTORY.	48.50	37.96
TAISHAN OVERSEA TRADING COMPANY LTD	Feiteng Kitchen Cabinets Taishan Corporation	48.50	37.96
Taizhou Overseas Int'l Ltd	Zhejiang Royal Home Co., Ltd	48.50	37.96
TANGSHAN BAOZHU FURNITURE CO.,LTD	TANGSHAN BAOZHU FURNITURE CO.,LTD	48.50	37.96
Tech Forest Cabinetry Co., Ltd	Tech Forest Cabinetry Co., Ltd	48.50	37.96
The Frame Manufacturing Co. Ltd	HUIZHOU DIWEIXIN JIATINGYONGPIN CO., LTD	48.50	37.96
Top Goal International Group Ltd.(Hong Kong)	Dongguan City Top Goal Furniture Co., Ltd	48.50	37.96
Tradewinds Furniture Ltd	Tradewinds Furniture Ltd	48.50	37.96
Wa Fok Art Craft Furniture (MACAO) Co., Ltd	Zhongshan Huafu Art Craft Furniture Co., Ltd	48.50	37.96
Weifang Fuxing Wood Co., Ltd	Weifang Fuxing Wood Co., Ltd	48.50	37.96
WEIFANG KITCHINET CORPORATION	WEIFANG KITCHINET CORPORATION	48.50	37.96
Weifang Lan Gu Wood Industry Co., Ltd	Weifang Lan Gu Wood Industry Co., Ltd	48.50	37.96
Weifang Master Wood Industry Co., Ltd	Weifang Master Wood Industry Co., Ltd	48.50	37.96
Weifang Yuanlin Woodenware Co., Ltd	Weifang Yuanlin Woodenware Co., Ltd	48.50	37.96
Weihai Adornus Cabinetry Manufacturing Co., Ltd	Weihai Adornus Cabinetry Manufacturing Co., Ltd	48.50	37.96
WEIHAI JARLIN CABINETRY MANUFACTURE CO., LTD.	WEIHAI JARLIN CABINETRY MANUFACTURE CO., LTD.	48.50	37.96
Wellday International Company Limited also known as Dongguan Wellday Household Co., Ltd.	Wellday International Company Limited also known as Dongguan Wellday Household Co., Ltd.	48.50	37.96
Wenzhou Youbo Industrial Co., Ltd	Wenzhou Youbo Industrial Co., Ltd	48.50	37.96
Wuxi Yushea Furniture Co., Ltd	Wuxi Yushea Furniture Co., Ltd	48.50	37.96
Wuxi Yusheng Kitchen-Bathroom Equipment Co., Ltd	Wuxi Yusheng Kitchen-Bathroom Equipment Co., Ltd	48.50	37.96
Xiamen Adler Cabinetry Co., Ltd	Xiamen Adler Cabinetry Co., Ltd	48.50	37.96
XIAMEN GOFOR STONE CO., LTD	KAICHENG (FUJIAN) KITCHEN CABINET CO., LTD	48.50	37.96
XIAMEN GOLDEN HUANAN IMP.& EXP. CO., LTD	Changtai Guanjia Industrial Co., Ltd	48.50	37.96
XIAMEN GOLDENHOME CO., LTD	XIAMEN GOLDENHOME CO., LTD	48.50	37.96
XIAMEN KAICHENG TRADING LIMITED COMPANY	KAICHENG (FUJIAN) KITCHEN CABINET CO., LTD	48.50	37.96
Xiamen Sintop Display Fixtures Co., Ltd	Xiamen Sintop Display Fixtures Co., Ltd	48.50	37.96
XINGZHI INTERNATIONAL TRADE LIMITED	XUZHOU YIHE WOOD CO., LTD	48.50	37.96
XUZHOU JIA LI DUO IMPORT&EXPORT CO., LTD	XUZHOU OUMEC WOOD-BASED PANEL CO., LTD	48.50	37.96
XUZHOU YIHE WOOD CO., LTD	XUZHOU YIHE WOOD CO., LTD	48.50	37.96
YEKALON INDUSTRY, INC	DONGGUAN TODA FURNITURE CO., LTD	48.50	37.96
YEKALON INDUSTRY, INC	GUANGZHOUSHI BAISEN DECORATIVE MATERIALS COMPANY LIMITED.	48.50	37.96
YEKALON INDUSTRY, INC	DONGGUAN FANYANUO FURNITURE CO., LTD	48.50	37.96
YEKALON INDUSTRY, INC	DONGGUANSHI ANKE BUILDING MATERIALS CO., LTD.	48.50	37.96
YEKALON INDUSTRY, INC	Oriental Chic Furniture Company Limited	48.50	37.96
YEKALON INDUSTRY, INC	DONGGUAN FRANCISS FURNITURE CO., LTD	48.50	37.96
YEKALON INDUSTRY, INC	SHANGHAI YUANYANG WOODEN CO., LTD	48.50	37.96
Yi Sen Wood Industry Limited Company of Ning An City.	Yi Sen Wood Industry Limited Company of Ning An City.	48.50	37.96
Yichun Dongmeng Wood Co., Ltd	Yichun Dongmeng Wood Co., Ltd	48.50	37.96
Yichun Dongmeng Wood Co., Ltd	Qingdao Dimei Wood Co., Ltd	48.50	37.96
Yichun Sunshine Wood Products Co., Ltd	Yichun Sunshine Wood Products Co., Ltd	48.50	37.96
Yixing Pengjia Cabinetry Co. Ltd	Yixing Pengjia Cabinetry Co. Ltd	48.50	37.96
Zhangjiagang Daye Hotel Furniture Co., Ltd	Zhangjiagang Daye Hotel Furniture Co., Ltd	48.50	37.96
ZHANGJIAGANG PRO–FIXTURE CO., LTD	Zhangjiagang Yuanjiahe Home Furniture Co., Ltd	48.50	37.96
ZHANGZHOU CITY XIN JIA HUA FURNITURE CO., LTD.	ZHANGZHOU CITY XIN JIA HUA FURNITURE CO., LTD.	48.50	37.96
Zhangzhou Guohui Industrial & Trade Co., Ltd	Zhangzhou Guohui Industrial & Trade Co., Ltd	48.50	37.96
Zhangzhou OCA Furniture Co., Ltd	Zhangzhou OCA Furniture Co., Ltd	48.50	37.96

Exporter	Producer	Estimated weighted-average dumping margin (percent)	Cash deposit rate (adjusted for subsidy offsets) (percent)
Zhaoqing Centech Decorative Material Company Ltd	Zhaoqing Centech Decorative Material Company Ltd	48.50	37.96
Zhejiang Jindi Holding Group Co., Ltd	Zhejiang Jindi Holding Group Co., Ltd	48.50	37.96
Zhong Shan Shi Yicheng Furniture & Craftwork Co., Ltd.	Zhong Shan Shi Yicheng Furniture & Craftwork Co., Ltd.	48.50	37.96
Zhong Shan Yue Qin Imp. & Exp. Co., Ltd	Zhongshan Jinpeng Furniture Co., Ltd	48.50	37.96
Zhongshan City Shenwan Meiting Furniture Factory	Zhongshan City Shenwan Meiting Furniture Factory	48.50	37.96
Zhongshan Fookyik Furniture Co., Ltd	Zhongshan Fookyik Furniture Co., Ltd	48.50	37.96
ZHONGSHAN GAINWELL FURNITURE CO., LTD	ZHONGSHAN GAINWELL FURNITURE CO., LTD	48.50	37.96
Zhongshan Guanda Furniture Manufacturing Co., Ltd also known as Guanda Furniture Co., Ltd.	Zhongshan Guanda Furniture Manufacturing Co., Ltd	48.50	37.96
ZHONGSHAN HENGFU FURNITURE COMPANY LIMITED.	ZHONGSHAN HENGFU FURNITURE COMPANY LIMITED.	48.50	37.96
Zhongshan King's Group Furniture (ENTERPRISES) Co., Ltd.	Zhongshan King's Group Furniture (ENTERPRISES) Co., Ltd.	48.50	37.96
Zhoushan For-strong Wood Co., Ltd	Zhoushan For-strong Wood Co., Ltd	48.50	37.96
Zhoushan For-strong Wood Co., Ltd	Shanghai Wanmuda Furniture Co., Ltd	48.50	37.96
Zhucheng Tonghe Woodworks Co., ltd	Zhucheng Tonghe Woodworks Co., ltd	48.50	37.96
Zhuhai Seagull Kitchen and Bath Products Co., Ltd	Zhuhai Seagull Kitchen and Bath Products Co., Ltd	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	DONGGUAN FANG CHENG FURNITURE LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	ZhongShan PRO–YEARN Crafts Product Co., Ltd	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	FUJIAN NEWMARK INDUSTRIAL CO., LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	Fuzhou Zhonghe Houseware CO., LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	MING LIANG FURNITURE PRODUCT CO., LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	XIANJU JUNYANG HOUSEHOLD PRODUCTS CO., LTD.	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	DongGuan HeTai Homewares CO., LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	CHENG TONG HARDWARE RPODUCT LTD	48.50	37.96
ZIEL INTERNATIONAL CO., LIMITED	Nantong Jon Ergonomic office Co., Ltd	48.50	37.96
China-Wide Entity		262.18	251.64

Provisional Measures

Section 733(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months, except where exporters representing a significant proportion of exports of the subject merchandise request Commerce extended the four-month period to no more than six-months. At the request of exporters that account for a significant proportion of wooden cabinets and vanities from China, Commerce extended the four-month period to six-months.[5] In the underlying investigation, Commerce published the preliminary determination on October 9, 2019. Therefore, the extended period, beginning on the date of publication of the *Preliminary Determination,* ended on April 5, 2020. Furthermore, section 737(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Therefore, in accordance with section 733(d) of the Act and our practice, we will instruct CBP to terminate the suspension of liquidation and to liquidate, without regard to antidumping duties, unliquidated entries of wooden cabinets and vanities from China entered, or withdrawn from warehouse, for consumption after April 5, 2020, the date on which the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register.** Suspension of liquidation will resume on the date of publication of the ITC's final determination in the **Federal Register.**

Notifications to Interested Parties

This notice constitutes the antidumping duty order with respect to wooden cabinets and vanities from China pursuant to section 736(a) of the Act. Interested parties can find a list of antidumping duty orders currently in effect at *http://enforcement.trade.gov/stats/iastats1.html.*

This order is published in accordance with sections 735(c)(2) and 736(a) of the Act, and 19 CFR 351.211(b).

Dated: April 16, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Order

The merchandise subject to this order consists of wooden cabinets and vanities that are for permanent installation (including floor mounted, wall mounted, ceiling hung or by attachment of plumbing), and wooden components thereof. Wooden cabinets and vanities and wooden components are made substantially of wood products, including solid wood and engineered wood products (including those made from wood particles, fibers, or other wooden materials such as plywood, strand board, block board, particle board, or fiberboard), or bamboo. Wooden cabinets and vanities consist of a cabinet box (which typically includes a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves) and may or may not include a frame, door, drawers and/or shelves. Subject merchandise includes wooden cabinets and vanities with or without wood veneers, wood, paper or other overlays, or laminates, with or without non-wood components or trim such as metal, marble, glass, plastic, or other resins, whether or not surface finished or unfinished, and whether or not completed.

Wooden cabinets and vanities are covered by this order whether or not they are imported attached to, or in conjunction with, faucets, metal plumbing, sinks and/or sink

[5] *See Preliminary Determination.*

bowls, or countertops. If wooden cabinets or vanities are imported attached to, or in conjunction with, such merchandise, only the wooden cabinet or vanity is covered by the scope.

Subject merchandise includes the following wooden component parts of cabinets and vanities: (1) wooden cabinet and vanity frames (2) wooden cabinet and vanity boxes (which typically include a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves), (3) wooden cabinet or vanity doors, (4) wooden cabinet or vanity drawers and drawer components (which typically include sides, backs, bottoms, and faces), (5) back panels and end panels, (6) and desks, shelves, and tables that are attached to or incorporated in the subject merchandise.

Subject merchandise includes all unassembled, assembled and/or ''ready to assemble'' (RTA) wooden cabinets and vanities, also commonly known as ''flat packs,'' except to the extent such merchandise is already covered by the scope of antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018). RTA wooden cabinets and vanities are defined as cabinets or vanities packaged so that at the time of importation they may include: (1) wooden components required to assemble a cabinet or vanity (including drawer faces and doors); and (2) parts *(e.g.,* screws, washers, dowels, nails, handles, knobs, adhesive glues) required to assemble a cabinet or vanity. RTAs may enter the United States in one or in multiple packages.

Subject merchandise also includes wooden cabinets and vanities and in-scope components that have been further processed in a third country, including but not limited to one or more of the following: trimming, cutting, notching, punching, drilling, painting, staining, finishing, assembly, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the in-scope product.

Excluded from the scope of this order, if entered separate from a wooden cabinet or vanity are:

(1) Aftermarket accessory items which may be added to or installed into an interior of a cabinet and which are not considered a structural or core component of a wooden cabinet or vanity. Aftermarket accessory items may be made of wood, metal, plastic, composite material, or a combination thereof that can be inserted into a cabinet and which are utilized in the function of organization/accessibility on the interior of a cabinet; and include:

- Inserts or dividers which are placed into drawer boxes with the purpose of organizing or dividing the internal portion of the drawer into multiple areas for the purpose of containing smaller items such as cutlery, utensils, bathroom essentials, *etc.*
- Round or oblong inserts that rotate internally in a cabinet for the purpose of accessibility to foodstuffs, dishware, general supplies, *etc.*

(2) Solid wooden accessories including corbels and rosettes, which serve the primary purpose of decoration and personalization.

(3) Non-wooden cabinet hardware components including metal hinges, brackets, catches, locks, drawer slides, fasteners (nails, screws, tacks, staples), handles, and knobs.

(4) Medicine cabinets that meet all of the following five criteria are excluded from the scope: (1) wall mounted; (2) assembled at the time of entry into the United States; (3) contain one or more mirrors; (4) be packaged for retail sale at time of entry; and (5) have a maximum depth of seven inches.

Also excluded from the scope of the order are:

(1) All products covered by the scope of the antidumping duty order on *Wooden Bedroom Furniture from the People's Republic of China. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005).

(2) All products covered by the scope of the antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR. 513 (January 4, 2018).

Imports of subject merchandise are classified under Harmonized Tariff Schedule of the United States (HTSUS) statistical numbers 9403.40.9060 and 9403.60.8081. The subject component parts of wooden cabinets and vanities may be entered into the United States under HTSUS statistical number 9403.90.7080. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

[FR Doc. 2020–08544 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Meeting of the Civil Nuclear Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of a Partially Closed Federal Advisory Committee Meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda for a partially closed meeting of the Civil Nuclear Trade Advisory Committee (CINTAC).

DATES: The meeting is scheduled for Thursday, May 21, 2020, from 11:00 a.m. to 4:00 p.m. Eastern Standard Time (EST). The deadline for members of the public to register to participate, including requests to make comments during the meeting and for auxiliary aids, or to submit written comments for dissemination prior to the meeting, is 5:00 p.m. Eastern Standard Time (EST) on Friday, May 15, 2020.

ADDRESSES: The meeting will be held via phone/webinar. Requests to register to participate (including to speak or for auxiliary aids) and any written comments should be submitted to: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, Room 28018, 1401 Constitution Ave. NW, Washington, DC 20230. (Fax: 202–482–5665; email: *jonathan.chesebro@trade.gov*). Members of the public are encouraged to submit registration requests and written comments via email to ensure timely receipt.

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, Room 28018, 1401 Constitution Ave. NW, Washington, DC 20230. (Phone: 202–482–1297; Fax: 202–482–5665; email: *jonathan.chesebro@trade.gov*).

SUPPLEMENTARY INFORMATION:

Background: The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand United States exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities will affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

The Department of Commerce renewed the CINTAC charter on August 10, 2018. This meeting is being convened under the sixth charter of the CINTAC.

Topics to be considered: The agenda for the CINTAC meeting on Thursday, May 21, 2020, is as follows:

Closed Session (11:00 a.m.–1:00 p.m.)—Discussion of matters determined to be exempt from the provisions of the Federal Advisory Committee Act relating to public meetings found in 5 U.S.C. App.

§§ (10)(a)(1) and 10(a)(3). The session will be closed to the public pursuant to Section 10(d) of FACA as amended by Section 5(c) of the Government in Sunshine Act, Public Law 94–409, and in accordance with Section 552b(c)(4) and Section 552b(c)(9)(B) of Title 5, United States Code, which authorize closure of meetings that are ''likely to disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential'' and ''likely to significantly frustrate implementation of a proposed agency action,'' respectively. The part of the meeting that will be closed will address (1) nuclear cooperation agreements; (2) encouraging ratification of the Convention on Supplementary Compensation for Nuclear Damage; and (3) identification of specific trade barriers impacting the U.S. civil nuclear industry.

Public Session (1:00 p.m.–4:00 p.m.)—Subcommittee work, review of deliberative recommendations, and opportunity to hear from members of the public.

Members of the public wishing to attend the public session of the meeting must notify Mr. Jonathan Chesebro at the contact information above by 5:00 p.m. EST on Friday, May 15, 2020 in order to pre-register to participate. A limited amount of time will be available for brief oral comments from members of the public attending the meeting. To accommodate as many speakers as possible, the time for public comments will be limited to two (2) minutes per person, with a total public comment period of 30 minutes. Individuals wishing to reserve speaking time during the meeting must contact Mr. Chesebro and submit a brief statement of the general nature of the comments and the name and address of the proposed participant by 5:00 p.m. EST on Friday, May 15, 2020. If the number of registrants requesting to make statements is greater than can be reasonably accommodated during the meeting, ITA may conduct a lottery to determine the speakers.

Any member of the public may submit written comments concerning the CINTAC's affairs at any time before and after the meeting. Comments may be submitted to the Civil Nuclear Trade Advisory Committee, Office of Energy & Environmental Industries, Room 28018, 1401 Constitution Ave. NW, Washington, DC 20230. For consideration during the meeting, and to ensure transmission to the Committee prior to the meeting, comments must be received no later than 5:00 p.m. EST on Friday, May 15, 2020. Comments received after that date will be distributed to the members but may not be considered at the meeting.

Copies of CINTAC meeting minutes will be available within 90 days of the meeting.

Dated: April 15, 2020.

Man Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2020–08431 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–107]

Wooden Cabinets and Vanities and Components Thereof From the People's Republic of China: Countervailing Duty Order

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: Based on affirmative final determinations by the Department of Commerce (Commerce) and the International Trade Commission (ITC), Commerce is issuing a countervailing duty (CVD) order on wooden cabinets and vanities and components thereof (wooden cabinets and vanities) from the People's Republic of China (China).

DATES: Applicable April 21, 2020.

FOR FURTHER INFORMATION CONTACT: Benito Ballesteros, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–7425.

SUPPLEMENTARY INFORMATION:

Background

In accordance with section 705(d) of the Tariff Act of 1930, as amended (Act), on February 28, 2020, Commerce published its affirmative final determination that countervailable subsidies are being provided to producers and exporters of wooden cabinets and vanities from China.[1] On April 13, 2020, the ITC notified Commerce of its final determination that an industry in the United States is materially injured within the meaning of section 705(b)(1)(A)(i) of the Act by reason of subsidized imports of subject merchandise from China.[2]

Scope of the Order

The products covered by this order are wooden cabinets and vanities from China. For a complete description of the scope of this order, *see* the Appendix to this notice.

Countervailing Duty Order

On April 13, 2020, in accordance with section 705(d) of the Act, the ITC notified Commerce of its final determination in this investigation, in which it found that an industry in the United States is materially injured within the meaning of section 705(b)(1)(A)(i) of the Act by reason of subsidized imports of wooden cabinets and vanities from China.[3] Therefore, in accordance with sections 705(c)(2) and 706 of the Act, Commerce is issuing this countervailing duty order. Because the ITC determined that imports of wooden cabinets and vanities from China are materially injuring a U.S. industry, unliquidated entries of such merchandise from China, entered or withdrawn from warehouse for consumption, are subject to the assessment of countervailing duties.

Therefore, in accordance with section 706(b)(1) of the Act, Commerce will direct U.S. Customs and Border Protection (CBP) to assess, upon further instruction by Commerce, countervailing duties for all relevant entries of wooden cabinets and vanities from China, which are entered, or withdrawn from warehouse, for consumption on or after August 12, 2019, the date of publication of the *Preliminary Determination,*[4] but will not include entries occurring after the expiration of the provisional measures period and before the publication of the ITC's final injury determination under section 705(b) of the Act, as further described below.

Suspension of Liquidation

In accordance with section 706 of the Act, we will instruct CBP to reinstitute the suspension of liquidation of wooden cabinets and vanities from China as described in the Appendix to this notice which are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the ITC's notice of final determination in the

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[1] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Final Affirmative Countervailing Duty Determination,* 85 FR 11962 (February 28, 2020) (*Final Determination*).

[2] *See* Letter to Jeffrey Kessler, Assistant Secretary of Commerce for Enforcement and Compliance, from David S. Johanson, Chairman of the U.S. International Trade Commission, dated April 13, 2020 (ITC Letter).

[3] *Id.*

[4] *See Wooden Cabinets and Vanities and Components Thereof from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination,* 84 FR 39798 (August 12, 2019) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

Federal Register. We will also instruct CBP to require, at the same time as importers would normally deposit estimated customs duties on the subject merchandise, a cash deposit of countervailing duties for each entry of the subject merchandise in an amount based on the net countervailable subsidy rates below for the subject merchandise. These instructions suspending liquidation will remain in effect until further notice. The all-others rate applies to all producers or exporters not specifically listed below.

Company	Subsidy rate (%)
The Ancientree Cabinet Co., Ltd.[5]	13.33
Dalian Meisen Woodworking Co., Ltd.[6]	18.27
Rizhao Foremost Woodwork Manufacturing Company Ltd.[7]	31.18
Henan AiDiJia Furniture Co., Ltd	293.45
Deway International Trade Co., Ltd	293.45
All Others	20.93

Provisional Measures

Section 703(d) of the Act states that instructions issued pursuant to an affirmative preliminary determination may not remain in effect for more than four months. In the underlying investigation, Commerce published the *Preliminary Determination* on August 12, 2019. As such, the four-month period beginning on the date of the publication of the *Preliminary Determination* ended on December 9, 2019. Furthermore, section 707(b) of the Act states that definitive duties are to begin on the date of publication of the ITC's final injury determination.

Therefore, in accordance with section 703(d) of the Act and our practice, we instructed CBP to terminate the suspension of liquidation and to liquidate, without regard to countervailing duties, unliquidated entries of wooden cabinets and vanities from China entered, or withdrawn from warehouse, for consumption, after December 9, 2019, the date on which the provisional measures expired, until and through the day preceding the date of publication of the ITC's final injury determination in the **Federal Register**. Suspension of liquidation will resume on the date of publication of the ITC's final determination in the **Federal Register**.

Notifications to Interested Parties

This notice constitutes the countervailing duty order with respect to wooden cabinets and vanities from China pursuant to section 706(a) of the Act. Interested parties can find a list of countervailing duty orders currently in effect at *http://enforcement.trade.gov/stats/iastats1.html.*

This order is issued and published in accordance with sections 705(c)(2) and 706(a) of the Act and 19 CFR 351.211(b).

Dated: April 16, 2020.

Jeffrey I. Kessler,

Assistant Secretary for Enforcement and Compliance.

Appendix

Scope of the Order

The merchandise subject to the order consists of wooden cabinets and vanities that are for permanent installation (including floor mounted, wall mounted, ceiling hung or by attachment of plumbing), and wooden components thereof. Wooden cabinets and vanities and wooden components are made substantially of wood products, including solid wood and engineered wood products (including those made from wood particles, fibers, or other wooden materials such as plywood, strand board, block board, particle board, or fiberboard), or bamboo. Wooden cabinets and vanities consist of a cabinet box (which typically includes a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves) and may or may not include a frame, door, drawers and/or shelves. Subject merchandise includes wooden cabinets and vanities with or without wood veneers, wood, paper or other overlays, or laminates, with or without non-wood components or trim such as metal, marble, glass, plastic, or other resins, whether or not surface finished or unfinished, and whether or not completed.

Wooden cabinets and vanities are covered by the order whether or not they are imported attached to, or in conjunction with, faucets, metal plumbing, sinks and/or sink bowls, or countertops. If wooden cabinets or vanities are imported attached to, or in conjunction with, such merchandise, only the wooden cabinet or vanity is covered by the scope.

Subject merchandise includes the following wooden component parts of cabinets and vanities: (1) Wooden cabinet and vanity frames (2) wooden cabinet and vanity boxes (which typically include a top, bottom, sides, back, base blockers, ends/end panels, stretcher rails, toe kicks, and/or shelves), (3) wooden cabinet or vanity doors, (4) wooden cabinet or vanity drawers and drawer components (which typically include sides, backs, bottoms, and faces), (5) back panels and end panels, (6) and desks, shelves, and tables that are attached to or incorporated in the subject merchandise.

Subject merchandise includes all unassembled, assembled and/or ''ready to assemble'' (RTA) wooden cabinets and vanities, also commonly known as ''flat packs,'' except to the extent such merchandise is already covered by the scope of antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018). RTA wooden cabinets and vanities are defined as cabinets or vanities packaged so that at the time of importation they may include: (1) Wooden components required to assemble a cabinet or vanity (including drawer faces and doors); and (2) parts *(e.g.,* screws, washers, dowels, nails, handles, knobs, adhesive glues) required to assemble a cabinet or vanity. RTAs may enter the United States in one or in multiple packages.

Subject merchandise also includes wooden cabinets and vanities and in-scope components that have been further processed in a third country, including but not limited to one or more of the following: Trimming, cutting, notching, punching, drilling, painting, staining, finishing, assembly, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the in-scope product.

Excluded from the scope of the order, if entered separate from a wooden cabinet or vanity are:

(1) Aftermarket accessory items which may be added to or installed into an interior of a cabinet and which are not considered a structural or core component of a wooden cabinet or vanity. Aftermarket accessory items may be made of wood, metal, plastic, composite material, or a combination thereof that can be inserted into a cabinet and which are utilized in the function of organization/accessibility on the interior of a cabinet; and include:

- Inserts or dividers which are placed into drawer boxes with the purpose of organizing or dividing the internal portion of the drawer into multiple areas for the purpose of containing smaller items such as cutlery, utensils, bathroom essentials, etc.
- Round or oblong inserts that rotate internally in a cabinet for the purpose of accessibility to foodstuffs, dishware, general supplies, etc.

(2) Solid wooden accessories including corbels and rosettes, which serve the primary purpose of decoration and personalization.

(3) Non-wooden cabinet hardware components including metal hinges, brackets, catches, locks, drawer slides, fasteners (nails, screws, tacks, staples), handles, and knobs.

(4) Medicine cabinets that meet all of the following five criteria are excluded from the

[5] In the *Final Determination,* Commerce found the following companies to be cross-owned with The Ancientree Cabinet Co., Ltd.: Jiangsu Hongjia Wood Co., Ltd., Jiangsu Hongjia Wood Co., Ltd. Shanghai Branch, and Shanghai Hongjia Wood Co., Ltd. *See Final Determination,* 85 FR at 11963.

[6] In the *Final Determination,* Commerce found the following company to be cross-owned with Dalian Meisen Woodworking Co., Ltd.: Dalian Hechang Technology Development Co., Ltd. *Id.*

[7] In the *Final Determination,* Commerce found the following companies to be cross-owned with Rizhao Foremost Woodwork Manufacturing Company Ltd.: Foremost Worldwide Co., Ltd. and Rizhao Foremost Landbridge Wood Industries Co., Ltd. *Id.*

scope: (1) Wall mounted; (2) assembled at the time of entry into the United States; (3) contain one or more mirrors; (4) be packaged for retail sale at time of entry; and (5) have a maximum depth of seven inches.

Also excluded from the scope of the order are:

(1) All products covered by the scope of the antidumping duty order on *Wooden Bedroom Furniture from the People's Republic of China. See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bedroom Furniture from the People's Republic of China,* 70 FR 329 (January 4, 2005).

(2) All products covered by the scope of the antidumping and countervailing duty orders on *Hardwood Plywood from the People's Republic of China. See Certain Hardwood Plywood Products from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value, and Antidumping Duty Order,* 83 FR 504 (January 4, 2018); *Certain Hardwood Plywood Products from the People's Republic of China: Countervailing Duty Order,* 83 FR 513 (January 4, 2018).

Imports of subject merchandise are classified under Harmonized Tariff Schedule of the United States (HTSUS) statistical numbers 9403.40.9060 and 9403.60.8081. The subject component parts of wooden cabinets and vanities may be entered into the United States under HTSUS statistical number 9403.90.7080. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

[FR Doc. 2020–08546 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Cancellation of a Meeting of the Civil Nuclear Trade Advisory Committee

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of Cancellation of a Partially Closed Federal Advisory Committee Meeting.

SUMMARY: This notice cancels the April 23, 2020 partially closed meeting of the Civil Nuclear Trade Advisory Committee (CINTAC).

FOR FURTHER INFORMATION CONTACT: Mr. Jonathan Chesebro, Office of Energy & Environmental Industries, International Trade Administration, Room 28018, 1401 Constitution Ave. NW, Washington, DC 20230. (Phone: 202–482–1297; Fax: 202–482–5665; email: *jonathan.chesebro@trade.gov*).

SUPPLEMENTARY INFORMATION: *Background:* The CINTAC was established under the discretionary authority of the Secretary of Commerce and in accordance with the Federal Advisory Committee Act (5 U.S.C. App.), in response to an identified need for consensus advice from U.S. industry to the U.S. Government regarding the development and administration of programs to expand United States exports of civil nuclear goods and services in accordance with applicable U.S. laws and regulations, including advice on how U.S. civil nuclear goods and services export policies, programs, and activities will affect the U.S. civil nuclear industry's competitiveness and ability to participate in the international market.

The Department of Commerce renewed the CINTAC charter on August 10, 2018. This meeting is being convened under the sixth charter of the CINTAC.

The **Federal Register** Notice for the April 23, 2020 CINTAC meeting was published on April 14, 2020 and is available at *https://www.federalregister.gov/documents/2020/04/14/2020-07796/meeting-of-the-civil-nuclear-trade-advisory-committee.*

Dated: April 15, 2020.

Man Cho,

Deputy Director, Office of Energy and Environmental Industries.

[FR Doc. 2020–08432 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–889]

Dioctyl Terephthalate From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2017–2018

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) determines that producers or exporters subject to this review made sales of subject merchandise at less than normal value during the period of review (POR) February 3, 2017 through July 31, 2018.

DATES: Applicable April 21, 2020.

FOR FURTHER INFORMATION CONTACT: Laurel LaCivita or Laura Griffith, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4243 or (202) 482–6430, respectively.

SUPPLEMENTARY INFORMATION:

Background

On October 18, 2019, Commerce published the *Preliminary Results* for this administrative review.[1] We invited interested parties to comment on the *Preliminary Results.*[2] This review covers three respondents: Aekyung Petrochemical Co., Ltd. (AKP), Hanwha Chemical Corporation (Hanwha Chemical), and LG Chem Ltd. (LG Chem). We received case briefs from AKP and Hanwha Chemical on November 18, 2019.[3] We received a rebuttal brief from the Eastman Chemical Company (the petitioner) on November 25, 2019.[4] Commerce conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order

The merchandise covered by the order is dioctyl terephthalate (DOTP), regardless of form. DOTP that has been blended with other products is included within this scope when such blends include constituent parts that have not been chemically reacted with each other to produce a different product. For such blends, only the DOTP component of the mixture is covered by the scope of this order.[5]

Subject merchandise is currently classified under subheading 2917.39.2000 of the Harmonized Tariff Schedule of the United States (HTSUS). Subject merchandise may also enter under subheadings 2917.39.7000 or 3812.20.1000 of the HTSUS. While the CAS registry number and HTSUS classification are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

Analysis of the Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the accompanying

[1] *See Dioctyl Terephthalate from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2017–2018,* 84 FR 55904 (October 18, 2019) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

[2] *See Preliminary Results,* 84 FR at 55905.

[3] *See* AKP's Letter, ''Administrative Review of Dioctyl Terephthalate from Korea: Case Brief of Aekyung Petrochemical Co., Ltd.,'' dated November 18, 2019; *see also* Hanwha Chemical's Letter, ''Dioctyl Terephthalate (DOTP) from the Republic of Korea: Case Brief,'' dated November 18, 2019.

[4] *See* Petitioner's Letter, ''Rebuttal Case Brief; dioctyl terephthalate (DOTP) from Korea,'' dated November 25, 2019.

[5] For a full description of the scope of the order, *see* Memorandum, ''Issues and Decision Memorandum for the Finals Results of the 2017–2018 Administrative Review of the Antidumping Duty Order Covering Dioctyl Terephthalate from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

Issues and Decision Memorandum. A list of the issues which parties raised, and to which we respond in the Issues and Decision Memorandum, is attached at the appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *http://enforcement.trade.gov/frn/index.html.* The signed and electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding our *Preliminary Results,* we made certain changes to the weighted-average dumping margin for AKP. For detailed information, *see* the Issues and Decision Memorandum.

Final Results of the Administrative Review

We determine that the following weighted-average dumping margins exist for the respondents for the period February 3, 2017 through July 31, 2018:

Exporter or producer	Weighted-average dumping margin (percent)
Aekyung Petrochemical Co., Ltd	0.82
Hanwha Chemical Corporation	22.97
LG Chem Ltd	0.00

Assessment Rates

Pursuant to section 751(a)(2)(A) of the Act and 19 CFR 351.212(b)(1), Commerce will determine, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. We will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for each importer's examined sales and the total entered value of the importer's sales in accordance with 19 CFR 351.212(b)(1).

Where the respondent's weighted-average dumping margin is either zero or *de minimis* within the meaning of 19 CFR 351.106(c), or an importer-specific rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

We intend to issue liquidation instructions to CBP 15 days after publication of the final results of this review.

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) The cash deposit rate for the companies listed above will be equal to each company's weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a producer or exporter not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (3) if the exporter is not a firm covered in this review, a prior review, or the original investigation but the producer has been covered in a prior complete segment of this proceeding, the cash deposit rate will be the rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 3.69 percent,[6] the all-others rate established in the less-than-fair-value investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final 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 could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding Administrative Protective Order

This notice also serves as a 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 return/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.

Notification to Interested Parties

We are issuing and publishing these final results of administrative review in accordance with sections 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: April 15, 2020.

Christian B. Marsh,

Deputy Assistant Secretaryfor Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Changes Since the Preliminary Results of Review
V. Discussion of the Issues
  Comment 1: AKP's Differential Pricing Analysis
  Comment 2: Errors in AKP's Preliminary Margin Calculations
  Comment 3: Constructed Export Price Offset for Hanwha Chemical
VI. Recommendation

[FR Doc. 2020–08414 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–DS–P

[6] *See Dioctyl Terephthalate from the Republic of Korea: Antidumping Duty Order,* 82 FR 39410 (August 18, 2017).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XS031]

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Amendment 53 to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico

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

ACTION: Notice of intent (NOI) to prepare a draft environmental impact statement (DEIS); request for comments.

SUMMARY: NMFS, Southeast Region, in collaboration with the Gulf of Mexico Fishery Management Council (Council) intends to prepare a DEIS to describe and analyze management alternatives to be included in Amendment 53 to the Fishery Management Plan (FMP) for the Reef Fish Resources of the Gulf of Mexico (Amendment 53). Amendment 53 will address the conservation and management of Gulf of Mexico red grouper and will consider alternatives to

revise the commercial and recreational sector allocation, the overfishing limit (OFL), acceptable biological catch (ABC), annual catch limits (ACLs), and annual catch targets (ACTs). The purpose of this NOI is to solicit public comments on the scope of issues to be addressed in the DEIS.

DATES: Written comments on the scope of issues to be addressed in the DEIS must be received by NMFS by May 21, 2020.

ADDRESSES: You may submit comments on Amendment 53 identified by ''NOAA–NMFS–2020–0062'' by any of the following methods:

• *Electronic Submissions:* Submit electronic comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov.* Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2020-0062,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.

• *Mail:* Submit written comments to Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Peter Hood, Southeast Regional Office, telephone: 727–824–5305; or email: *Peter.hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: The status of the Gulf red grouper stock was evaluated in the Southeast Data, Assessment, and Review (SEDAR) 61 stock assessment that was completed in 2019. The results of SEDAR 61 indicated that the Gulf red grouper stock is not considered overfished or undergoing overfishing. However, fishermen and the Council have expressed concern about the health of the stock because of a decrease in landings, fewer legal sized fish, and a recent red tide event off the west coast of Florida. All weights described in this notice are in gutted weight.

In 2018, the Council noted that the combined commercial and recreational Gulf red grouper landings have trended downwards from over 7.26 million lb (3.29 million kg) in 2014 to approximately 4.16 million lb (1.89 million kg) in 2017. The Council also heard public testimony, primarily from commercial fishermen, who noted that Gulf red grouper are harder to catch and that there appears to less legal-size and larger fish throughout the species' range on the west Florida shelf. In addition, the Council's Scientific and Statistical Committee (SSC) reviewed an interim stock analysis conducted by the NMFS Southeast Fisheries Science Center (SEFSC) and concluded that the stock may be declining. Therefore, the SSC recommended that the Council reduce the 2019 Gulf red grouper total ACL from 10.70 million lb (4.85 million kg) to 4.60 million lb (2.09 million kg). The Council decided on a more precautionary approach and reduced the 2019 ACL to 4.16 million lb (1.89 million kg), which was the equal to the 2017 harvest (84 FR 52036; October 1, 2019).

The SSC reviewed the SEDAR 61 stock assessment in September 2019. To predict recreational fishing effort and landings, the assessment used the historical time series of recreational landings that has been fully-calibrated to the new Marine Recreational Information Program (MRIP) Fishing Effort Survey (FES). This survey provides a better estimate of recreational effort and landings than the previous MRIP survey, and indicates that landing estimates for many species, including Gulf red grouper, are greater than previously thought. As a result, the calibrated historical recreational landings, when compared to commercial landings, are greater than the current allocation of 24 percent recreational and 76 percent commercial, which was established in 2009 based on the average landings from 1986 through 2005.

The Council's SSC agreed with the determination in SEDAR 61 that the Gulf red grouper stock was not overfished or experiencing overfishing, but recognized the stock may have been adversely affected by the 2018 red tide event. Therefore, the SSC recommended that the catch level projections produced by the assessment assume that the impact from the 2018 red tide is approximately the same as the impact of a red tide event that occurred in 2005. In January 2020, the SSC received additional information about how different sector allocations impact the OFL and ABC projections produced by the assessment. The SEFSC explained that if the commercial and recreational allocation is changed to better reflect historical recreational harvest based on the FES-adjusted MRIP landing estimates, the projected OFL and ABC are less than if the allocation remains the same. This reduction is caused by changes in the estimated size distribution of harvested fish and greater estimates of discarded fish by the recreational sector.

The Council and NMFS are currently considering two actions in Amendment 53. The first action would revise the Gulf red grouper allocation between the commercial and recreational sectors. The Council is currently considering historical landings as a basis to revise the allocation. For the second action, the Council is considering revising the sector ACLs and ACTs based on the allocation selected in the first action of Amendment 53 and the results of SEDAR 61. The Council and NMFS may add actions to Amendment 53 in the future, such as recreational bag limits, minimum size limits, and seasonal closures, after the scoping process or based on future discussions of this amendment.

NMFS, in collaboration with the Council, will develop a DEIS to describe and analyze alternatives to address the management needs described above including the ''no action'' alternatives. In accordance with the Companion Manual to NOAA Administrative Order 216–6A, Section 8(B), Scoping Requirements for an EIS, NMFS, in collaboration with the Council, has identified preliminary environmental issues as a means to initiate discussion for scoping purposes only. The public is invited to provide written comments on the preliminary issues, which are identified as actions in the Amendment 53 draft options paper. These preliminary issues may not represent the full range of issues that eventually will be evaluated in the DEIS. A copy of the Amendment 53 draft options paper is available at *https://www.fisheries.noaa.gov/action/amendment-53-red-grouper-allocations-and-catch-levels.*

After the DEIS associated with Amendment 53 is completed, it will be filed with the Environmental Protection Agency (EPA). After filing, the EPA will publish a notice of availability (NOA) of the DEIS for public comment in the **Federal Register**. The DEIS will have a 45-day comment period. This procedure is pursuant to regulations issued by the Council on Environmental Quality (CEQ) for implementing the procedural provisions of the National Environmental Policy Act (NEPA; 40 CFR parts 1500–1508) and the Companion Manual to NOAA Administrative Order 216–6A.

The Council and NMFS will consider public comments received on the DEIS in developing the final environmental impact statement (FEIS), and before the Council votes to submit the final amendment to NMFS for Secretarial review, approval, and implementation. NMFS will announce in the **Federal Register** the availability of the final amendment and FEIS for public review during the Secretarial review period, and will consider all public comments prior to final agency action to approve, disapprove, or partially approve the final amendment. During Secretarial review, NMFS will also file the FEIS with the EPA and the EPA will publish an NOA for the FEIS in the **Federal Register**.

NMFS will announce, through a document published in the **Federal Register**, all public comment periods on the final amendment, its proposed implementing regulations, and the availability of its associated FEIS. NMFS will consider all public comments received during the Secretarial review period, whether they are on the final amendment, the proposed regulations, or the FEIS, prior to final agency action.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 15, 2020.

Hélène M.N. Scalliet,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–08438 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA134]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Alaska Marine Lines Lutak Dock Project, Haines, Alaska

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Alaska Marine Lines, Inc. (AML) to incidentally harass, by Level A and Level B harassment, marine mammals during pile driving activities associated with the Lutak Dock Project in Haines, Alaska.

DATES: This authorization is effective from June 15, 2020 through June 14, 2021.

FOR FURTHER INFORMATION CONTACT: Dwayne Meadows, Ph.D., 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: *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. 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 incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On 9 July 2019, NMFS received a request from AML for an IHA to take marine mammals incidental to Lutak Dock project in Haines, Alaska. The application was deemed adequate and complete on October 23, 2019. AML's request is for take of seven species of marine mammals by Level B harassment and/or Level A harassment. Neither AML nor NMFS expects serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

Description of Specified Activity

The project consists of the demolition, re-construction, and improvement of a commercial barge cargo dock in Lutak Inlet near Haines, Alaska adjacent to the Haines Ferry Terminal. The project includes the following in-water components: Removal (by pulling or cutting off at the mudline or using a vibratory hammer as a last resort) of 12 steel pipe piles (16 inch diameter) of two berthing dolphins associated with the existing steel cargo bridge; fill 4,000 yards (3058 cubic meters) of gravel and 1,000 yards (765 cubic meters) of riprap to construct a causeway below the new dock; installing below mean high water (MHW) a 46-foot (14 m) long by 15-foot (4.6 m) wide steel float; installing below MHW (using vibratory or impact pile driving or down-the-hole (DTH) drilling) four 24-inch diameter steel pipe piles to construct two float strut dolphins, six 36-inch diameter steel pipe piles to construct two breasting dolphins; and construction of a 40-foot (12 m) wide by 40-foot (12 m) long, pile supported (three 30-inch diameter steel pipe piles), concrete abutment within the causeway to support a 120-foot long (36.6 m) by 24-foot (7.3 m) wide steel bridge over navigable waters.

The pile driving/removal or DTH drilling can result in take of marine mammals from sound in the water which results in behavioral harassment or auditory injury. The footprint of the project is approximately one square mile (2.6 square km) around the project site. The project will take no more than 8 days of pile-driving/removal or DTH drilling.

A detailed description of the planned project is provided in the **Federal Register** notice for the proposed IHA (84 FR 65117; November 26, 2019). Since that time, no changes have been made to the planned pile driving activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Responses

A notice of NMFS's proposal to issue an IHA to AML was published in the **Federal Register** on November 26, 2019 (84 FR 65117). That notice described, in detail, AML's activity, the marine mammal species that may be affected by

the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received no public comments. A comment letter from the Marine Mammal Commission (Commission) was received outside of the public comment process pursuant to the Commission's authority to recommend steps it deems necessary or desirable to protect and conserve marine mammals (16 U.S. C. 1402.202(a)). We are obligated to respond to the Commission's recommendations within 120 days, and we do so below.

Comment 1: The Commission recommends that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated **Federal Register** notice process.

Response: NMFS appreciates the streamlining achieved by the use of abbreviated **Federal Register** notices and intends to continue using them for proposed IHAs that include minor changes from previously issued IHAs, but which do not satisfy the renewal requirements. However, our method for issuing renewals meets statutory requirements and maximizes efficiency, and we plan to continue considering requests for renewals.

Comment 2: The Commission recommends that NMFS stipulate that a renewal is a one-time opportunity in all **Federal Register** notices requesting comments on the possibility of a renewal, on its web page detailing the renewal process, and in all draft and final authorizations that include a term and condition for a renewal.

Response: NMFS thanks the Commission for its recommendation. Currently, **Federal Register** notices announcing proposed IHAs and the potential for a Renewal state, in the **SUMMARY** section, ''NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met.'' Further, no notice for any additional Renewal is included in the **Federal Register** Notice for proposed Renewals, so the current process already ensures that only one Renewal will be issued. We have revised the website to clarify some of the language around Renewal IHAs.

Comment 3: The Commission recommends that NMFS finish reviewing and finalize its recommended proxy source levels for both impact and vibratory installation of the various pile types and sizes.

Response: NMFS thanks the Commission for its recommendation.

Comment 4: The Commission recommends that NMFS require all applicants that propose to use a DTH hammer to install piles, conduct in-situ measurements and adjust the Level A and B harassment zones accordingly. They further recommend that we re-estimate the Level A harassment zones for DTH drilling based on source levels provided either by Reyff and Heyvaert (2019) or Denes *et al.* (2019) and NMFS's Level A harassment thresholds for impulsive sources and (2) increase the numbers of Level A harassment takes accordingly.

Response: We appreciate the Commission's concern about the rise of DTH drilling. We have received a number of in-situ measurements from prior projects, including Reyff and Heyvaert (2019) and Denes *et al.* (2019), and are currently evaluating those data to determine next steps to ensure marine mammals are adequately protected. We direct the Commission and other readers to our recent response to a similar Commission comment, which can be found at 85 FR 673 (January 7, 2020).

Comment 5: The Commission recommends that NMFS include in the **Federal Register** notice relevant site-specific information for harbor and Dall's porpoises, pertinent information regarding subsistence use of the various marine mammal species, whether AML's activities overlap in time and space with known hunting activities, whether the local Native Alaskan communities that hunt marine mammals were contacted, whether any concerns were conveyed, whether additional mitigation measures are warranted, and the requirement to report unauthorized taking (including injured and dead marine mammals) to the Alaska Regional Stranding Coordinator.

Response: The Commission did not note any specific information lacking for harbor and Dall's porpoises that would affect the proposed authorization so we have not added any additional information to this notice. We note that the proposed IHA referred readers to the Stock Assessment Reports and other information on these and the other species on our website. AML contacted local Native Alaskan communities and updated the subsistence use section of their application accordingly, and we include this new information below. We note the appropriate local Alaska Regional contact for unauthorized take was in our proposed IHA.

Comment 6: The Commission recommends that NMFS include in the notice and final authorization, if issued, the requirements to extrapolate Level A harassment takes to unobserved portions of the Level A harassment zone, similar to Level B harassment takes and to keep a running tally of total Level A and B harassment takes based on both observed and extrapolated takes.

Response: We clarify in this notice and final authorization the requirement for AML to extrapolate Level A harassment takes to unobserved portions of the Level A harassment zone, if necessary. With regard to keeping a running tally of total Level A and B harassment takes, we agree that the applicant must ensure they do not exceed authorized takes.

Comment 7: The Commission recommends that NMFS re-estimate the Level B harassment zone for impact installation of 36-in piles based on the source level of 193 dB re 1 μPa at 10 m as provided in Caltrans (2015) and consistent with the other source level metrics.

Response: AML chose to use the more conservative source level of 194 dB re 1 μPa at 10 m as provided in Denes *et al.* (2016) because this reference is based on local conditions more similar to the current project. We support the use of the more conservative source level of Denes (2016).

Changes From the Proposed IHA to Final IHA

A new paper was published that provided updated estimates of the proportion of western Distinct Population Segment (DPS) Steller sea lions occurring in different parts of the range of the eastern DPS of Steller sea lions in Alaska (Hastings *et al.,* 2020). For the area of this project the estimate declined from 2 percent to 1.4 percent. We used the updated 1.4 percent value to calculate the share of take for the two DPSs. The final take numbers are thus 1291 for the eastern DPS and 18 for the western DPS.

New information also became available for the abundance of humpback whales in the area. We used that to calculate density and estimate take, though in the end, take did not change from the proposed authorization.

Minor clarifications have been made to language regarding pile removal methods in the Description of Specified Activity section. In the Estimated Take section we clarified the use of Denes *et al.* (2016) to calculate the Level B harassment zones for impact pile driving as this reference is based on local conditions more similar to the current project and is a more conservative estimate. We also clarified in that section the method for determining a combined source level for vibratory and DTH drilling. As a result of the ESA Section 7 Biological Opinion the mitigation requirement not to recommence pile driving is extended to

30 minutes for ESA listed species and there are additional reporting requirements for take of ESA listed species. We clarify in the Monitoring and Reporting section of this notice and final authorization the requirement for AML to extrapolate Level A harassment takes to unobserved portions of the Level A harassment zone, if necessary. Additional details on subsistence use and consultations with local Native Alaskan communities are provided in the Effects of Specified Activities on Subsistence Uses of Marine Mammals section of their application accordingly and we included those herein.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize 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's Stock Assessment Reports (SARs; *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS's website (*https://www.fisheries.noaa.gov/find-species*).

Table 1 lists all species with expected potential for occurrence in Haines, Alaska 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 (2019). 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's 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's 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's U.S. Alaska SARs (*e.g.,* Muto *et al.,* 2019). All values presented in Table 1 are the most recent available at the time of publication and are available in the draft 2019 SARs (Muto *et al.,* 2019).

TABLE 1—MARINE MAMMALS POTENTIALLY PRESENT IN THE VICINITY OF THE STUDY AREAS

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	North Pacific	-; N	N/A (see SAR, N/A, 2015), see text.	See SAR	4.4
Family Balaenopteridae (rorquals):						
Humpback Whale	*Megaptera novaeangliae*	Central North Pacific	-;N (Hawaii DPS)	10,103 (0.3, 7,890, 2006)	83	25
		Central North Pacific	T,D,Y (Mexico DPS)	3,264	N/A	N/A
Minke whale [4]	*Balaenoptera acutorostrata*	Alaska	-; N	N/A, see text	N/A	0
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae:						
Killer whale [5]	*Orcinus orca*	Alaska Resident		2,347	24	1
		Northern Resident	-; Y	261	1.96	0
		West Coast transient		243	2.4	0
Family Phocoenidae (porpoises):						
Dall's porpoise [4]	*Phocoenoides dalli*	Alaska	-; N	83,400 (0.097, N/A, 1991)	N/A	38
Harbor porpoise	*Phocoena phocoena*	Southeast Alaska	-; Y	975 (2012)	8.9	34
Order Carnivora—Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions):						
California sea lion	*Zalophus californianus*	U.S.	-; N	257,606 (N/A, 233,515, 2014).	14,011	>320
Steller sea lion	*Eumetopias jubatus*	Eastern U.S.	-; N	41,638 (n/a; 41,638; 2015)	2,498	108
Steller sea lion	*Eumetopias jubatus*	Western U.S.	E,D,Y	54,268 (see SAR, 54,267, 2017).	326	247
Family Phocidae (earless seals):						
Harbor seal	*Phoca vitulina richardii*	Lynn Canal/Stephens Passage.	-; N	9,478 (see SAR, 8,605, 2011).	155	50

[1] 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 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.

[2] NMFS marine mammal stock assessment reports online at: *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments.* CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

[3] These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

[4] The most recent abundance estimate is >8 years old, there is no official current estimate of abundance available for this stock.

[5] NMFS has preliminary genetic information on killer whales in Alaska which indicates that the current stock structure of killer whales in Alaska needs to be reassessed. NMFS is evaluating the new genetic information. A complete revision of the killer whale stock assessments will be postponed until the stock structure evaluation is completed and any new stocks are identified'' (Muto, Helker et al. 2018). For the purposes of this IHA application, the existing stocks are used to estimate potential takes.

All species that could potentially occur in the planned project area are included in Table 1. As described below, all 7 species (with 10 managed stocks) temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we have authorized it.

A detailed description of the of the species likely to be affected by AML's planned project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the **Federal Register** notice for the proposed IHA (84 FR 65117; November 26, 2019); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from pile installation and removal activities for the Lutak Dock Project have the potential to result in behavioral harassment of marine mammals in the vicinity of the action area. The **Federal Register** notice for the proposed IHA (84 FR 65117; November 26, 2019) included a discussion of the effects of anthropogenic noise on marine mammals, therefore that information is not repeated here; please refer to the **Federal Register** notice (84 FR 65117; November 26, 2019) for that information.

The main impact associated with the Lutak Dock Project would be temporarily elevated sound levels and the associated direct effects on marine mammals. The project would not result in permanent impacts to habitats used directly by marine mammals, such as haulout sites, but may have potential short-term impacts to food sources such as forage fish, and minor impacts to the immediate substrate during installation and removal of piles during the planned project. These potential effects are discussed in detail in the **Federal Register** notice for the proposed IHA (84 FR 65117; November 26, 2019), therefore that information is not repeated here; please refer to that **Federal Register** notice for that information.

Estimated Take

This section provides an estimate of the number of incidental takes for authorization through this IHA, which will inform both NMFS' consideration of ''small numbers'' 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 acoustic source (*i.e.,* vibratory or impact pile driving or DTH drilling) has 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 mysticetes, high frequency species and pinnipeds because predicted auditory injury zones are larger than for mid-frequency species. Auditory injury is unlikely to occur for mid-frequency species. The mitigation and monitoring measures are expected to minimize the severity of the taking to the extent practicable.

As described previously, no mortality is authorized for this activity. Below we describe how the take is estimated.

Generally speaking, 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. We note that while these basic factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

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 Permanent Threshold Shift (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.,* 2012). Based on what the available science indicates 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 Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1 microPascal (μPa) (root mean square (rms)) for continuous (*e.g.,* vibratory pile-driving, drilling) and above 160 dB re 1 μPa (rms) for non-explosive impulsive (*e.g.,* impact pile driving) or intermittent (*e.g.,* scientific sonar) sources.

AML's planned activity includes the use of continuous (vibratory pile-driving, drilling) and impulsive (impact pile-driving) sources, and therefore the 120 and 160 dB re 1 μPa (rms) thresholds are applicable.

Level A harassment for non-explosive sources—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) 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). AML's activity includes the use of impulsive (impact pile-driving) sources.

These thresholds are provided in Table 2. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at *https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

TABLE 2—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{pk,flat}$: 219 dB; $L_{E,LF,24h}$: 183 dB	*Cell 2:* $L_{E,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{pk,flat}$: 230 dB; $L_{E,MF,24h}$: 185 dB	*Cell 4:* $L_{E,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{pk,flat}$: 202 dB; $L_{E,HF,24h}$: 155 dB	*Cell 6:* $L_{E,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{pk,flat}$: 218 dB; $L_{E,PW,24h}$: 185 dB	*Cell 8:* $L_{E,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{pk,flat}$: 232 dB; $L_{E,OW,24h}$: 203 dB	*Cell 10:* $L_{E,OW,24h}$: 219 dB.

* 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 μPa, and cumulative sound exposure level (L_E) has a reference value of 1μPa^{2}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 identifying the area ensonified above the acoustic thresholds, which include source levels and transmission loss coefficient.

Even though multiple pile sizes will be used, to be conservative for calculation of take, we assumed all piles would be the largest size pile (36 inch). It is also likely that impact and vibratory pile driving will occur on the same day, so we calculate Level B take assuming the larger vibratory disturbance isopleths for every day of activity. For vibratory pile driving we assumed a source level of 175 dB (RMS SPL) based on Caltrans (2015) with a maximum of five piles per day and 60 minutes per pile. For DTH drilling we used a source level of 171 dB (RMS SPL); this is derived from Denes *et al.* (2016), where we used the more conservative 90 percent median value. We assumed no more than two piles per day with DTH drilling as the duration per pile was assumed to be 3 hours. For impact pile driving activities we used source levels of 210 dB (PK SPL) or 183 dB (single strike SEL) based on Caltrans (2015) and 194 dB (RMS SPL) from Denes *et al.* (2016), to be conservative. We assumed no more than five piles per day and 700 strikes per pile. In all cases we used a propagation loss coefficient of 15 logR as most appropriate for these stationary, in-shore sources. Because DTH would only be used in combination with vibratory pile driving, we also used a combined scenario that assumed 4 hours of vibratory pile driving plus 6 hours of DTH drilling in a single day. For this scenario the source level was calculated by converting the source levels from dB before averaging and then re-converting the result to dB again. This is thus not a direct arithmetic average of all the hourly levels in decibels and could be described as the energy equivalent average level over 10 hours of activity.

When the NMFS Technical Guidance (2016) was published, in recognition of the fact that ensonified area/volume could be more technically challenging to predict because of the duration component in the new thresholds, we developed a User Spreadsheet that includes tools to help predict a simple isopleth that can be used in conjunction with marine mammal density or occurrence to help predict takes. We note that because of some of the assumptions included in the methods used for these tools, we anticipate that isopleths produced are typically going to be overestimates of some degree, which may result in some degree of overestimate of Level A harassment 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 stationary sources, such as pile driving and drilling in this project, NMFS User Spreadsheet predicts the distance at which, if a marine mammal remained at that distance the whole duration of the activity, it would incur PTS. Inputs used in the User Spreadsheet, and the resulting isopleths are reported below.

NMFS User spreadsheet input scenarios for vibratory pile driving, impact pile driving, and the combined DTH drilling and vibratory pile driving scenario discussed above are shown in Table 3. These input scenarios lead to PTS isopleth distances (Level A thresholds) of anywhere from 7 to 2,742 meters, depending on the marine mammal group and scenario (Table 4). Table 4 also shows the daily ensonified areas (Level A harassment zones) to the PTS threshold distances for each scenario and marine mammal group; these vary from just a few square meters to 8.736 km^2.

TABLE 3—NMFS USER SPREADSHEET INPUTS

User spreadsheet input			
	Vibratory pile driving	Impact pile driving	DTH/vibratory pile driving
Spreadsheet Tab Used	(A.1) Vibratory pile driving	(E.1) Impact pile driving	(A.1) Vibratory pile driving.
Source Level (RMS SPL or single strike SEL)	175	183 SELss, 194 SPLrms	173.
Weighting Factor Adjustment (kHz)	2.5	2	2.5.
(a) Number of strikes per pile	N/A	700	N/A.
(a) Activity Duration (h) within 24-h period	5	N/A	10.
Propagation (xLogR)	15	15	15.
Distance of source level measurement (meters)	10	10	10.
Number of piles per day	5	5	2.5.

TABLE 4—NMFS USER SPREADSHEET OUTPUTS: PTS ISOPLETHS AND DAILY ENSONIFIED AREA

User spreadsheet output					
Source type	Low-frequency cetaceans	Mid-frequency cetaceans	High-frequency cetaceans	Phocid pinnipeds	Otariid pinnipeds
PTS Isopleth (meters)					
Vibratory pile driving	171	15	253	104	7
Impact pile driving	2302	82	2742	1232	90
DTH/vibratory pile driving	200	18	296	122	9
Daily ensonified area (km²)					
Vibratory pile driving	0.056	0.001	0.113	0.025	0
Impact pile driving	6.899	0.017	8.736	2.369	0.02
DTH/vibratory pile driving	0.074	0.001	0.151	0.032	0

The distances to the Level B threshold of 120 dB RMS are 28.8 miles (46.3 km) for vibratory pile driving and 0.98 miles (1.58 km) for impact driving. The enclosed nature of Lutak Inlet restricts the propagation of noise in all directions before noise levels reduce below the Level B threshold for continuous source types (*i.e.,* vibratory pile driving, DTH). Therefore, the area ensonified to the Level B threshold is truncated by land in all directions. Measurements of the ensonified areas show that 5.179 km² are ensonified to the Level B threshold for impact pile driving and 22.164 km² are ensonified to the Level B threshold for vibratory pile driving. Note that thresholds for behavioral disturbance are unweighted with respect to marine mammal hearing and therefore the thresholds apply to all species.

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 density of six of the seven marine mammal species (except humpback whales, see below) for which take is authorized is calculated by month in the project area (see Table 6–4 in the application) for months when project activity is planned to occur (June through October). Density was estimated using available survey data, literature, sightings from protected Species observers (PSOs) from other projects, personal communication from researchers, state and Federal biologists, average group size (*i.e.,* killer whales, Dall's porpoise) and the data underlying the IHA issued by NMFS for the ADOT&PF Haines Ferry Terminal Project (NMFS, 2018b). Density estimates were calculated by dividing the estimated monthly abundance for each species by the area of marine mammal habitat near the project, which is approximately 91.3 km² and extends from Lutak Inlet/Chilkat River south down Lynn Canal to the Gran Point haulout. In order to be conservative, even though pile driving could occur at any period from June through October, for purposes of requesting takes, we used the highest monthly density for each species to calculate take. For killer whales and Dall's porpoises we calculated density by assuming a minimum group size of 5 and 10 animals, respectively, might enter the ensonified area, rather than their lower density value, because of the social nature of these species. Thus the species densities used in our take calculations are shown in Table 5.

A very small number of humpback whales were recorded on the sea lion surveys near Gran Point (low single digits), representing our only non-anecdotal source of locally-obtained abundance data. Various reports, both anecdotal and from these surveys, put the number of humpback whales present near the project area in the single digits (NMFS, 2017; ECO49, 2019 (the application)). We estimate that the number of whales that may encounter project sound per day is likely about one per day. Sometimes, a breeding female whale with a calf may pass by, increasing a particular day's total whale exposure rate from one to two. Because this operation will continue for up to 8 days, we estimate no more than 10 whales total might enter the ensonified area during the project.

TABLE 5—SPECIES DENSITY VALUES USED TO CALCULATE TAKE

Species	Density (#/km²)
Minke Whale	0.022
Killer Whale	0.055
Harbor Porpoise	0.055
Dall's Porpoise	0.11
Harbor Seal	1.095
Steller Sea Lion	7.382

Take Calculation and Estimation

Here we describe how the information provided above is brought together to produce a quantitative take estimate. We estimated Level A take for the project by multiplying the maximum monthly species density for the species with data from Table 5 by the daily ensonified area for PTS for Level A from Table 4 above and then multiplying by the maximum possible number of work days (8) and finally rounding to the next whole number (Table 6). We similarly estimated Level B take for the project by multiplying the maximum monthly species density from Table 5 by the ensonified area for Level B (22.164 km^2) and then multiplying by the maximum possible number of work days (8) and finally rounding to the next whole number. Estimated Level A takes from Table 6 were then subtracted from the preliminary Level B takes to get the total number of unique Level B takes that do not double-count the Level A takes (Table 6).

For humpback whales we estimated above no more than 10 whales total may encounter project sound at Level B Harassment levels; thus our total take is estimated to be 10 whales. Of these 10 whales, 6.1 percent are expected to be of the ESA listed entity, or about 0.6 whales, which we conservatively round up to one ESA listed Mexico DPS whale exposed to Level B acoustic harassment. The remaining nine takes are of the Hawaii DPS whales. No Level A harassment is expected for ESA-listed humpbacks due to the very small total number of humpbacks that are expected to be exposed. Given the size of the daily ensonified area for PTS for Level A from Table 4 above, we estimate three of the takes of the Hawaii DPS of humpback whales will be Level A takes, leaving six Level B takes for the Hawaii DPS and seven overall for the species (Table 6).

TABLE 6—AUTHORIZED LEVEL A AND B TAKE AND PERCENT OF MMPA STOCK TO BE TAKEN

Authorized Take	Species		
	Level B	Level A	% of Stock
Humpback Whale [1]	7	3	0.1
Minke Whale	2	2	N/A
Killer Whale [2]	10	0	0.35
Harbor Porpoise	6	4	1.03
Dall's Porpoise	12	8	N/A
Harbor Seal	174	21	2.06
Steller Sea Lion (Eastern DPS) [2 3]	1291	0	3.1
Steller Sea Lion (Western DPS) [2 3]	18	0	0.03

[1] Distribution of take by ESA status is 6 Level B takes and 3 Level A takes for Hawaii DPS and 1 Level B take for Mexico.

[2] The potential for these species to experience PTS due to vibratory/impact driving or from DTH drilling is very low considering the distances to the PTS thresholds and the species behavior. Shutdown for all species is at 200 m (see below) which would further decrease possibility of Level A takes for these species. Therefore, Level A takes are not authorized.

[3] Total estimated take of Steller sea lions was 1309 individuals. Distribution between the stocks was calculated assuming 1.4 percent Western DPS and rounding to nearest whole number.

Effects of Specified Activities on Subsistence Uses of Marine Mammals

The availability of the affected marine mammal stocks or species for subsistence uses may be impacted by this activity. The subsistence uses that may be affected and the potential impacts of the activity on those uses are described below. The information from this section is analyzed to determine whether the necessary findings may be made in the Unmitigable Adverse Impact Analysis and Determination section.

No records exist of subsistence harvests of whales and porpoises in Lynn Canal (Haines, 2007). Subsistence harvest of harbor seals and Steller sea lions by Alaska Natives is not prohibited by the MMPA. The ADF&G has regularly conducted surveys of harbor seal and Steller sea lion subsistence harvest in Alaska and the number of animals taken for subsistence in this immediate area is low when compared to other areas in Southeast Alaska (Wolfe *et al.,* 2013). Marine mammals comprise less than 1 pound (0.45 kg) per capita of all resources harvested by Haines residents (Household Survey of Wildfoods Resources Harvest in Haines, as cited in Haines, 2007). Construction activities at the project site would be expected to cause only short term, non-lethal disturbance of marine mammals. Impacts on the abundance or availability of either species to subsistence hunters in the region are not anticipated.

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 the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses. 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 the 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, as well as subsistence uses. 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.

In addition to the measures described later, AML is required to employ the following mitigation measures:

• *Schedule:* No pile driving or removal would occur from March 1 through May 31 to avoid peak marine mammal abundance periods and critical foraging periods;

• *Pile Removal:* If possible, piles must be removed by using a direct pull method or by cutting piles off at the mudline instead of using a vibratory hammer;

• *Pile Driving Delay/Shut-Down:* For use of in-water heavy machinery/vessel (*e.g.,* use of barge-mounted excavators, or dredging), AML will implement a minimum shutdown zone of 10 m radius around the pile/vessel. For vessels, AML must cease operations and reduce vessel speed to the minimum required to maintain steerage and safe working conditions. In addition, if an animal comes within 200 m of a pile being driven or removed, AML would shut down. The 200 m shutdown zone would only be reopened when a marine mammal has not been observed within the shutdown zone for a 15-minute period (30 minutes for ESA listed humpback whales and Steller sea lions). If pile driving is stopped, pile installation would not commence if pile any marine mammals are observed anywhere within the Level A harassment zone (Table 7). Pile driving activities would only be conducted during daylight hours when it is possible to visually monitor for marine mammals. If poor environmental conditions restrict visibility (*e.g.,* from excessive wind or fog, high Beaufort state), pile installation would be delayed. If a species for which authorization has not been granted, or if a species for which authorization has been granted but the authorized takes are met, AML would delay or shut-down pile driving if the marine mammal approaches or is observed within the Level A and/or B harassment zones. In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA, such as serious injury or mortality, the PSO on watch would immediately call for the cessation of the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and NMFS Alaska Regional Office;

TABLE 7—LEVEL A HARASSMENT ZONES (m) FOR EACH PROJECT ACTIVITY

Hearing group	Vibratory	DTH	Combined vibratory + DTH	Impact
Low Frequency Cetaceans	*200	*200	*200	*1400
Mid-Frequency Cetaceans	*200	*200	*200	*200
High Frequency Cetaceans	253	*200	296	2700
Phocids	*200	*200	*200	1200
Otarids	*200	*200	*200	*200

*Actual zone distance is less, but 200-m shutdown zone takes precedence.

• *Soft-start:* For all impact pile driving, a ''soft start'' technique will be used at the beginning of each pile installation day, or if pile driving has ceased for more than 30 minutes, to allow any marine mammal that may be in the immediate area to leave before hammering at full energy. The soft start requires AML to provide an initial set of three strikes from the impact hammer at reduced energy, followed by a one-minute waiting period, then two subsequent reduced energy strike sets. If any marine mammal is sighted within the 200-m Level A shutdown zone prior to pile-driving, or during the soft start, AML will delay pile-driving until the animal is confirmed to have moved outside and is on a path away from the Level A harassment zone or if 15 minutes have elapsed since the last sighting; and

• *Other best management practices:* AML will drive all piles with a vibratory hammer to the maximum extent possible (*i.e.,* until a desired depth is achieved or to refusal) prior to using an impact hammer and will use DTH drilling prior to using an impact hammer. AML will also use the minimum hammer energy needed to safely install the piles.

Based on our evaluation of the applicant's proposed measures, NMFS has determined that the 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, and on the availability of such species or stock for subsistence uses.

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 planned 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); and

• Mitigation and monitoring effectiveness.

Visual Monitoring

Monitoring would be conducted 30 minutes before, during, and 30 minutes after pile driving and removal activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

A primary PSO must be placed at Lutak Dock where pile driving would occur. The primary purpose of this observer is to monitor and implement the 200 m Level A shutdown zone. Two additional observers must focus on monitoring large parts of the Level B harassment zone as well as visible parts of the Level A shutdown and harassment zones. The second observer must be placed at a vantage point near Tanani Point that allows monitoring of the area offshore from Lutak Dock and across the inlet, a width of about 0.6 miles (1 km, see application Figure 11–1). This location is near the edge of the Level A harassment zone for low-frequency cetaceans during impact pile driving. The third PSO must be placed northwest of the dock near the edge of the Level A harassment zone for low-frequency cetaceans. Therefore, the outer edge of the largest Level A harassment zone and a majority of the Level B harassment zone would be monitored by these other two PSOs. These two PSOs must also assess movement of animals within Level A harassment zones, including time spent at various distances from the sound source to help us gather needed information on the dynamics of marine mammal behavior around pile driving activities. Since not all of the level A or B harassment zones will be observable by PSOs, they will calculate take for the project by extrapolating the observable area to the total size of the Level A or B harassment zone, as needed. PSOs would scan the waters using binoculars, and/or spotting scopes, and would use a handheld GPS or range-finder device to verify the distance to each sighting from the project site. All PSOs would be trained in marine mammal identification and behaviors and are required to have no other project-related tasks while conducting monitoring. The following measures also apply to visual monitoring:

(1) Monitoring will be conducted by qualified observers, who will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures when applicable by calling for the shutdown to the hammer operator. Qualified observers are trained biologists, with the following minimum qualifications:

(a) Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface with ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;

(b) Advanced education in biological science or related field (undergraduate degree or higher required);

(c) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);

(d) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(e) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(f) Writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates and times when in-water construction activities were suspended to avoid potential incidental injury from construction sound of marine mammals observed within a defined shutdown zone; and marine mammal behavior; and

(g) Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary; and

(2) AML shall submit observer CVs for approval by NMFS.

A draft marine mammal monitoring report would be submitted to NMFS within 90 days after the completion of pile driving and removal activities, or 60 days prior to a requested date of issuance of any future IHAs for projects at the same location, whichever comes first. It will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated marine mammal observation data sheets. Specifically, the report must include:

• Dates and times (begin and end) of all marine mammal monitoring;

• Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.,* impact or vibratory);

• Weather parameters and water conditions during each monitoring period (*e.g.,* wind speed, percent cover, visibility, sea state);

• The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;

• Age and sex class, if possible, of all marine mammals observed;

• PSO locations during marine mammal monitoring;

• Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);

• Description of any marine mammal behavior patterns during observation, including direction of travel;

• Number of individuals of each species (differentiated by month as appropriate) detected within the monitoring zone, and estimates of number of marine mammals taken, by species (a correction factor may be applied to total take numbers, as appropriate);

• Detailed information about any implementation of any mitigation triggered (*e.g.,* shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;

• Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and

• An extrapolation of the estimated takes by Level A or B harassment based on the number of observed exposures within the Level A or B harassment zone and the percentage of the Level A or B harassment zone that was not visible, when applicable.

If no comments are received from NMFS within 30 days, the draft final report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In addition, AML must develop and submit to NMFS Alaska Region a digital spreadsheet that specifies the date and start/stop times each pile was removed/installed; the method(s) used to remove/

install each pile; the size of each pile; and any other information which may be useful in aiding the assessment of effects of different pile driving activities on ESA-listed species.

In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by the IHA (if issued), such as an injury, serious injury or mortality, AML would immediately cease the specified activities and report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the Alaska Regional Stranding Coordinator. The report would include the following information:

- Description of the incident;
- Environmental conditions (*e.g.,* Beaufort sea state, visibility);
- Description of all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities would not resume until NMFS is able to review the circumstances of the prohibited take. NMFS would work with AML to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. AML would not be able to resume their activities until notified by NMFS via letter, email, or telephone.

In the event that AML discovers an injured or dead marine mammal, and the lead PSO 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 as described in the next paragraph), AML would immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator. The report would include the same information identified in the paragraph above. Activities would be able to continue while NMFS reviews the circumstances of the incident. NMFS would work with AML to determine whether modifications in the activities are appropriate.

In the event that AML discovers an injured or dead marine mammal and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the IHA (*e.g.,* previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), AML would report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, and the NMFS Alaska Stranding Hotline and/or by email to the Alaska Regional Stranding Coordinator, within 24 hours of the discovery. AML would provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network.

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's 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, the discussion of our analyses applies to all the species listed in Table 6, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. There is little information about the nature or severity of the impacts, or the size, status, or structure of any of these species or stocks that would lead to a different analysis for this activity. Pile driving/removal and drilling activities have the potential to disturb or displace marine mammals. Specifically, the project activities may result in take, in the form of Level A harassment and Level B harassment from underwater sounds generated from pile driving and removal and DTH drilling. Potential takes could occur if individuals of these species are present in the ensonified zone when these activities are underway.

The takes from Level A and Level B harassment would be due to potential behavioral disturbance, Temporary Threshold Shift (TTS), and PTS. No mortality is anticipated given the nature of the activity and measures designed to minimize the possibility of injury to marine mammals. Level A harassment is only anticipated for humpback whales, minke whales, Dall's porpoise, harbor porpoise, and harbor seal. The potential for harassment is minimized through the construction method and the implementation of the planned mitigation measures (see Mitigation section).

The Level A harassment zones identified in Table 7 are based upon an animal exposed to impact pile driving five piles per day. Considering duration of impact driving each pile (up to 15 minutes) and breaks between pile installations (to reset equipment and move pile into place), this means an animal would have to remain within the area estimated to be ensonified above the Level A harassment threshold for multiple hours. This is highly unlikely given marine mammal movement throughout the area. If an animal was exposed to accumulated sound energy, the resulting PTS would likely be small (*e.g.,* PTS onset) at lower frequencies where pile driving energy is concentrated. Nevertheless, we authorize a small amount of Level A take for five species which is considered in our analysis.

Behavioral responses of marine mammals to pile driving and removal at the Dock, if any, are expected to be mild and temporary. Marine mammals within the Level B harassment zone may not show any visual cues they are disturbed by activities (as noted during modification to the Kodiak Ferry Dock) or could become alert, avoid the area, leave the area, or display other mild responses that are not observable such as changes in vocalization patterns. Given the short duration of noise-generating activities per day and that pile driving and removal would occur on 8 days across 4–5 months, any harassment would be temporary. In addition, AML would not conduct pile driving or removal during the spring eulachon and herring runs, when marine mammals are in greatest abundance and engaging in concentrated foraging behavior. There are no other areas or times of known

biological importance for any of the affected species.

In addition, although some affected humpback whales and Steller sea lions may be from a DPS that is listed under the ESA, it is unlikely that minor noise effects in a small, localized area of habitat would have any effect on the stocks' ability to recover. In combination, we believe that these factors, as well as the available body of evidence from other similar activities, demonstrate that the potential effects of the specified activities will have only minor, short-term effects on individuals. The specified activities are not expected to impact rates of recruitment or survival and will therefore not result in population-level impacts.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival:

- No mortality is anticipated or authorized;
- Authorized Level A harassment would be very small amounts and of low degree;
- AML would avoid pile driving and removal during peak periods of marine mammal abundance and foraging (*i.e.,* March 1 through May 31 eulachon and herring runs);
- AML would implement mitigation measures such as vibratory driving piles to the maximum extent practicable, soft-starts, and shut downs; and
- Monitoring reports from similar work in Alaska have documented little to no effect on individuals of the same species impacted by the specified activities.

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 monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned 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 and 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.

The amount of take NMFS authorizes is less than one-third of any stock's best population estimate. These are all likely conservative estimates because they assume all pile driving occurs the month which has the highest marine mammal density and assumes all takes are of individual animals which is likely not the case. The Alaska stock of Dall's porpoise has no official NMFS abundance estimate as the most recent estimate is greater than 8 years old. Nevertheless, the most recent estimate was 83,400 animals and it is highly unlikely this number has drastically declined. Therefore, the 20 authorized takes of this stock clearly represent small numbers of this stock. The Alaska stock of minke whale has no stock-wide abundance estimate. The stock ranges from the Bering and Chukchi seas south through the Gulf of Alaska. Surveys in portions of the range have estimated abundances of 2,020 on the eastern Bering Sea shelf and 1,233 from the Kenai Fjords in the Gulf of Alaska to the central Aleutian Islands. Thus there appears to thousands of animals at least in the stock and clearly the two authorized takes of this stock represent small numbers of this stock.

Based on the analysis contained herein of the planned activity (including the planned mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS 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

In order to issue an IHA, NMFS must find that the specified activity will not have an ''unmitigable adverse impact'' on the subsistence uses of the affected marine mammal species or stocks by Alaskan Natives. NMFS has defined ''unmitigable adverse impact'' in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. As discussed above, subsistence harvest of harbor seals and Steller sea lions comprise less than 1 pound (0.45 kg) per capita of all resources harvested by Haines residents, so the area is not important for subsistence hunting. The short-term, relatively low-impact, Level A and Level B harassment takes resulting from construction activities associated with the Lutak Dock project will have no impact on the ability of hunters to harvest marine mammals. Therefore, NMFS has 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 Endangered Species Act of 1973 (ESA: 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 Alaska Region Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

NMFS Alaska Region issued a Biological Opinion to NMFS Office of Protected Resources on April 13, 2020, which concluded the issuance of an IHA to AML is not likely to jeopardize the continued existence of Western DPS Steller sea lion (*Eumetopias jubatus*) or the Mexico DPS of humpback whales (*Megaptera novaeangliae*) and not likely to adversely affect sperm whales (*Physeter macrocephalus*).

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 action (*i.e.,* the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations with no anticipated serious injury or mortality) of the Companion Manual for NOAA

Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Authorization

NMFS has issued an IHA to AML for conducting the Lutak Dock project in Haines, Alaska between Jun 15, 2020 and June 14, 2021, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. The final IHA can be found at *https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act.*

Dated: April 16, 2020.

Donna S. Wieting,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2020–08408 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA135]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting (online).

SUMMARY: The Pacific Fishery Management Council (Pacific Council) will hold an online work session of its Coastal Pelagic Species Management Team (CPSMT) to review the draft Range of Alternatives (ROA) relative to the Pacific sardine rebuilding plan. This webinar is open to the public.

DATES: The webinar will be held Thursday, May 7, 2020, from 9 a.m. to 2 p.m., Pacific Daylight Time, or until business for the day has been completed.

ADDRESSES: The meeting will be held as an online meeting. Online access information will be posted to the Council's website (*www.pcouncil.org*) in advance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Kerry Griffin, Pacific Council; telephone: (503) 820–2409.

SUPPLEMENTARY INFORMATION: The primary purpose of the work session is to consider a draft ROA document relative to the Pacific sardine rebuilding plan. The ROA is tentatively scheduled to be considered by the Council at its June 2020 Council meeting. Other June Council meeting agenda items may also be considered by the CPSMT, as necessary.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov;* (503) 820–2412) at least 10 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 16, 2020.

Tracey L. Thompson,

Acting Deputy Director,Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–08423 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA138]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (Council) Scientific and Statistical Committee (SSC) will hold a meeting.

DATES: The meeting will be held on Tuesday, May 12, 2020, from 10 a.m. through 5:30 p.m. and Wednesday, May 13, 2020, from 9 a.m. through 12:30 p.m. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: The meeting will take place over webinar with a telephone-only connection option. Details on how to connect to the webinar by computer and by telephone will be available at: *http://www.mafmc.org/ssc.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; website: *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The purpose of this meeting is to review the analysis, work products, and potential outcomes developed by the *Illex* workgroup. Formed in 2019, the *Illex* workgroup is comprised of SSC members, Council members, NEFSC, GARFO, and Council staff and is tasked with developing approaches for possible in-year quota adjustments and lay the basis for a research track *Illex* stock assessment that is scheduled for 2021. Utilizing the information provided by the *Illex* workgroup and other relevant data and information, the SSC will review and possibly modify the 2020 *Illex* acceptable biological catch (ABC) and make 2021 ABC recommendations for *Illex* fishery. The SSC will also receive an update and provide feedback on the recently completed Northeast Habitat Climate Vulnerability Assessment. The SSC will also review updates and possible changes to the overfishing limit (OFL) coefficient of variation (CV) guidance document, elect a vice-chair of the SSC, receive an update on the 2020 National Scientific Coordination Subcommittee meeting, and review the 2020 SSC species/topics lead assignments. In addition, the SSC may take up any other business as necessary.

A detailed agenda and background documents will be made available on the Council's website (*www.mafmc.org*) prior to the meeting.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Saunders, (302) 526–5251, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 16, 2020.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2020–08424 Filed 4–20–20; 8:45 am]

BILLING CODE 3510–22–P

COMMODITY FUTURES TRADING COMMISSION

Agricultural Advisory Committee Meeting

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of meeting.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) announces that the Agricultural Advisory Committee (AAC) will hold a public meeting. The Federal Advisory Committee Act and its implementing regulations require the Commission to provide notice of the meeting at least fifteen days in advance of the meeting through a **Federal Register** notice unless there are exceptional circumstances. The exceptional circumstances requiring less than fifteen days' notice are the COVID–19 pandemic.

DATES: The meeting will be held on Wednesday, April 22, 2020, from 3:00 p.m. to 5:00 p.m. Members of the public who wish to submit written statements in connection with the meeting should submit them by May 1, 2020.

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

- *CFTC Comments Portal: https://comments.cftc.gov.* Select the ''Submit Comments'' link for this meeting notice and follow the instructions on the Public Comment Form.
- *Email:* Send to Christopher J. Kirkpatrick, Secretary of the Commission, *Secretary@cftc*.gov, identified with the subject ''Agricultural Advisory Committee.''

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged. Any statements submitted in connection with the committee meeting will be made available to the public, including by publication on the CFTC website, *https://www.cftc.gov.* If you are unable to submit comments online, contact the individual listed below to discuss alternate means of submitting your comments.

FOR FURTHER INFORMATION CONTACT: Summer Mersinger, AAC Designated Federal Officer, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581; phone: 202–418–5075; email: *SMersinger@cftc.gov.*

SUPPLEMENTARY INFORMATION: At this meeting, the AAC will hear remarks from the United States Department of Agriculture, Designated Contract Markets, and the CFTC on their respective responses to the COVID–19 pandemic, as well as solicit actionable recommendations for the Commission related to work streams and select issues. The agenda for this meeting will be available to the public and posted on the Commission's website at *http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_meetings.*

The meeting agenda may change to accommodate other AAC priorities. For agenda updates and instructions to access the meeting via phone and the internet (forthcoming), please visit the AAC committee site at: *http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_meetings.*

Instructions for public access to the live audio feed of the meeting will be posted on the Commission's website prior to the event. Members of the public may also listen to the public meeting by telephone by calling a domestic toll-free telephone or international toll or toll-free number, which will be posted on the CFTC's website, *https://www.cftc.gov,* on the page for the meeting, under Related Links to connect to a live, listen-only audio feed. Call-in participants should be prepared to provide their first name, last name, and affiliation. In the event that the time, date, or place of this meeting changes, an announcement of the change, along with the new time, date, or place of the meeting, will be posted on the Commission's website.

After the meeting, a transcript of the meeting will be published through a link on the CFTC's website at: *http://www.cftc.gov/About/CFTCCommittees/AgriculturalAdvisory/aac_meetings.* All written submissions provided to the CFTC in any form will also be published on the CFTC's website. Persons requiring special accommodations to attend the meeting because of a disability should notify the contact person above as soon as possible.

(Authority: 5 U.S.C. App. 2 section 10(a)(2).)

Dated: April 15, 2020.

Robert Sidman,

Deputy Secretary of the Commission.

[FR Doc. 2020–08313 Filed 4–20–20; 8:45 am]

BILLING CODE 6351–01–P

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Application Package for CNCS Application

AGENCY: Corporation for National and Community Service (CNCS).

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, CNCS is proposing to renew an information collection.

DATES: Written comments must be submitted to the individual and office listed in the **ADDRESSES** section by June 22, 2020.

ADDRESSES: You may submit comments, identified by the title of the information collection activity, by any of the following methods:

(1) *By mail sent to:* Corporation for National and Community Service, Attention: Amy Borgstrom, 250 E Street SW, Washington, DC, 20525.

(2) By hand delivery or by courier to the CNCS mailroom at the mail address given in paragraph (1) above, between 9:00 a.m. and 4:00 p.m. Eastern Time, Monday through Friday, except federal holidays.

(3) Electronically through *www.regulations.gov.*

Comments submitted in response to this notice may be made available to the public through regulations.gov. For this reason, please do not include in your comments information of a confidential nature, such as sensitive personal information or proprietary information. If you send an email comment, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. Please note that responses to this public comment request containing any routine notice about the confidentiality of the communication will be treated as public comment that may be made available to the public, notwithstanding the inclusion of the routine notice.

FOR FURTHER INFORMATION CONTACT: Amy Borgstrom, 202–606–6930, or by email at *aborgstrom@cns.gov.*

SUPPLEMENTARY INFORMATION:

Title of Collection: CNCS Application Instructions.

OMB Control Number: 3045–0187.

Type of Review: Renewal.

Respondents/Affected Public: Businesses and Organizations and State, Local or Tribal Governments.

Total Estimated Number of Annual Responses: 13,200.

Total Estimated Number of Annual Burden Hours: 79,200.

Abstract: These application instructions will be used by applicants for funding through CNCS competitions. The application is completed electronically using the CNCS web-based grants management system or submitted via email. CNCS also seeks to continue using the currently approved information collection until the revised information collection is approved by OMB. The currently approved information collection is due to expire on September 30, 2020.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. Comments are invited on: (a) Whether the 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 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. All written comments will be available for public inspection on *regulations.gov*.

Dated: April 15, 2020.

Amy Borgstrom,

Associate Director of Policy.

[FR Doc. 2020–08415 Filed 4–20–20; 8:45 am]

BILLING CODE 6050–28–P

DEPARTMENT OF DEFENSE

Department of the Navy

Notice To Exchange Real Property at the Philadelphia Navy Yard Annex (PNYA), Philadelphia, PA

AGENCY: Department of the Navy, DoD.

ACTION: Notice.

SUMMARY: The Navy is publishing this Notice to identify Federal real property it intends to exchange for property owned by Philadelphia Authority for Industrial Development (PAID) needed by the Navy to meet mission requirements and improve security at the Philadelphia Navy Yard Annex (PNYA), Philadelphia, PA.

FOR FURTHER INFORMATION CONTACT: Mr. Adam Provost, Naval Facilities Engineering Command Mid-Atlantic (NAVFAC MIDLANT), 9324 Virginia Avenue, Norfolk, VA 23511–3095; telephone (757) 341–1976.

SUPPLEMENTARY INFORMATION: The proposed uses are consistent and compatible with the Navy and PAID redevelopment plans respectively.

Description of the Navy property sought by PAID: Three non-contiguous parcels aggregating approximately 15.1 acres of land at PNYA.

Description of the PAID property sought by Navy: Six non-contiguous parcels consisting of approximately 23 acres.

On December 4, 2019 the Navy notified the appropriate Congressional committees of the proposed exchange pursuant to 10 U.S.C. 2869(d)(2).

Dated: April 15, 2020.

D.J. Antenucci,

Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2020–08365 Filed 4–20–20; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

[Docket No. ED–2020–SCC–0061]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; National Assessment of Educational Progress (NAEP) 2021

AGENCY: National Center for Education Statistics (NCES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing a revision of an existing information collection.

DATES: Interested persons are invited to submit comments on or before May 21, 2020.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347 or email *NCES.Information.Collections@ed.gov.*

SUPPLEMENTARY INFORMATION: The Department of Education (ED), in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the Department assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand the Department's information collection requirements and provide the requested data in the desired format. ED is soliciting comments on the proposed information collection request (ICR) that is described below. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: National Assessment of Educational Progress (NAEP) 2021.

OMB Control Number: 1850–0928.

Type of Review: A revision of an existing information collection.

Respondents/Affected Public: Individuals or Households.

Total Estimated Number of Annual Responses: 628,317.

Total Estimated Number of Annual Burden Hours: 372,570.

Abstract: The National Assessment of Educational Progress (NAEP), conducted by the National Center for Education Statistics (NCES), is a federally authorized survey of student achievement at grades 4, 8, and 12 in various subject areas, such as mathematics, reading, writing, science, U.S. history, civics, geography, economics, technology and engineering literacy (TEL), and the arts. The National Assessment of Educational Progress Authorization Act (Pub. L. 107–279 Title III, section 303) requires the assessment to collect data on specified student groups and characteristics, including information organized by race/ethnicity, gender, socio-economic status, disability, and limited English proficiency. It requires fair and accurate presentation of achievement data and permits the collection of background, noncognitive, or descriptive information that is related to academic achievement and aids in fair reporting of results. The intent of the law is to provide representative sample data on student achievement for the nation, the states, and subpopulations of students and to monitor progress over time. The nature of NAEP is that burden alternates from a relatively low burden in national-level administration years to a substantial burden increase in state-level administration years when the sample has to allow for estimates for individual states and some of the large urban districts. The request is to conduct NAEP 2021, including operational assessments and pilot tests: Operational national/state Digitally Based Assessments (DBA) in mathematics and reading at grades 4 and 8, and Puerto Rico in mathematics at grades 4 and 8; operational national DBA in U.S. history and civics at grade 8; and pilot DBA for mathematics at grades 4 and 8 was approved in April 2020. This request is the first of three 30D packages that will provide updates to materials for NAEP 2021, and provides the final details of the design for NAEP 2021 as well as some updated communication materials and a new sampling memo. The subsequent Materials Updates #2 and #3 are scheduled for June and October of 2020. The NAEP results will be reported to the public through the Nation's Report Card as well as other online NAEP tools.

Dated: April 16, 2020.

Stephanie Valentine,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2020–08425 Filed 4–20–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Training and Information for Parents of Children With Disabilities—Parent Training and Information Centers and Parent Information and Training Program

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2020 for Training and Information for Parents of Children with Disabilities—Parent Training and Information Centers, Catalog of Federal Domestic Assistance (CFDA) number 84.328M, and Parent Information and Training program, CFDA number 84.235F. These centers will provide objective information, resources, and impartial training that support parents and youth in working in partnership with professionals to establish and meet high expectations for children and youth with disabilities. This notice relates to approved information collections under OMB control numbers 1820–0018 and 1820–0028.

DATES:

Applications Available: April 21, 2020.

Deadline for Transmittal of Applications: June 22, 2020.

Date of 84.328M Pre-Application Meeting: OSERS will conduct a pre-application meeting specific to these competitions via webinar on May 4, 2020, at 4:00 p.m., Eastern Time.

In addition, no later than April 27, 2020, the Office of Special Education Programs (OSEP) will post a pre-recorded informational webinar designed to provide technical assistance to interested applicants. Information about the teleconference and the pre-recorded webinar may be found at *www2.ed.gov/fund/grant/apply/osep/new-osep-grants.html.*

Date of 84.235F Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information related to RSA's discretionary grant competitions and a PowerPoint presentation specifically related to this Parent Information and Training Program competition at *https://ncrtm.ed.gov/RSAGrantInfo.aspx.* OSERS will conduct a pre-application meeting specific to this competition via conference call in order to respond to questions on May 5, 2020 at 1:00 p.m. Eastern Time. OSERS invites you to send questions to *tara.jordan@ed.gov* in advance of the pre-application meeting. The teleconference information, including the 84.235F pre-application meeting summary of the questions and answers, will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* within 6 days after the pre-application meeting.

Deadline for Intergovernmental Review: August 19, 2020.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: For 84.328M, Carmen Sanchez, U.S. Department of Education, 400 Maryland Avenue SW, Room 5162, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–6595. Email: *Carmen.Sanchez@ed.gov.* For 84.235F, Tara Jordan, U.S. Department of Education, 400 Maryland Avenue SW, Room 5058E, Potomac Center Plaza, Washington, DC 20202–5076. Telephone: (202) 245–7341. Email: *Tara.Jordan@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.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunities Description

Purpose of Programs: The purpose of the Training and Information for Parents of Children with Disabilities—Parent Training and Information Centers program, CFDA number 84.328M, is to ensure that parents of children with disabilities receive impartial training and objective information to help improve outcomes and raise expectations for their children. The Parent Information and Training program, CFDA number 84.235F, is designed to support projects that provide impartial training and objective information to enable individuals with

disabilities, and the parents, family members, guardians, advocates, or other authorized representatives of the individuals (hereafter collectively referred to as ''individuals with disabilities and their families''), to participate more effectively with professionals in meeting the vocational, independent living, and rehabilitation needs of individuals with disabilities. This program is designed to meet the unique training and information needs of those individuals who live in the area to be served, particularly those who are members of populations that have been unserved or underserved by programs under the Rehabilitation Act of 1973, as amended (Rehabilitation Act).

Priorities: In accordance with 34 CFR 75.105(b)(2)(iv) and (v), the CFDA 84.328M Absolute Priority is from allowable activities specified in the statute, or otherwise authorized in the statute (see sections 671 and 681(d) of the Individuals with Disabilities Education Act (IDEA); 20 U.S.C. 1471 and 1481). In accordance with 34 CFR 75.105(b)(2)(v), the CFDA 84.235F Absolute Priority is from allowable activities specified in the statute (see section 303(c)(2) of the Rehabilitation Act; 29 U.S.C. 773(c)(2)).

Absolute Priorities: For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are absolute priorities. Under 34 CFR 75.105(c)(3) we consider only applications that meet one or both of these priorities.

Note: Eligible applicants may apply for both absolute priorities but must submit separate applications for each absolute priority. An applicant may apply only once under each identified region of the CFDA 84.235F priority. An applicant may apply only once under the CFDA 84.328M priority, except an applicant may apply for multiple regional centers within a single State and must submit a separate application for each region (see page 24 for a list of States within each region). For example, an applicant applying for the 84.328M grant for Idaho and the 84.235F grant for region D–2, which contains Idaho, must submit separate applications under both CFDA numbers. Or an applicant submitting for multiple 84.328M regions within Texas must submit separate applications for each region. If the applicant also applies for an 84.235F grant for region B–2, which contains Texas, the applicant must submit a separate application for the 84.235F grant. Applicants that apply for both absolute priority 1 and 2 are encouraged to address in their applications how they will work to provide seamless services for families and individuals with disabilities receiving services under both the IDEA and the Rehabilitation Act.

These priorities are:

CFDA 84.328M Absolute Priority—Parent Training and Information Centers.

Background:

The purpose of this priority is to fund 65 Parent Training and Information Centers (PTIs) designed to meet the information and training needs of parents [1] of infants, toddlers, children, and youth with disabilities,[2] ages birth through 26 (collectively, ''children with disabilities''), and the information and training needs of youth with disabilities living in the States or regions of the States served by the centers. These PTIs, consistent with statute, will provide individualized assistance, training, and resources to help parents work with schools, early childhood providers, and early childhood and educational systems to meet the unique needs of their children and set high expectations and challenging objectives for every child with a disability. PTIs will also provide high-quality, accurate, and impartial information to families of children with disabilities on the range of educational options that may be available in their State and local community and will coordinate with Community Parent Resource Centers (CPRCs) (CFDA 84.328C) that may be funded in their respective States or regions of their States.

PTIs (*www.parentcenterhub.org/find-your-center/*) promote the effective education of children with disabilities by ''strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home'' (section 601(c)(5)(B) of IDEA; 20 U.S.C. 1400(c)(5)(B)). PTIs, consistent with section 671(b) (20 U.S.C. 1471(b)) of IDEA, serve families of children who may be inappropriately identified, underserved families, families with limited English proficiency, and families in which a parent may also experience a disability. PTIs help parents (a) navigate systems providing early intervention, special education and related services, general education, and postsecondary options; (b) understand the educational and service options available to them and their children; (c) understand the nature of their children's disabilities; (d) learn about their rights and responsibilities under IDEA; (e) expand their knowledge of evidence-based practices [3] to help their children succeed; (f) strengthen their collaboration with professionals; (g) locate resources for themselves and their children; and (h) advocate for improved child outcomes and student achievement, increased graduation rates, and improved postsecondary outcomes for all children through participation in program and school reform activities.

By providing parents with impartial information and individualized assistance and training, PTIs enable parents to (a) make informed decisions when choosing educational and early learning options that best meet the needs of their children; (b) help their children meet developmental and academic goals; (c) help their children meet challenging expectations established for all children; and (d) prepare their children to achieve positive postsecondary outcomes that lead to lives that are as productive and independent as possible. In addition, parent centers help youth with disabilities understand their rights and responsibilities and learn self-advocacy skills to prepare them to lead productive lives as independently as possible.

PTIs are also valuable partners to Federal, State, and local agencies, providing expertise on how to better support families and youth with disabilities so that they can effectively and efficiently access IDEA services. Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

CFDA 84.328M Priority:

The Department intends to fund 65 grants to establish and operate 65 PTIs. Based on the quality of applications received, the Department intends to fund one PTI in each of the following States: [4] Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia,

[1] The term ''parent'' includes natural, adoptive, and foster parents, guardians, and individuals acting in the role of ''parent'' as defined in section 602(23) of IDEA. (20 U.S.C. 1401(23)).

[2] The term ''disabilities'' refers to the full range of disabilities described in section 602(3) of IDEA. (20 U.S.C. 1401(3)).

[3] The term ''evidenced-based practices'' (EBPs) means, at a minimum, demonstrating a rationale (as defined in 34 CFR 77.1) based on high-quality research findings or positive evaluation that such activity, strategy, or intervention is likely to improve student outcomes or other relevant outcomes.

[4] Under section 602(31) of IDEA, the term ''State'' means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas. Under section 602(22) ''outlying area'' means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, U.S. Virgin Islands, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and one PTI to serve the freely associated States [5] and outlying areas in the Pacific. In addition, the Department intends to fund PTIs to serve regions within each of the following States: California, Florida, Illinois, New York, and Texas. Regional PTIs will be better able to provide responsive services to families in the largest, most diverse States.

At a minimum, the PTIs must—(a) increase parents' capacity to help their children with disabilities improve their early learning, school-aged, and postsecondary outcomes; (b) increase parents' knowledge of educational and early learning options; and (c) increase youth with disabilities' capacity to be effective self-advocates.

In addition to these programmatic requirements, to be considered for funding under this priority, applicants must meet the following application and administrative requirements in this priority:

(a) In the narrative section of the application under ''Significance,''—

(1) Present appropriate information on—

(i) The needs of parents in the geographic diversity of its State or region, including, but not limited to, underserved parents, low income parents, parents with limited English proficiency, and parents with disabilities;

(ii) The needs of youth with disabilities in the geographic diversity of its State or region, including, but not limited to, underserved youth, incarcerated youth, youth in foster care, and youth with limited English proficiency; and

(iii) The variety of educational options available within the State and local communities, and how parents and youth are made aware of these options; and

(2) Demonstrate how the proposed project will, within the geographic diversity in its State or region—

(i) Address the needs of parents of children with disabilities for high-quality services that increase parents' capacity to help their children with disabilities improve their early learning, school-aged, and postsecondary outcomes. To meet this requirement the applicant must—

(A) Demonstrate knowledge of best practices on providing training and information to the variety of parents in its State or region;

(B) Demonstrate knowledge of best practices in outreach and family-centered services;

(C) Demonstrate knowledge of current education practices and policy initiatives to improve outcomes in early intervention and early childhood, general and special education, transition services, and postsecondary options; and

(D) Demonstrate knowledge of how to identify and work with appropriate partners in the State, including local providers and lead agencies providing Part C services; State and local educational agencies; State child welfare agencies; disability-specific systems and entities serving families, such as the State's protection and advocacy system; vocational rehabilitation (VR) agencies; and other nonprofits serving families in order to improve outcomes; and

(ii) Address the needs of youth with disabilities for high-quality services that increase their capacity to be effective self-advocates. To meet this requirement the applicant must—

(A) Demonstrate knowledge of best practices for providing training and information to the variety of youth with disabilities in its State or region;

(B) Demonstrate knowledge of current education practices and policy initiatives in self-advocacy; and

(C) Demonstrate knowledge of how to work with appropriate partners serving youth with disabilities, including State and local VR agencies, other nonprofits, and Independent Living Centers that provide assistance such as postsecondary education options, employment training, and supports.

(b) Demonstrate, in the narrative section of the application under ''Quality of project design,'' how the proposed project will—

(1) Use a project logic model to guide the development of project plans and activities within its State or region;

Note: The following websites provide more information on logic models and conceptual frameworks: *www.osepideasthatwork.org/logicModel* and *www.osepideasthatwork.org/resources-grantees/program-areas/ta-ta/tad-project-logic-model-and-conceptual-framework.*

(2) Develop and implement an outreach plan to inform parents of children with disabilities of how they can benefit from the services provided by the PTI, including, but not limited to—

(i) Parents of children who may be inappropriately identified;

(ii) Underserved parents;

(iii) Parents with limited English proficiency;

(iv) Low-income parents; and

(v) Parents with disabilities; and

(3) Develop and implement an outreach plan to inform youth with disabilities of how they can benefit from the services provided by the PTI.

(c) Demonstrate, in the narrative section of the application under ''Quality of project services,'' how the proposed project will—

(1) Provide high-quality services that increase parents' capacity to help their children with disabilities improve their early learning, school-aged, and postsecondary outcomes. To meet this requirement the applicant must include information as to how the services will—

(i) Increase parents' knowledge of—

(A) The nature of their children's disabilities, including their children's strengths, and academic, behavioral, and developmental challenges;

(B) The importance of having high expectations for their children and how to help them meet those expectations;

(C) The local, State, and Federal resources available to assist them and their children and local resources that strengthen their connection to their communities;

(D) IDEA, Federal IDEA regulations, and State regulations, policies, and practices implementing IDEA, including—

(*1*) Their rights and responsibilities under IDEA, including procedural safeguards and dispute resolution;

(*2*) Their role on Individualized Family Service Plan (IFSP) and Individualized Education Program (IEP) Teams and how to effectively participate on IFSP and IEP Teams; and

(*3*) How services are provided under IDEA;

(E) Other relevant educational and health care legislation, including the Elementary and Secondary Education Act of 1965, as amended (ESEA); the Rehabilitation Act, especially section 504 of the Rehabilitation Act (Section 504) and the provisions established by the Workforce Innovation and Opportunity Act (WIOA); and the Americans with Disabilities Act (ADA);

(F) Transition services, at all levels, including Part C early intervention to Part B preschool, preschool to

[5] The freely associated States of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

elementary school, elementary school to secondary school, secondary school to postsecondary education and workforce options, and re-entry of incarcerated youth to school and the community;

(G) The options available within the State and their community to educate and help their children meet educational and developmental outcomes;

(H) How their children can have access to the general education curriculum and inclusive early learning programs, including access to corresponding academic standards and assessments, extracurricular and enrichment opportunities, and other initiatives available to all children;

(I) Early intervention and education practices that improve outcomes and help children meet high expectations; and

(J) School reform efforts to improve student achievement and increase graduation rates; and

(ii) Increase parents' capacity to—

(A) Effectively support their children with disabilities and participate in their children's education;

(B) Make informed decisions when choosing educational and early learning options that best meet the needs of their children;

(C) Communicate effectively and work collaboratively in partnership with early intervention service providers, school-based personnel, related services personnel, and administrators;

(D) Resolve disputes effectively; and

(E) Participate in school reform activities to improve outcomes for all children;

(2) Provide high-quality services that increase youth with disabilities' capacity to be effective self-advocates. To meet this requirement the applicant must include information as to how the services will—

(i) Increase the knowledge of youth with disabilities about—

(A) The nature of their disabilities, including their strengths, and of their academic, behavioral, and developmental challenges;

(B) The importance of having high expectations for themselves and how to meet those expectations;

(C) The resources available to support their success in secondary and postsecondary education and employment and full participation in their communities;

(D) IDEA, Section 504, Rehabilitation Act, WIOA, ADA, and other legislation, regulations, and policies that affect people with disabilities;

(E) Their rights and responsibilities while receiving services under IDEA, the Rehabilitation Act, and WIOA, and after transitioning to post-school programs, services, and employment;

(F) How they can participate on IEP Teams;

(G) The options available within the State and their community to help them meet their educational and post-transition outcomes; and

(H) Supported decision making necessary to transition to adult life; and

(ii) Increase the capacity of youth with disabilities to—

(A) Advocate for themselves, including communicating effectively and working collaboratively in partnership with providers; and

(B) Make informed decisions when choosing educational options that best meet their needs;

(3) Use various methods to deliver services, including in-person and remotely through the use of technology;

(4) Use best practices for providing training and information to adult learners and youth;

(5) Establish cooperative partnerships with any CPRCs and any other PTIs funded in the State under sections 672 and 671 of IDEA, respectively;

(6) Establish cooperative partnerships with the Parent Training and Information Centers funded under the Rehabilitation Act (CFDA 84.235F) in the Regional Parent Technical Assistance Center's (Regional PTAC's) (CFDA 84.328R) region to which they belong, and the Center for Parent Information and Resources (CFDA 84.328R); and

(7) Network with local, State, and national organizations and agencies, such as protection and advocacy agencies and VR agencies that serve parents and families of children with disabilities, to better support families and children with disabilities to effectively and efficiently access IDEA and pre-employment transition services.

(d) In the narrative section of the application under ''Quality of the project evaluation,'' include an evaluation plan for the project as described in the following paragraphs. The evaluation plan must describe: Measures for evaluating the quality, accuracy, and impartiality of project services and products; measures of progress in implementation, including the criteria for determining the extent to which the project's products and services have met the goals for reaching its target population; measures of intended outcomes or results of the project's activities in order to evaluate those activities; and how well the goals or objectives of the proposed project, as described in its logic model, have been met.

(e) Demonstrate, in the narrative section of the application under ''Adequacy of resources and quality of project personnel,'' how—

(1) The applicant and any key partners have adequate resources to carry out the proposed activities; and

(2) The proposed costs are reasonable in relation to the anticipated results and benefits.

(3) The proposed project will encourage applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability, as appropriate; and

(4) The proposed key project personnel, consultants, and subcontractors have the qualifications and experience to carry out the proposed activities and achieve the project's intended outcomes.

(f) Demonstrate, in the narrative section of the application under ''Quality of the management plan,'' how—

(1) The proposed management plan will ensure that the project's intended outcomes will be achieved on time and within budget. To address this requirement, the applicant must describe—

(i) Clearly defined responsibilities for key project personnel, consultants, and subcontractors, as applicable; and

(ii) Timelines and milestones for accomplishing the project tasks;

(2) Key project personnel and any consultants and subcontractors will be allocated and how these allocations are appropriate and adequate to achieve the project's intended outcomes;

(3) The proposed management plan will ensure that the products and services provided are of high quality, impartial, relevant, and useful to recipients;

(4) The board of directors will be used to provide appropriate oversight to the project;

(5) The proposed project will benefit from a diversity of perspectives, including those of families using a variety of education options, youth, educators, and State and local providers, among others, in its development and operation;

(6) The proposed project will ensure that the annual performance reports submitted to the Department will—

(i) Be accurate and timely;

(ii) Include information on the projects' outputs and outcomes; and

(iii) Include, at a minimum, the number and demographics of parents and youth to whom the PTI provided information and training, the parents' and youth's unique needs, and the levels of service provided to them; and

(7) The project management and staff will—

(i) Make use of the technical assistance (TA) and products provided by the OSEP-funded Center on Parent Information and Resources, Regional PTACs, and other TA centers, as appropriate;

(ii) Participate in developing individualized TA plans with the Regional PTAC, as appropriate; and

(iii) Facilitate one site visit from the Regional PTAC during the grant cycle.

(g) Address the following application requirements. The applicant must—

(1) Include, in Appendix A, a logic model for the project;

(2) Include, in Appendix A, personnel-loading charts and timelines, as applicable, to illustrate the management plan described in the narrative;

(3) Include, in the budget, travel funds to support the project director's attendance at one meeting sponsored by OSEP or the Regional PTACs, at a minimum;

(4) Maintain a website that meets government or industry-recognized standards for accessibility and that includes, at a minimum, a current calendar of upcoming events, free informational publications for families, and links to webinars or other online multimedia resources; and

(5) Assure that the information provided to parents is accurate and impartial.

Waiver of Proposed Rulemaking: Under the Administrative Procedure Act (APA) (5 U.S.C. 553), the Department generally offers interested parties the opportunity to comment on proposed priorities and requirements. Section 681(d) of IDEA, however, makes the public comment requirements of the APA inapplicable to the priority in this notice.

Program Authority: 20 U.S.C. 1471 and 1481.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

CFDA 84.235F Absolute Priority—Parent Information and Training Program.

Background:

The purpose of this priority is for the Rehabilitation Services Administration (RSA) to fund eight Parent Information and Training (RSA–PTI) centers, to meet the information and training needs of individuals with disabilities and their families, so that individuals with disabilities can achieve their employment and independent living goals. The Secretary may fund out of rank order to ensure that the RSA–PTI centers will be distributed geographically throughout the country, with two RSA–PTI centers within each of the OSEP-funded Regional PTAC regions.[6] Funding will be provided to the highest ranked applicant for each region. Applicants must propose to provide services to all States in a region:

Region A–1: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont.

Region A–2: Delaware, Maryland, New Jersey, New York, Pennsylvania, District of Columbia, Puerto Rico, U.S. Virgin Islands.

Region B–1: Florida, Georgia, North Carolina, South Carolina, Tennessee, Virginia.

Region B–2: Alabama, Arkansas, Louisiana, Mississippi, Oklahoma, Texas.

Region C–1: Illinois, Indiana, Kentucky, Michigan, Minnesota, Ohio, West Virginia, Wisconsin.

Region C–2: Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming.

Region D–1: Alaska, Hawaii, Oregon, Washington, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam.

Region D–2: Arizona, California, Colorado, Idaho, Nevada, New Mexico, Utah.

The RSA–PTI centers will be designed to meet the unique training and information needs of individuals with disabilities and their families who live in the area to be served, particularly those who are members of populations that have been unserved or underserved by other Rehabilitation Act programs. The RSA–PTI centers will coordinate and work closely with the PTI centers established under the CFDA 84.328M priority pursuant to section 671 of IDEA. Finally, the RSA–PTI centers will help to build greater and more effective family engagement in the education and postsecondary transition of their children and create or expand partnerships with community-based organizations to provide supports and services to students and families.

The Department has funded RSA–PTI centers under the Rehabilitation Act since 1993. For individuals with disabilities and their families, particularly for youth of transition age, the need for information about postsecondary transition, VR, independent living, and other adult services is critical. The current Federal approach to assisting students with disabilities in transitioning to postsecondary education or the workforce necessitates that students and their parents navigate multiple programs and service systems in order to piece together the supports these students need to achieve maximum independence in adulthood. Under this complex arrangement, information dissemination and service coordination are essential (GAO, 2012).

Furthermore, although families may be familiar with the supports provided while a youth with disabilities is in secondary school, they may not be aware of options available for postsecondary education and training and may be intimidated by the process to obtain financial aid for such options. Without accurate and timely information about available services, students may miss opportunities to access services that could mean the difference between achieving an optimal level of self-sufficiency and relying on public assistance to meet their basic needs (GAO, 2012). Finally, although many youths with disabilities receive work experiences while in secondary school, additional exploration and on-the-job training experiences provided through a VR services program may introduce them to career possibilities not previously considered.

The RSA–PTI centers have provided information and training to thousands of individuals with disabilities and their families to help them better understand the varied eligibility requirements for, and the complex array of services provided by, programs that serve adults with disabilities. Having accurate and user-friendly information helps to ensure that individuals with disabilities receive the services that will help them achieve their employment and independent living goals. Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S.

[6] For RSA-funded grants, ''State'' includes, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (Rehabilitation Act, Section 7(34)). The Regional PTAC regions and the States in those regions can be found at *www.parentcenterhub.org/rptacs/.*

Constitution and the Federal civil rights laws.

References:

United States Government Accountability Office (GAO). (2012). Report to the Ranking Member, Committee on Education and the Workforce, House of Representatives. Students with Disabilities, Better Federal Coordination Could Lessen Challenges in the Transition from High School. July 2012. *www.gao.gov/assets/600/592329.pdf.*

CFDA 84.235F Priority:

Under this priority, we provide grants for the establishment or continuation of projects that provide information and training to assist individuals with disabilities, and the parents, family members, guardians, advocates, or authorized representatives of the individuals (hereafter collectively referred to as ''individuals with disabilities and their families'') to participate more effectively with professionals in meeting the vocational, independent living, and rehabilitation needs of individuals with disabilities. To be considered for funding under this priority, an applicant must meet the application, programmatic, and administrative requirements of this priority. The applicant must address the following requirements and explain how it will assist individuals with disabilities, including youth of transition age, and their families to—

(a) Better understand VR and independent living programs and services. To meet this requirement, the applicant may describe—

(1) How it will assess the need across all States in the defined geographic region for information and training materials to inform individuals with disabilities and their families about VR and independent living services, particularly those that have been underserved in receiving the services the applicant intends to offer;

(2) The materials and training that will be developed to explain the VR process and how VR is designed to lead to high-quality competitive employment outcomes in the integrated labor market for individuals with disabilities;

(3) A plan for disseminating the materials developed across all States in the defined geographic region and particularly to families and individuals with disabilities that have been underserved in receiving the services the applicant intends to offer; and

(4) A plan for evaluating the information and training materials disseminated.

(b) Provide follow-up support for transition and employment programs. To meet this requirement, the applicant may describe—

(1) How it will identify and provide services to families and individuals with disabilities across all States in the defined geographic region and particularly to families and individuals with disabilities that have been underserved in receiving the services the applicant intends to offer;

(2) A plan for developing the necessary follow-up activities so that individuals with disabilities experience a smooth transition from secondary school activities to employment and other post-school activities;

(3) How it will develop and disseminate training materials on transition services and employment programs;

(4) A plan for evaluating the information and training materials disseminated on transition services and employment programs; and

(5) How it will develop collaborative arrangements with VR service providers and employers in the area to be served that will facilitate the provision of transition services and employment programs to support individuals with disabilities and their families.

(c) Communicate more effectively with transition and rehabilitation personnel and other relevant professionals. To meet this requirement, the applicant may describe—

(1) How it will identify and provide services to families and individuals with disabilities across all States in the defined geographic region and particularly to families and individuals with disabilities that have been underserved in receiving the services the applicant intends to offer;

(2) How training will be provided to individuals with disabilities and their families to help them understand the language and the frame of reference that rehabilitation professionals use in their work so that such individuals and their families will be capable of communicating effectively with such professionals;

(3) How the needs of individuals with disabilities and their families who are from culturally diverse backgrounds or who have varying communication needs will be addressed; and

(4) How the effectiveness of the training will be evaluated.

(d) Provide support in the development of the individualized plan for employment (IPE). To meet this requirement the applicant may describe—

(1) How it will identify and provide services to families and individuals with disabilities across all States in the defined geographic region and particularly to families and individuals with disabilities that have been underserved in receiving the services the applicant intends to offer;

(2) How it will provide training to individuals with disabilities and their families to help them develop IEPs with a focus on transition services needed in order to achieve high-quality employment and independence and that will later be coordinated with the IPEs developed for the individuals; and

(3) How it will provide training to individuals with disabilities and their families to help them develop comprehensive IPEs leading to employment goals consistent with the individuals' strengths, abilities, and informed choice.

(e) Provide support and expertise in obtaining information about rehabilitation and independent living programs, services, and resources that are appropriate. To meet this requirement the applicant may describe—

(1) How it will identify and provide services to families and individuals with disabilities across all States in the defined geographic region and particularly to families and individuals with disabilities that have been underserved in receiving the services the applicant intends to offer;

(2) How it will develop and disseminate materials to educate individuals with disabilities and their families about the array of transition, rehabilitation, and independent living services and programs available in the area to be served;

(3) How it will provide information to individuals with disabilities from diverse ethnic, cultural, and linguistic backgrounds and how it will provide information in accessible formats (*e.g.,* languages other than English or in braille or large print); and

(4) How it will develop relationships with rehabilitation and independent living service providers in the area to be served so that the information the PTI provides is current and meaningful.

(f) Provide support and guidance in helping individuals with significant disabilities, including students with disabilities, transition to competitive integrated employment. To meet this requirement the applicant may describe—

(1) How it will identify and provide services to families and individuals with disabilities across all States in the defined geographic region and particularly to families and individuals with disabilities that have been

underserved in receiving the services the applicant intends to offer;

(2) How it will develop relationships with schools and employers to educate individuals with disabilities and their families about competitive integrated employment opportunities;

(3) How it will provide information regarding competitive integrated work-based learning opportunities and employment opportunities to individuals with disabilities from diverse ethnic, cultural, and linguistic backgrounds; and

(4) How it will develop relationships with VR services providers and employers in the area to be served so that the information the PTI provides is current and meaningful.

(g) Understand the provisions of the Rehabilitation Act, particularly provisions relating to employment, supported employment, and independent living. To meet this requirement the applicant may describe—

(1) How it would train individuals with disabilities and their families about how to access, and what to expect from, VR and independent living programs available under the Rehabilitation Act and how such services and programs can help individuals with disabilities achieve their goals in postsecondary education, independent living, and high-quality competitive employment in the integrated labor market, including supported employment; and

(2) How it would provide information to individuals with disabilities and their families on the rights such individuals have to access these programs and their rights to due process if they are not satisfied with the services they receive.

Program Authority: 29 U.S.C. 773(c).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Note: The regulations in 34 CFR part 79 apply to all applicants except federally recognized Indian Tribes.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education (IHEs) only.

II. Award Information

CFDA 84.328M Absolute Priority

Type of Award: Discretionary grants.

Estimated Available Funds: $21,195,248.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Information concerning funding amounts for individual States for this competition is provided in the ''Maximum Award'' column of the table in this section.

The Department took into consideration current funding levels, population distribution, poverty rates, and low-density enrollment when determining the award amounts for grants under this competition. For the States listed in the funding table, one award may be made for up to the amounts listed in the table to a qualified applicant for a PTI to serve the entire State.

Estimated Range of Awards: $103,612 to $679,768.

Estimated Average Size of Awards: $326,081.

Maximum Award: See table. We will not make an award exceeding the corresponding amount shown in the table for each State for a single budget period of 12 months.

Applications for one five-year award will be accepted to serve the area in the Pacific comprised of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the Freely Associated States consisting of the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau.

Applications for five-year awards will also be accepted to serve regions in the following States:

California:

Region 1—Los Angeles county;

Region 2—Imperial, Orange, Riverside, San Bernardino, and San Diego counties;

Region 3—Fresno, Inyo, Kern, Kings, Madera, Mariposa, Merced, Mono, San Luis Obispo, Santa Barbara, Tulare, and Ventura counties;

Region 4—Alameda, Contra Costa, Marin, Monterey, Napa, San Benito, San Francisco, San Mateo, Santa Clara, Santa Cruz, Solano, and Sonoma counties; and

Region 5—Alpine, Amador, Butte, Calaveras, Colusa, Del Norte, El Dorado, Glenn, Humboldt, Lake, Lassen, Mendocino, Modoc, Nevada, Placer, Plumas, Sacramento, San Joaquin, Shasta, Sierra, Siskiyou, Stanislaus, Sutter, Tehama, Trinity, Tuolumne, Yolo, and Yuba counties.

Florida:

Region 1—Alachua, Baker, Bay, Bradford, Brevard, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Flagler, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Holmes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Marion, Nassau, Okaloosa, Putnam, Santa Rosa, Seminole, St. Johns, Suwannee, Taylor, Union, Volusia, Wakulla, Walton, and Washington counties;

Region 2—Charlotte, Citrus, Collier, DeSoto, Glades, Hardee, Hendry, Hernando, Highlands, Hillsborough, Lee, Manatee, Pasco, Pinellas, Sarasota, and Sumter counties; and

Region 3—Broward, Indian River, Lake, Martin, Miami-Dade, Monroe, Okeechobee, Orange, Osceola, Palm Beach, Polk, and St. Lucie counties.

Illinois:

Region 1—Cook, DuPage, Grundy, Kane, Kendall, Lake, McHenry, and Will counties; and

Region 2—The rest of the State of Illinois.

New York:

Region 1—Bronx, Kings, Nassau, New York, Queens, Richmond, and Suffolk counties; and

Region 2—The rest of the State of New York.

Texas:

Region 1—Atascosa, Bandera, Bastrop, Bexar, Blanco, Burnet, Caldwell, Cameron, Comal, Dimmit, Fayette, Frio, Gillespie, Gonzales, Guadalupe, Hays, Hidalgo, Jim Hogg, Kendall, Kerr, Kinney, La Salle, Lee, Llano, Maverick, Medina, Real, Starr, Travis, Uvalde, Webb, Willacy, Williamson, Wilson, Zapata, and Zavala counties;

Region 2—Andrews, Archer, Armstrong, Bailey, Baylor, Bell, Borden, Bosque, Brewster, Briscoe, Brown, Callahan, Carson, Castro, Childress, Clay, Cochran, Coke, Coleman, Collingsworth, Comanche, Concho, Coryell, Cottle, Crane, Crockett, Crosby, Culberson, Dallam, Dawson, Deaf Smith, Dickens, Donley, Eastland, Ector, Edwards, El Paso, Falls, Fisher, Floyd, Foard, Freestone, Gaines, Garza, Glasscock, Gray, Hale, Hall, Hamilton, Hansford, Hardeman, Hartley, Haskell, Hemphill, Hill, Hockley, Howard, Hudspeth, Hutchinson, Irion, Jack, Jeff Davis, Jones, Kent, Kimble, King, Knox, Loving, Lamb, Lampasas, Limestone, Lipscomb, Lubbock, Lynn, Martin, Mason, McCulloch, McLennan, Menard, Midland, Mills, Mitchell, Montague, Moore, Motley, Navarro, Nolan, Ochiltree, Oldham, Parmer, Pecos, Potter, Presidio, Randall, Reagan,

Reeves, Roberts, Runnels, San Saba, Schleicher, Scurry, Shackelford, Sherman, Stephens, Sterling, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Tom Green, Upton, Val Verde, Ward, Wheeler, Wichita, Wilbarger, Winkler, Yoakum, and Young counties;

Region 3—Anderson, Angelina, Bowie, Camp, Cass, Cherokee, Collin, Cooke, Dallas, Delta, Denton, Ellis, Erath, Fannin, Franklin, Grayson, Gregg, Harrison, Henderson, Hood, Hopkins, Hunt, Johnson, Kaufman, Lamar, Marion, Morris, Nacogdoches, Palo Pinto, Panola, Parker, Rains, Red River, Rockwall, Rusk, Sabine, San Augustine, Shelby, Smith, Somervell, Tarrant, Titus, Upshur, Van Zandt, Wise, and Wood counties; and

Region 4—Aransas, Austin, Bee, Brazoria, Brazos, Brooks, Burleson, Calhoun, Chambers, Colorado, DeWitt, Duval, Fort Bend, Galveston, Goliad, Grimes, Hardin, Harris, Houston, Jackson, Jasper, Jefferson, Jim Wells, Karnes, Kenedy, Kleberg, Lavaca, Leon, Liberty, Live Oak, Madison, Matagorda, McMullen, Milam, Montgomery, Newton, Nueces, Orange, Polk, Refugio, Robertson, San Jacinto, San Patricio, Trinity, Tyler, Victoria, Walker, Waller, Washington, and Wharton counties.

Applicants for PTIs to serve the regions within these States must submit a separate application for each of the regions they propose to serve.

Estimated Number of Awards: 65.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

TRAINING AND INFORMATION FOR PARENTS OF CHILDREN WITH DISABILITIES—PARENT TRAINING AND INFORMATION CENTERS (84.328M) APPLICATION NOTICE FOR FY 2020

State	Maximum award
ALABAMA	$298,602
ALASKA	200,000
ARIZONA	402,873
ARKANSAS	200,000
CALIFORNIA	
CA Region 1	532,105
CA Region 2	660,910
CA Region 3	307,981
CA Region 4	406,987
CA Region 5	294,664
COLORADO	306,283
CONNECTICUT	200,000
DELAWARE	200,000
DISTRICT OF COLUMBIA	200,000
FLORIDA	
FL Region 1	283,230
FL Region 2	262,640
FL Region 3	490,620
GEORGIA	639,236
HAWAII	200,000
IDAHO	200,000
ILLINOIS	
IL Region 1	480,387
IL Region 2	227,148
INDIANA	403,124
IOWA	200,000
KANSAS	200,000
KENTUCKY	273,114
LOUISIANA	293,313
MAINE	200,000
MARYLAND	317,529
MASSACHUSETTS	348,565
MICHIGAN	572,037
MINNESOTA	314,959
MISSISSIPPI	200,590
MISSOURI	355,206
MONTANA	200,000
NEBRASKA	200,000
NEVADA	200,000
NEW HAMPSHIRE	200,000
NEW JERSEY	456,033
NEW MEXICO	200,000
NEW YORK	
NY Region 1	595,579
NY Region 2	463,700
NORTH CAROLINA	609,015

TRAINING AND INFORMATION FOR PARENTS OF CHILDREN WITH DISABILITIES—PARENT TRAINING AND INFORMATION CENTERS (84.328M) APPLICATION NOTICE FOR FY 2020—Continued

State	Maximum award
NORTH DAKOTA	200,000
OHIO	660,275
OKLAHOMA	248,200
OREGON	219,788
PACIFIC	200,000
PENNSYLVANIA	679,768
PUERTO RICO	202,373
RHODE ISLAND	200,000
SOUTH CAROLINA	293,497
SOUTH DAKOTA	200,000
TENNESSEE	395,568
TEXAS	
TX Region 1	430,303
TX Region 2	245,844
TX Region 3	558,001
TX Region 4	550,550
U.S. VIRGIN ISLANDS	103,612
UTAH	210,656
VERMONT	200,000
VIRGINIA	471,006
WASHINGTON	400,789
WEST VIRGINIA	200,000
WISCONSIN	328,588
WYOMING	200,000

CFDA 84.235F Absolute Priority

Type of Award: Discretionary grants.

Estimated Available Funds: $2,400,000.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in subsequent years from the list of unfunded applications from this competition.

Maximum Award: $300,000.

Estimated Number of Awards: 8. Funding will be provided to the top-ranked applicant that provides services to all of the States listed in each of the identified regions as outlined in the following table.

Region	States within region	Maximum award amount
A–1	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont	$300,000
A–2	Delaware, Maryland, New Jersey, New York, Pennsylvania, District of Columbia, Puerto Rico, U.S. Virgin Islands.	300,000
B–1	Florida, Georgia, North Carolina, South Carolina, Tennessee, Virginia	300,000
B–2	Alabama, Arkansas, Louisiana, Mississippi, Oklahoma, Texas	300,000
C–1	Illinois, Indiana, Kentucky, Michigan, Minnesota, Ohio, West Virginia, Wisconsin	300,000
C–2	Iowa, Kansas, Missouri, Montana, Nebraska, North Dakota, South Dakota, Wyoming	300,000
D–1	Alaska, Hawaii, Oregon, Washington, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam.	300,000
D–2	Arizona, California, Colorado, Idaho, Nevada, New Mexico, Utah	300,000

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

CFDA 84.328M Absolute Priority

1. *Eligible Applicants:* Parent organizations.

Note: Section 671(a)(2) of IDEA defines a ''parent organization'' as a private nonprofit organization (other than an IHE) that—

(a) Has a board of directors—

(1) The majority of whom are parents of children with disabilities ages birth through 26;

(2) That includes—

(i) Individuals working in the fields of special education, related services, and early intervention; and

(ii) Individuals with disabilities; and

(3) The parent and professional members of which are broadly representative of the population to be served, including low-income parents and parents of limited English proficient children; and

(b) Has as its mission serving families of children with disabilities who are ages birth through 26, and have the full range of disabilities described in section 602(3) of IDEA.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

3. *Subgrantees:* Under 34 CFR 75.708(b) and (c), a grantee under this competition may award subgrants—to directly carry out project activities described in its application—to the following types of entities: IHEs and private nonprofit organizations suitable to carry out the activities proposed in the application.

The grantee may award subgrants to entities it has identified in an approved application.

4. *Other General Requirements:* (a) Recipients of funding under this program must make positive efforts to employ and advance in employment qualified individuals with disabilities (see section 606 of IDEA).

(b) Each applicant for, and recipient of, funding under this program must involve individuals with disabilities, or parents of individuals with disabilities ages birth through 26, in planning, implementing, and evaluating the project (see section 682(a)(1)(A) of IDEA).

CFDA 84.235F Absolute Priority

1. *Eligible Applicants:* Private nonprofit organizations that meet the requirements in section 303(c)(4) of the Rehabilitation Act. An applicant must—

(a) Include information demonstrating the capacity and expertise of the organization to—

(i) Coordinate training and information activities with Centers for Independent Living;

(ii) Coordinate and work closely with PTIs established pursuant to section 671 of IDEA, the CPRCs established pursuant to section 672 of IDEA, and the eligible entities receiving awards under section 673 of IDEA; and

(iii) Effectively conduct the training and information activities authorized in section 303 of the Rehabilitation Act;

(b) Be governed by a board of directors that—

(i) Includes professionals in the VR field; and on which a majority of the members are individuals with disabilities or the parents, family members, guardians, advocates, or authorized representatives of the individuals; or

(ii) Has a membership that represents the interests of individuals with disabilities; and establishes a special governing committee to operate a training and information program under section 303(c)(4) of the Rehabilitation Act that includes professionals in the VR field and on which a majority of the members are individuals with disabilities or the parents, family members, guardians, advocates, or authorized representatives of the individuals; and may include representatives from special education and other public and private agencies on the board, as appropriate; and

(c) Serve, and demonstrate the capacity for serving, individuals with a full range of disabilities, and the parents, family members, guardians, advocates, or authorized representatives of the individuals.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

Eligible applicants may apply for both absolute priorities but must submit separate applications for each absolute priority. An applicant may apply only once under each identified region of the CFDA 84.235F priority. An applicant may apply only once under the CFDA 84.328M priority, except an applicant may apply for multiple regional centers within a single State and must submit a separate application for each region. For example, an applicant applying for the 84.328M grant for Idaho and the 84.235F grant for region D–2, which contains Idaho, must submit separate applications under both CFDA numbers. Or an applicant submitting for multiple 84.328M regions within Texas must submit separate applications for each region. If the applicant also applies for an 84.235F grant for region B–2, which contains Texas, the applicant must submit a separate application for the 84.235F grant.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

3. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

4. *Recommended Page Limit:* The application narrative (Part III of the application) is where you, the applicant, address the selection criteria that reviewers use to evaluate your application. We recommend that you (1) limit the application narrative to no more than 50 pages, and (2) use the following standards:

- A ''page'' is 8.5″ x 11″, on one side only, with 1″ margins at the top, bottom, and both sides.
- Double space (no more than three lines per vertical inch) all text in the application narrative, including titles, headings, footnotes, quotations, reference citations, and captions, as well as all text in charts, tables, figures, graphs, and screen shots.
- Use a font that is 12 point or larger.
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to Part I, the cover sheet; Part II, the budget section, including the narrative budget justification; Part IV, the assurances and certifications; or the abstract (follow the guidance provided in the application package for completing the abstract), the table of contents, the list of priority requirements, the resumes, the reference list, the letters of support, or the appendices. However, the recommended page limit does apply to all of the application narrative, including all text in charts, tables, figures, graphs, and screen shots.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for these competitions are from 34 CFR 75.210 and are as follows:

CFDA 84.328M Absolute Priority and CFDA 84.235F Absolute Priority

(a) *Significance.* (15 points)

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses; and

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(b) *Quality of the project design.* (10 points)

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable; and

(ii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(c) *Quality of project services.* (25 points)

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice;

(ii) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services;

(iii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services; and

(iv) The extent to which the TA services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(d) *Quality of the project evaluation.* (15 points)

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project;

(ii) The extent to which the methods of evaluation are appropriate to the context within which the project operates;

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes; and

(iv) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(e) *Adequacy of resources and quality of project personnel.* (20 points)

(1) The Secretary considers the adequacy of resources and quality of project personnel for the proposed project.

(2) In determining the adequacy of resources and quality of project personnel for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization;

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project;

(iii) The extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability;

(iv) The qualifications, including relevant training and experience, of key project personnel;

(v) The qualifications, including relevant training and experience, of project consultants or subcontractors; and

(vi) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(f) *Quality of the management plan.* (15 points)

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks;

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project;

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project; and

(iv) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

In addition, in making a competitive grant award, the Secretary requires various assurances including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department of Education (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are

eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by ensuring that greater numbers of individuals who are eligible to serve as reviewers for any particular group of applicants will not have conflicts of interest. It also will increase the quality, independence, and fairness of the review process, while permitting panel members to review applications under discretionary grant competitions for which they also have submitted applications.

4. *Risk Assessment and Specific Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this competition the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose specific conditions and, in appropriate circumstances, high-risk conditions on a grant if the applicant or grantee is not financially stable; has a history of unsatisfactory performance; has a financial or other management system that does not meet the standards in 2 CFR part 200, subpart D; has not fulfilled the conditions of a prior grant; or is otherwise not responsible.

5. *Integrity and Performance System:* If you are selected under this competition to receive an award that over the course of the project period may exceed the simplified acquisition threshold (currently $250,000), under 2 CFR 200.205(a)(2) we must make a judgment about your integrity, business ethics, and record of performance under Federal awards—that is, the risk posed by you as an applicant—before we make an award. In doing so, we must consider any information about you that is in the integrity and performance system (currently referred to as the Federal Awardee Performance and Integrity Information System (FAPIIS)), accessible through the System for Award Management. You may review and comment on any information about yourself that a Federal agency previously entered and that is currently in FAPIIS.

Please note that, if the total value of your currently active grants, cooperative agreements, and procurement contracts from the Federal Government exceeds $10,000,000, the reporting requirements in 2 CFR part 200, Appendix XII, require you to report certain integrity information to FAPIIS semiannually. Please review the requirements in 2 CFR part 200, Appendix XII, if this grant plus all the other Federal funds you receive exceed $10,000,000.

VI. Award Administration Information

1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

2. *Administrative and National Policy Requirements:* We identify administrative and national policy requirements in the application package and reference these and other requirements in the *Applicable Regulations* section of this notice.

We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements, please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case, the Secretary establishes a data collection period.

5. *Performance Measures:*

CFDA 84.328M Absolute Priority:

Under the Government Performance Results Modernization Act of 2010 (GPRA 2010), the Department has established a set of performance measures, including long-term measures, that are designed to yield information on the quality, relevance, and usefulness of the materials, products, and services of the Training and Information for Parents of Children with Disabilities program. These measures are:

- *Program Performance Measure 1:* The percentage of materials used by projects that are deemed to be of high quality;
- *Program Performance Measure 2:* The percentage of products and services deemed to be of high relevance to educational and early intervention policy and practice; and
- *Program Performance Measure 3:* The percentage of all products and services deemed to be useful to improve educational or early intervention policy or practice.
- *Program Performance Measure 4:* The percentage of individuals with disabilities and their families receiving PTI services who report enhanced knowledge and understanding of IDEA services.

Grantees will be required to report information on their project's performance in annual reports to the Department (34 CFR 75.590).

CFDA 84.235F Absolute Priority:

GPRA 2010 directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals. The required annual report must include information on two measures:

• *Program Performance Measure 1:* The percentage of individuals with disabilities and their families receiving PTI services who report enhanced knowledge and understanding of VR services; and

• *Program Performance Measure 2:* The percentage of all products and services developed to improve VR service utilization deemed to be useful by individuals with disabilities and their families receiving PTI services.

The data needed to support these measures will be collected by grantees via survey, assessed, and reported in the aggregate to RSA. Grantees will negotiate targets with RSA after the first year, which will be used to establish a baseline.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* 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 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.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2020–08390 Filed 4–20–20; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Parent Information and Training Program—Technical Assistance for Parent Training and Information Centers

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: The mission of the Office of Special Education and Rehabilitative Services (OSERS) is to improve early childhood, educational, and employment outcomes and raise expectations for all people with disabilities, their families, their communities, and the Nation. As such, the Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2020 for Parent Information and Training Program-Technical Assistance for Parent Training and Information Centers, Catalog of Federal Domestic Assistance (CFDA) number 84.235G. The national center under this competition is designed to provide technical assistance to, and coordination among, the State-level Parent Training and Information (PTI) centers that are funded under section 303(c) of the Rehabilitation Act, known as the Rehabilitation Services Administration (RSA) PTI centers, and to establish and maintain partnerships with the State-level PTI centers established pursuant to section 671 and 681(d) of the Individuals with Disabilities Education Act (IDEA), known as the Office of Special Education Programs (OSEP)-funded PTIs. This notice relates to the approved information collection under OMB control number 1820–0028.

DATES: *Applications Available:* April 21, 2020.

Deadline for Transmittal of Applications: June 22, 2020.

Deadline for Intergovernmental Review: August 19, 2020.

Date of Pre-Application Meeting: The Office of Special Education and Rehabilitative Services (OSERS) will post a PowerPoint presentation that provides general information related to RSA's discretionary grant competitions and a PowerPoint presentation specifically related to this Parent Information and Training Program—Technical Assistance for Parent Training and Information Centers at *https://ncrtm.ed.gov/RSAGrantInfo.aspx.* OSERS will conduct a pre-application meeting specific to this competition via conference call in order to respond to questions on May 5, 2020 at 3:00 p.m. Eastern Time. OSERS invites you to send questions to *tara.jordan@ed.gov* in advance of the pre-application meeting. The teleconference information, including the 84.235G pre-application meeting summary of the questions and answers, will be available at *https://ncrtm.ed.gov/RSAGrantInfo.aspx* within 6 days after the pre-application meeting.

ADDRESSES: For the addresses for obtaining and submitting an application, please refer to our Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf.*

FOR FURTHER INFORMATION CONTACT: Tara Jordan, U.S. Department of Education, 400 Maryland Avenue SW, Room 5058E, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–7341. Email: *Tara.Jordan@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.

SUPPLEMENTARY INFORMATION:

Full Text of Announcement

I. Funding Opportunity Description

Purpose of Program: Under the Parent Information and Training Program, section 303(c) of the Rehabilitation Act, RSA funds State-level PTI centers and one national PTI center. The State-level PTI centers provide training and information to individuals with disabilities and their parents, family members, guardians, advocates, or authorized representatives (hereafter referred to as ''individuals with disabilities and their families'') who live in the service area, particularly those who are members of populations that have been unserved or underserved by programs under the Rehabilitation Act.

The national PTI center is designed to provide technical assistance to, and coordination among, the State-level PTI centers that are funded under section 303(c) of the Rehabilitation Act, and to establish and maintain partnerships with the State-level PTI centers established pursuant to section 671 and 681(d) of IDEA.

Priority: In accordance with 34 CFR 75.105(b)(2)(v), this priority is from allowable activities specified in the statute (see section 303(c)(6) of the Rehabilitation Act, 29 U.S.C. 773(c)(6)).

Absolute Priority: For FY 2020 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is an absolute priority. Under 34 CFR 75.105(c)(3) we consider only applications that meet this priority.

This priority is:

Parent Information and Training Program-Technical Assistance for Parent Information and Training Centers.

Background:

The Department has funded RSA–PTI centers and a national center under the Rehabilitation Act since 1993. For individuals with disabilities and their families, particularly for youth of transition age, the need for information about transition, vocational rehabilitation (VR), independent living, and other adult services is critical. The current Federal approach to assisting students with disabilities in transitioning to postsecondary education or the workforce necessitates that students and their parents navigate multiple service systems and access multiple programs in order to piece together the supports these students need to achieve maximum independence in adulthood. Under this complex structure, information dissemination and service coordination are essential (GAO, 2012).

Also, although families may be familiar with the supports provided while a youth with disabilities is in secondary school, the options available for postsecondary education and training, including how to obtain financial aid for such options, can often be daunting. Without receiving accurate and timely information about available services, students may miss opportunities to access needed services that could mean the difference between achieving an optimal level of self-sufficiency and relying on public assistance to meet their basic needs (GAO, 2012). Finally, although many youths with disabilities receive work experiences while in secondary school, additional job exploration and on-the-job training experiences provided through a VR services program can introduce them to career possibilities not previously considered.

Having accurate and user-friendly information available helps to ensure that individuals with disabilities receive the services that will help them achieve their employment and independent living goals. Projects must be awarded and operated in a manner consistent with the nondiscrimination requirements contained in the U.S. Constitution and the Federal civil rights laws.

The purpose of this priority is to fund a national PTI center to provide technical assistance to, and coordination of, the State-level PTI centers funded in FY 2020 under section 303(c) of the Rehabilitation Act, and to establish and maintain partnerships with the State-level PTI centers established pursuant to sections 671 and 681(d) of IDEA.

The purpose of the technical assistance and coordination provided by the national PTI center is to assist individuals with disabilities and their families in achieving their employment and independent living goals by: (1) Ensuring that the individual RSA–PTI centers are providing consistent, high-quality information and training to individuals with disabilities and their families; (2) ensuring that the RSA–PTI centers are working together, sharing best practices, not duplicating effort, and collaborating on activities; and (3) establishing and maintaining partnerships with the OSEP-funded PTIs and Regional Parent Technical Assistance Centers. This coordination is designed to increase the consistency of information provided by the centers funded under the Rehabilitation Act and those funded under IDEA. Finally, this center will help to build greater and more effective family engagement in the education and transition of their children and create or expand partnerships with community-based organizations to provide supports and services to individuals with disabilities and their families.

References:

United States Government Accountability Office (GAO). (2012). Report to the Ranking Member, Committee on Education and the Workforce, House of Representatives. Students with Disabilities, Better Federal Coordination Could Lessen Challenges in the Transition from High School. July 2012. Retrieved from: *www.gao.gov/assets/600/592329.pdf.*

Priority:

Under this priority a grant is awarded for the establishment or continuation of a national Parent Training and Information (PTI) center that provides technical assistance and coordination of the PTI centers funded under section 303(c) of the Rehabilitation Act. Specifically, this national PTI center will coordinate information and training provided by the State-level PTI centers to individuals with disabilities and their parents, family members, guardians, advocates, or authorized representatives (hereafter referred to as ''individuals with disabilities and their families''). To be considered for funding under this priority, consistent with section 303(c)(2) of the Rehabilitation Act, an applicant must meet the following application, programmatic, and administrative requirements of this priority:

(a) The national PTI center must coordinate and provide technical assistance to the PTI centers funded by RSA to help these PTI centers, at a minimum, to—

(1) Assist individuals with disabilities and their families to better understand VR and independent living programs and services;

(2) Provide follow-up support for transition and employment programs for individuals with disabilities and their families;

(3) Assist individuals with disabilities and their families to communicate more effectively with transition and rehabilitation personnel and other relevant professionals;

(4) Provide support to individuals with disabilities and their families in the development of the individualized plan for employment;

(5) Provide support and expertise for individuals with disabilities and their families in obtaining information about rehabilitation and independent living programs, services, and resources that are appropriate; and

(6) Assist individuals with disabilities and their families to understand the provisions of the Rehabilitation Act, particularly provisions relating to employment, supported employment, and independent living.

(b) In order to effectively provide coordination and technical assistance to the RSA-funded PTI centers on the activities in paragraph (a), the national PTI center may, among other activities—

(1) Survey all RSA-funded PTI centers to determine collective and individualized technical assistance activities being provided and the gaps in information and training that exist;

(2) Prioritize and provide individualized technical assistance to PTI centers that serve areas in which

there are low-performing State VR agencies, poor employment outcomes for individuals with disabilities, and PTIs with capacity issues;

(3) Build the capacity of the network of RSA-funded PTI centers by conducting a set of coordinated activities, including opportunities for peer-to-peer information sharing using various strategies such as listservs, newsletters, and other community of practice strategies;

(4) Develop and Disseminate information and resources on promising and evidence-based practices that lead to high-quality employment outcomes and independent living for individuals with disabilities;

(5) Share with the RSA-funded PTI centers strategies for communicating effectively with individuals from culturally, ethnically, and linguistically diverse backgrounds;

(6) Foster development of expertise in assisting State-level RSA-funded PTI centers as they work with individuals with disabilities, including youth with disabilities of transition age, and their families to access transition services, VR programs, and career development opportunities, including expertise in the provision of technical assistance on how to coordinate a student's Individualized Education Program with the individualized plan for employment so that the services provided to individuals with disabilities under both plans are more likely to lead to high-quality competitive employment in the integrated labor market;

(7) Create tools to help State-level RSA-funded PTI centers to build their capacity to disseminate information and conduct training activities for individuals with disabilities, including youth with disabilities of transition age, and their families on the transition from school to adult life, available VR program services, career development, and related fields;

(8) Support RSA-funded PTI centers in conducting their annual data collection activities on parent training outcomes and consolidating data into an annual report;

(9) Conduct an annual evaluation survey of RSA-funded PTI centers to determine which products and services were deemed to be useful by PTI centers and the individuals with disabilities and families accessing their products and services, with particular emphasis on the effectiveness of those products and services designed to improve VR service utilization; and

(10) Coordinate with the State-level PTI centers and the parent technical assistance centers funded by OSEP in disseminating information and training materials on transition services, VR, supported employment, independent living, and career development.

Program Authority: 29 U.S.C. 773(c)(6).

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, and 99. (b) The Office of Management and Budget Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement) in 2 CFR part 180, as adopted and amended as regulations of the Department in 2 CFR part 3485. (c) The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards in 2 CFR part 200, as adopted and amended as regulations of the Department in 2 CFR part 3474.

Note: The regulations in 34 CFR part 86 apply to institutions of higher education only.

II. Award Information

Type of Award: Discretionary grant.

Estimated Available Funds: $300,000.

The Administration has requested $300,000 for new awards for this program for FY 2020.

Contingent upon the availability of funds and the quality of applications, we may make additional awards in FY 2020 from the list of unfunded applications from this competition.

Maximum Award: We will not make an award exceeding $300,000 for a single budget period of 12 months.

Estimated Number of Awards: 1.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* Private nonprofit organizations that, to the extent practicable, are the PTI centers established pursuant to section 671 of IDEA. Eligible applicants must also meet the requirements in section 303(c)(4) of the Rehabilitation Act. To receive a grant, an applicant must—

(a) Include in its application information demonstrating the capacity and expertise of the organization—

(i) To coordinate training and information activities with centers for independent living;

(ii) To coordinate and work closely with PTI centers established pursuant to section 671 of IDEA, the community parent resource centers established pursuant to section 672 of IDEA, and the eligible entities receiving awards under section 673 of IDEA; and

(iii) To effectively conduct the training and information activities authorized in section 303 of the Rehabilitation Act;

(b)(i) Be governed by a board of directors—

(A) That includes professionals in the VR field; and

(B) On which a majority of the members are individuals with disabilities or the parents, family members, guardians, advocates, or authorized representatives of the individuals; or

(ii)(A) Have a membership that represents the interests of individuals with disabilities; and

(B) Establish a special governing committee that includes professionals in the VR field and on which a majority of the members are individuals with disabilities or the parents, family members, guardians, advocates, or authorized representatives of the individuals to operate a training and information program under section 303(c)(4) of the Rehabilitation Act; and

(c) Serve, and demonstrate the capacity for serving, individuals with a full range of disabilities, and the parents, family members, guardians, advocates, or authorized representatives of the individuals.

2. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

IV. Application and Submission Information

1. *Application Submission Instructions:* Applicants are required to follow the Common Instructions for Applicants to Department of Education Discretionary Grant Programs, published in the **Federal Register** on February 13, 2019 (84 FR 3768) and available at *www.govinfo.gov/content/pkg/FR-2019-02-13/pdf/2019-02206.pdf,* which contain requirements and information on how to submit an application.

2. *Intergovernmental Review:* This competition is subject to Executive Order 12372 and the regulations in 34 CFR part 79. Information about Intergovernmental Review of Federal Programs under Executive Order 12372 is in the application package for this competition.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210 and are as follows:

(a) *Significance (15 points).*

(1) The Secretary considers the significance of the proposed project.

(2) In determining the significance of the proposed project, the Secretary considers the following factors:

(i) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses; and

(ii) The importance or magnitude of the results or outcomes likely to be attained by the proposed project.

(b) *Quality of project design (10 points).*

(1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which there is a conceptual framework underlying the proposed research or demonstration activities and the quality of that framework.

(c) *Quality of project services (25 points).*

(1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which the services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(ii) The extent to which the services to be provided by the proposed project are appropriate to the needs of the intended recipients or beneficiaries of those services.

(iii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(iv) The extent to which the technical assistance services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(d) *Quality of the project evaluation (15 points).*

(1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation are appropriate to the context within which the project operates.

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(iv) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(f) *Adequacy of resources and quality of project personnel (20 points).*

(1) The Secretary considers the adequacy of resources *and quality of project personnel* for the proposed project.

(2) In determining the adequacy of resources *and quality of project personnel* for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(iii) The extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(iv) The qualifications, including relevant training and experience, of key project personnel.

(v) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(vi) The relevance and demonstrated commitment of each partner in the proposed project to the implementation and success of the project.

(f) *Quality of the management plan (15 points).*

(1) The Secretary considers the quality of the management plan for the proposed project.

(2) In determining the quality of the management plan for the proposed project, the Secretary considers the following factors:

(i) The adequacy of the management plan to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, timelines, and milestones for accomplishing project tasks.

(ii) The extent to which the time commitments of the project director and principal investigator and other key project personnel are appropriate and adequate to meet the objectives of the proposed project.

(iii) The adequacy of mechanisms for ensuring high-quality products and services from the proposed project.

(iv) How the applicant will ensure that a diversity of perspectives are brought to bear in the operation of the proposed project, including those of parents, teachers, the business community, a variety of disciplinary and professional fields, recipients or beneficiaries of services, or others, as appropriate.

2. *Review and Selection Process:* We remind potential applicants that in reviewing applications in any discretionary grant competition, the Secretary may consider, under 34 CFR 75.217(d)(3), the past performance of the applicant in carrying out a previous award, such as the applicant's use of funds, achievement of project objectives, and compliance with grant conditions. The Secretary may also consider whether the applicant failed to submit a timely performance report or submitted a report of unacceptable quality.

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3. *Additional Review and Selection Process Factors:* In the past, the Department has had difficulty finding peer reviewers for certain competitions because so many individuals who are eligible to serve as peer reviewers have conflicts of interest. The standing panel requirements under section 682(b) of IDEA also have placed additional constraints on the availability of reviewers. Therefore, the Department has determined that, for some discretionary grant competitions, applications may be separated into two or more groups and ranked and selected for funding within specific groups. This procedure will make it easier for the Department to find peer reviewers by

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1. *Award Notices:* If your application is successful, we notify your U.S. Representative and U.S. Senators and send you a Grant Award Notification (GAN); or we may send you an email containing a link to access an electronic version of your GAN. We may notify you informally, also.

If your application is not evaluated or not selected for funding, we notify you.

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We reference the regulations outlining the terms and conditions of an award in the *Applicable Regulations* section of this notice and include these and other specific conditions in the GAN. The GAN also incorporates your approved application as part of your binding commitments under the grant.

3. *Open Licensing Requirements:* Unless an exception applies, if you are awarded a grant under this competition, you will be required to openly license to the public grant deliverables created in whole, or in part, with Department grant funds. When the deliverable consists of modifications to pre-existing works, the license extends only to those modifications that can be separately identified and only to the extent that open licensing is permitted under the terms of any licenses or other legal restrictions on the use of pre-existing works. Additionally, a grantee or subgrantee that is awarded competitive grant funds must have a plan to disseminate these public grant deliverables. This dissemination plan can be developed and submitted after your application has been reviewed and selected for funding. For additional information on the open licensing requirements please refer to 2 CFR 3474.20.

4. *Reporting:* (a) If you apply for a grant under this competition, you must ensure that you have in place the necessary processes and systems to comply with the reporting requirements in 2 CFR part 170 should you receive funding under the competition. This does not apply if you have an exception under 2 CFR 170.110(b).

(b) At the end of your project period, you must submit a final performance report, including financial information, as directed by the Secretary. If you receive a multiyear award, you must submit an annual performance report that provides the most current performance and financial expenditure information as directed by the Secretary under 34 CFR 75.118. The Secretary may also require more frequent performance reports under 34 CFR 75.720(c). For specific requirements on reporting, please go to *www.ed.gov/fund/grant/apply/appforms/appforms.html.*

(c) Under 34 CFR 75.250(b), the Secretary may provide a grantee with additional funding for data collection analysis and reporting. In this case the Secretary establishes a data collection period.

5. *Performance Measures:* The Government Performance and Results Act of 1993 (GPRA) directs Federal departments and agencies to improve the effectiveness of programs by engaging in strategic planning, setting outcome-related goals for programs, and measuring program results against those goals. The required annual report must include information on the following measure: The percentage of all products and services deemed to be useful by PTI centers to improve VR service utilization. The data on this measure will be collected by the grantee via survey, assessed, and reported in the aggregate to RSA. The grantee will negotiate targets with RSA after the first year, which will be used to establish a baseline.

6. *Continuation Awards:* In making a continuation award under 34 CFR 75.253, the Secretary considers, among other things: Whether a grantee has made substantial progress in achieving the goals and objectives of the project; whether the grantee has expended funds in a manner that is consistent with its approved application and budget; and, if the Secretary has established performance measurement requirements, the performance targets in the grantee's approved application.

In making a continuation award, the Secretary also considers whether the grantee is operating in compliance with the assurances in its approved application, including those applicable to Federal civil rights laws that prohibit discrimination in programs or activities receiving Federal financial assistance from the Department (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

VII. Other Information

Accessible Format: Individuals with disabilities can obtain this document and a copy of the application package in an accessible format (*e.g.,* braille, large print, audiotape, or compact disc) on request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* 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 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.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Mark Schultz,

Commissioner, Rehabilitation Services Administration. Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2020–08391 Filed 4–20–20; 8:45 am]

BILLING CODE 4000–01–P

FEDERAL COMMUNICATIONS COMMISSION

[DA 20–308; FRS 16674]

Consumer Advisory Committee

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This is a supplemental notice regarding the meeting of the Federal Communications Commission's (hereinafter ''FCC'' or ''Commission'') Consumer Advisory Committee (hereinafter the ''Committee'') scheduled for April 27, 2020. The Committee will hold this upcoming meeting remotely via live internet link on the Commission's website.

DATES: April 27, 2020, 10:30 a.m. to 12:30 p.m.

ADDRESSES: The Meeting will be held via conference call and will be available to the public at *http://www.fcc.gov/live.*

FOR FURTHER INFORMATION CONTACT: Scott Marshall, Designated Federal Officer of the Committee, (202) 418–2809 (voice or Relay), email: *scott.marshall@fcc.gov;* or Gregory V. Haledjian, Deputy Designated Federal Officer of the Committee, (202) 418–7440 (voice or Relay) email: *gregory.haledjian@fcc.gov.* U.S. Postal Service Mailing address: Federal Communications Commission, 445 12th Street SW, Washington, DC 20554.

SUPPLEMENTARY INFORMATION: The Commission announced the meeting in a Public Notice, DA–308, released on April 7, 2020. This Public Notice was published in the **Federal Register** on April 16, 2020.

Good cause for late notice: The announcement of the public meeting was published in the **Federal Register** less than 15 days before the meeting date of April 27, 2020. There is good cause for this late notice. Specifically, although the Commission issued the Public Notice on April 7, 2020, disruptions in connection with the COVID–19 pandemic delayed the Office of the Federal Register's receipt of the notice from the Commission as well as subsequent publication in the **Federal Register**.

Federal Communications Commission.

Gregory Haledjian,

Legal Advisor, Consumer and Governmental Affairs Bureau.

[FR Doc. 2020–08400 Filed 4–20–20; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meetings

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 85 FR 21232.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, April 21, 2020 at 10:00 a.m.

CHANGES IN THE MEETING: The meeting will be a Virtual Meeting.

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer. Telephone: (202) 694–1220.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2020–08565 Filed 4–17–20; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

TIME AND DATE: 11:00 a.m., Thursday, April 30, 2020.

PLACE: This meeting will be conducted through a video conference involving all Commissioners. Any person wishing to listen to the proceedings may call the phone number listed below.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *American Aggregates of Michigan, Inc.,* Docket No. LAKE 2018–340. (Issues include whether the Judge erred in denying the Secretary's motion to approve settlement.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Phone Number for Listening to Meeting: 1–(866) 236–7472; Passcode: 678–100.

Authority: 5 U.S.C. 552b.

Dated: April 17, 2020.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2020–08505 Filed 4–17–20; 11:15 am]

BILLING CODE 6735–01–P

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m., Thursday, April 30, 2020.

PLACE: This meeting will be conducted through a video conference involving all Commissioners. Any person wishing to listen to the proceedings may call the phone number listed below.

STATUS: Open.

MATTERS TO BE CONSIDERED: The Commission will consider and act upon the following in open session: *Secretary of Labor* v. *Hopedale Mining LLC,* Docket No. LAKE 2019–149. (Issues include whether the Judge erred in denying the Secretary's motion to approve settlement.)

Any person attending this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs. Subject to 29 CFR 2706.150(a)(3) and § 2706.160(d).

CONTACT PERSON FOR MORE INFORMATION: Emogene Johnson (202) 434–9935/(202) 708–9300 for TDD Relay/1–800–877–8339 for toll free.

Phone Number for Listening to Meeting: 1–(866) 236–7472; Passcode: 678–100.

Authority: 5 U.S.C. 552b.

Dated: April 17, 2020.

Sarah L. Stewart,

Deputy General Counsel.

[FR Doc. 2020–08504 Filed 4–17–20; 11:15 am]

BILLING CODE 6735–01–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 (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 applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The applications listed below, as well as other related filings required by the Board, if any, 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 paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than May 6, 2020.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Senior Vice President) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *Phillippe D. Katz, Esther Katz, Isaac S. Katz, Maxwell T. Katz, Kara Z. Newman and Charlotte Cohen, all of Lawrence, New York; Austin J. Katz of Clifton, New Jersey; Marga Marx, Joseph M. Fink, Eva Fink, Moshe Aaron Fink, Eric Dov Fink, Elliot Meir Fink, Hillary Fink Rosenberg and Kaethe Fink Feit, all of New York, New York; KF Investors LLC, and Momar Corporation, both of New York, New York, and both with Eva Fink and Ester Katz, as principal shareholders; Marneu Holding Company, New York, New York, the general partners of which are Moses Marx, Bronx, New York (who has previously received permission to control the bank holding company and bank listed below) and United Equity Reality Associates, New York, New York, (the principal shareholders of which are Moses Marx, Joseph M. Fink, and Phillip D. Katz); Terumah Foundation, Inc., New York, New York, Moses Marx, Marga Marx, Eva Fink, Joseph M. Fink, Esther Katz and Philippe D. Katz, as directors; and United Equities Commodities Company, New York, New York, Moses Marx, Joseph M. Fink, and Phillip D. Katz, as general partners;* as members of a group acting in concert with Moses Marx to retain voting shares of Berkshire Bancorp Inc. and thereby indirectly retain voting shares of The Berkshire Bank, both of New York, New York.

Board of Governors of the Federal Reserve System, April 16, 2020.

Yao-Chin Chao,

Assistant Secretary of the Board.

[FR Doc. 2020–08404 Filed 4–20–20; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Agency for Healthcare Research and Quality

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Agency for Healthcare Research and Quality, HHS.

ACTION: Notice.

SUMMARY: This notice announces the intention of the Agency for Healthcare Research and Quality (AHRQ) to request that the Office of Management and Budget (OMB) approve the proposed information collection project ''Evaluation of the SHARE Approach Model.''

This proposed information collection was previously published in the **Federal Register** on February 4, 2020, and allowed 60 days for public comment. AHRQ did not receive comments from members of the public. The purpose of this notice is to allow an additional 30 days for public comment.

DATES: Comments on this notice must be received by 30 days after date of publication of this notice.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Doris Lefkowitz, AHRQ Reports Clearance Officer, (301) 427–1477, or by email at *doris.lefkowitz@AHRQ.hhs.gov*

SUPPLEMENTARY INFORMATION:

Proposed Project

Evaluation of the SHARE Approach Model

Shared decision making (SDM) occurs when a health care provider and a patient work together to make a health care decision that is best for the patient. Implementing SDM involves effective communication between providers and patients to take into account evidence-based information about available options, the provider's knowledge and experience, and the patient's values and preferences in reaching the best health care decision for a patient. To facilitate SDM in all care delivery settings, AHRQ developed the five-step SHARE Approach, which includes exploring and comparing the benefits, harms, and risks of each option through meaningful dialogue about what matters most to the patient. Using the SHARE Approach also builds a trusting and lasting relationship between health care professionals and patients.

SDM is increasingly included in clinical care guidelines, and in some cases is even mandated. While there is considerable interest in improving SDM across broad health care settings, less is known about how to effectively implement SDM. There is evidence that SDM is often not conducted effectively in practice, and identifying ways to improve SDM has therefore become an imperative. Lack of clinician support and education have been identified as important barriers to SDM.

The SHARE Approach was released in 2015 by AHRQ as a clinician-facing toolkit that teaches clinicians skills to facilitate SDM across a broad range of clinical contexts. While several implementation success stories have been shared with AHRQ, to date there has been no formal evaluation of the effectiveness of the SHARE Approach materials for improving SDM in primary and specialty care settings for which it was designed. As a result, challenges that may be faced by practices who wish to implement the SHARE Approach are currently unknown. Without research to identify and address these issues, practices and organization may be unable to effectively implement the SHARE Approach and may be unwilling to do so absent evidence of its effectiveness at improving SDM outcomes.

The Evaluation of the SHARE Approach Model project aims to revise the SHARE Approach toolkit to remove outdated references and increase applicability for SDM in contexts involving problem solving, evaluate the implementation of the SHARE Approach model in eight primary care

and four cardiology clinics, and evaluate the effectiveness of the SHARE Approach model at improving SDM.

Method of Collection

The purpose of this clearance request is to collect the information needed to evaluate the implementation and effectiveness of the modified SHARE Approach materials. Specifically, the data collection activities requested in this clearance are:

1. Brief surveys of physicians, advanced practice providers, other clinicians, nurses and other staff in 12 clinics immediately following the SHARE Approach training in each clinic.

2. A brief survey of physicians, advanced practice providers, other clinicians, nurses and other staff in 12 clinics one month following the SHARE Approach training in each clinic.

3. A short card survey completed by patients in the 12 clinics immediately following a clinic visit with a physician or advanced practice provider.

4. A short card survey completed by physicians or advanced practice providers in the 12 clinics immediately following a clinic visit with a patient.

5. Audio recordings of patient-provider (physician or advanced practice provider) encounters in clinic examination rooms in the 12 clinics.

This study is being conducted by AHRQ through its contractor, the University of Colorado, pursuant to AHRQ's statutory authority to conduct and support research on health care and on systems for the delivery of such care, including activities with respect to clinical practice, including primary care and practice-oriented research. 42 U.S.C 299a(a)(4).

Estimated Annual Respondent Burden

Exhibit 1 shows the estimated burden hours for the respondents' time to participate in the research activities that will be conducted under this clearance. Data collection will occur between September 2020 and October 2021. Surveys of physicians, advanced practice providers, other clinicians, nurses and other staff in each of the 12 practices will be conducted at the time of SHARE training and again approximately 1 to 2 months following training. These will be conducted with no more than 100 physicians, advanced practice providers, other clinicians, nurses and other staff for each survey and will require no more than 10 minutes to complete.

Brief card surveys will be completed by both patients and clinicians. We estimate the maximum number of patients participating in the card survey as follows: A maximum of 100 clinicians will see a maximum of 20 patients per day, of which half (n = 10) will agree to complete the card survey, over 6 days of data collection, totaling N = 6,000 patient respondents (100 × 10 × 6). The patient card survey will take a maximum of 2 minutes per completed survey. Clinicians will complete a card survey for every patient they see during the 6 days of data collection, or a total of N = 12,000 card surveys (100 clinicians × 20 patients per day × 6 days). The clinician card survey will require a maximum of 1 minute per completed survey.

Audio recordings of up to 260 clinical encounters will be obtained with burden not to exceed 10 minutes to obtain patient informed consent.

EXHIBIT 1—ESTIMATED RESPONDENT BURDEN HOURS

Type of information collection	Number of respondents	Number of responses per respondent	Hours per response	Total burden hours
Card survey (patient)	6,000	1	2/60	200
Card survey (clinician)	100	120	1/60	200
Audio recorded encounters	260	1	10/60	44
Clinician survey *	100	2	10/60	34
Totals	6,460	na	na	478

* May include telephone non-response follow-up in which case the burden will not change.

Exhibit 2 shows the estimated cost burden of respondents for these data collection activities, based on the respondent's time to participate in these data collection activities. The total cost burden is estimated to be $29,831.

EXHIBIT 2—ESTIMATED COST BURDEN

Type of Information collection	Number of respondents	Total burden hours	Average hourly wage rate *	Total cost burden
Card survey (patient)	6,000	200	$24.98	$4,996
Card survey (clinician)	100	200	101.43	20,286
Audio recorded encounters	260	44	24.98	1,100
Clinician survey	100	34	101.43	3,449
Totals	6,460	478	na	29,831

* Based upon the average wages for 29–1060 Physicians and Surgeons (broad) and 00–0000 All Occupations, ''National Compensation Survey: Occupational Wages in the United States, May 2018,'' U.S. Department of Labor, Bureau of Labor Statistics *https://www.bls.gov/oes/current/oes_nat.htm#29-0000.*

Request for Comments

In accordance with the Paperwork Reduction Act, comments on AHRQ's information collection are requested with regard to any of the following: (a) Whether the proposed collection of information is necessary for the proper performance of AHRQ's health care research and health care information dissemination functions, including whether the information will have practical utility; (b) the accuracy of AHRQ's estimate of burden (including hours and costs) of the proposed

collection(s) of information; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information upon the respondents, including the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and included in the Agency's subsequent request for OMB approval of the proposed information collection. All comments will become a matter of public record.

Dated: April 15, 2020.

Virginia L. Mackay-Smith,

Associate Director.

[FR Doc. 2020–08364 Filed 4–20–20; 8:45 am]

BILLING CODE 4160–90–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of General Medical Sciences; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of NIGMS SCORE Applications.

Date: June 18, 2020.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3AN12, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sonia Ortiz-Miranda, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, (301) 402–9448, *sonia.ortiz-miranda@nih.gov*.

Name of Committee: National Institute of General Medical Sciences Special Emphasis Panel; Review of NIGMS COBRE Phase 1 Applications.

Date: June 18–19, 2020.

Time: 8:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Natcher Building, Room 3An12N, 45 Center Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ruth Grossman, Ph.D., Scientific Review Officer, Office of Scientific Review, National Institute of General Medical Sciences, National Institutes of Health, 45 Center Drive, Room 3AN18, Bethesda, MD 20892, (301) 435–2409, *grossmanrs@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.375, Minority Biomedical Research Support; 93.821, Cell Biology and Biophysics Research; 93.859, Pharmacology, Physiology, and Biological Chemistry Research; 93.862, Genetics and Developmental Biology Research; 93.88, Minority Access to Research Careers; 93.96, Special Minority Initiatives; 93.859, Biomedical Research and Research Training, National Institutes of Health, HHS)

Dated: April 15, 2020.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–08362 Filed 4–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Center for Complementary & Integrative Health; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Center for Complementary and Integrative Health Special Emphasis Panel; Center of Excellence for Research on Complementary and Integrative Health (P01) (CERCIH).

Date: May 21, 2020.

Time: 1:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Two Democracy Plaza, 6707 Democracy Boulevard, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jessica Marie McKlveen, Ph.D., Scientific Review Officer, Office of Scientific Review, Division of Extramural Activities, NCCIH, NIH, 6707 Democracy Boulevard, Suite 401, Bethesda, MD 20892–5475, *jessica.mcklveen@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.213, Research and Training in Complementary and Alternative Medicine, National Institutes of Health, HHS)

Dated: April 16, 2020.

Ronald J. Livingston, Jr.,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2020–08439 Filed 4–20–20; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2020–0003]

Notice of President's National Security Telecommunications Advisory Committee Meeting

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice of Federal Advisory Committee Act (FACA) meeting; request for comments.

SUMMARY: CISA is publishing this notice to announce the following President's National Security Telecommunications Advisory Committee (NSTAC) meeting. This meeting will be partially closed to the public.

DATES:

Meeting Registration: Registration to attend the meeting is required and must be received no later than 5:00 p.m. Eastern Time (ET) on May 6, 2020. For more information on how to participate, please contact *NSTAC@hq.dhs.gov.*

Speaker Registration: Registration to speak during the meeting's public comment period must be received no later than 5:00 p.m. ET on May 6, 2020.

Written Comments: Written comments must be received no later than 5:00 p.m. ET on May 6, 2020.

Meeting Date: The NSTAC will meet on May 13, 2020, from 12:00 p.m. to 2:30 p.m. ET. The meeting may close early if the committee has completed its business.

ADDRESSES: The meeting will be held via conference call. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance, please email *NSTAC@hq.dhs.gov* by 5:00 p.m. ET on May 6, 2020.

Comments: Members of the public are invited to provide comment on the issues that will be considered by the

committee as listed in the **SUPPLEMENTARY INFORMATION** section below. Associated materials that participants may discuss during the meeting will be available at *https://www.cisa.gov/national-security-telecommunications-advisory-committee* for review on April 28, 2020. Comments may be submitted by 5:00 p.m. ET on May 6, 2020 and must be identified by Docket Number CISA–2020–0003. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Please follow the instructions for submitting written comments.
- *Email: NSTAC@hq.dhs.gov.* Include the Docket Number CISA–2020–0003 in the subject line of the email.

Instructions: All submissions received must include the words ''Department of Homeland Security'' and the Docket Number for this action. Comments received will be posted without alteration to *www.regulations.gov,* including any personal information provided.

Docket: For access to the docket and comments received by the NSTAC, please go to *www.regulations.gov* and enter docket number CISA–2020–0003.

A public comment period will be held during the meeting from 1:50 p.m. to 2:00 p.m. ET. Speakers who wish to participate in the public comment period must register by emailing *NSTAC@hq.dhs.gov.* Speakers are requested to limit their comments to three minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, following the last request for comments.

FOR FURTHER INFORMATION CONTACT: Helen Jackson, (703) 705–6276, *helen.jackson@cisa.dhs.gov.*

SUPPLEMENTARY INFORMATION: The NSTAC was established by Executive Order (E.O.) 12382, 47 FR 40531 (September 13, 1982), as amended and continued under the authority of E.O. 13889, dated September 27, 2019. Notice of this meeting is given under FACA, 5 U.S.C. Appendix (Pub. L. 92–463). The NSTAC advises the President on matters related to national security and emergency preparedness (NS/EP) telecommunications and cybersecurity policy.

Agenda: The NSTAC will hold a conference call on Wednesday, May 13, 2020, to discuss current NSTAC activities pertinent to Government cybersecurity initiatives and NS/EP priorities with senior Government officials. During the meeting, NSTAC members will also: (1) Receive a status update from the NSTAC Software-Defined Networking Subcommittee; and (2) evaluate potential future NSTAC study topics.

Basis for Closure: In accordance with section 10(d) of FACA and *The Government in the Sunshine Act* (5 U.S.C. 552b(c)(9)(B)), it has been determined that certain agenda items require closure, as the disclosure of the information that will be discussed would not be in the public interest.

The committee will meet in a closed session from 12:00 p.m. to 1:20 p.m. Participants will engage in discussions on the: (1) Impact of pandemics on the information and communications technology (ICT) ecosystem and communications resiliency; and (2) Federal Government efforts concerning fifth generation (5G) technologies. For these items, Government officials will share data with NSTAC members on ongoing NS/EP, cybersecurity, and communications resiliency initiatives across the public and private sectors. The information discussed will include specific vulnerabilities that affect the United States' ICT/5G infrastructures and proposed mitigation strategies. The premature disclosure of this information to the public would be likely to significantly frustrate implementation of proposed agency action. Therefore, this portion of the meeting is required to be closed pursuant to section 10(d) of FACA and *The Government in the Sunshine Act* (5 U.S.C. 552b(c)(9)(B)).

Helen Jackson,

Designated Federal Officer, NSTAC.

[FR Doc. 2020–08427 Filed 4–20–20; 8:45 am]

BILLING CODE 9110–9P–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R8–NWRS–2020–N067]; [FXRS12610800000–190–FF08R00000]

Butte Sink, Willow Creek—Lurline, and North Central Valley Wildlife Management Areas, CA; Final Comprehensive Conservation Plan/ Environmental Assessment and Finding of No Significant Impact

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of a final comprehensive conservation Plan (CCP), environmental assessment (EA), and finding of no significant impact (FONSI) for the Butte Sink, Willow Creek-Lurline, and North Central Valley Wildlife Management Areas (WMAs) in California. The CCP/EA/FONSI, prepared under the National Wildlife Refuge System Improvement Act of 1997, and in accordance with the National Environmental Policy Act, describes how the Service will manage the three WMAs for the next 15 years. Compatibility determinations for six public uses are also included in the final CCP.

ADDRESSES: You will find the final CCP and the EA/FONSI on the WMAs website at *https://go.usa.gov/xPm3r.*

FOR FURTHER INFORMATION CONTACT: The Planning Team Leader, by email at *fw8plancomments@fws.gov.* Include ''WMAs Final CCP/EA'' in the subject line of the message.

SUPPLEMENTARY INFORMATION: We announce the availability of a final comprehensive conservation plan/environmental assessment and finding of no significant impact (CCP/EA/FONSI) for Butte Sink, Willow Creek-Lurline, and North Central Valley Wildlife Management Areas, which are located in Tehama, Butte, Glenn, Colusa, Yuba, Sacramento, Sutter, Placer, Yolo, Solano, Contra Costa, and San Joaquin Counties, California. The CCP/EA/FONSI, prepared under the National Wildlife Refuge System Improvement Act of 1997, and in accordance with the National Environmental Policy Act of 1969, describes how the Service will manage the three WMAs for the next 15 years. Compatibility determinations for public uses are also included in the final CCP.

Introduction

With this notice, we complete the CCP process for Butte Sink, Willow Creek—Lurline, and North Central Valley Wildlife Management Areas, which we began by publishing a notice of intent in the **Federal Register** on November 30, 2009 (74 FR 62584). For more about the initial process and the history of the Wildlife Management Area, see that notice. We released the draft CCP and EA to the public, announcing and requesting comments in a notice of availability on June 15, 2015 (80 FR 34166). The 85-day comment period ended on September 9, 2015. A summary of public comments and our responses are included in the final CCP.

Background

The National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), which amended the National Wildlife Refuge System Administration Act of 1966, requires the

Service to develop a CCP for each National Wildlife Refuge. The purpose of developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System (NWRS), consistent with sound principles of fish and wildlife management, conservation, legal mandates, and our policies. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation, and photography, environmental education, and interpretation. We will review and update the CCP at least every 15 years in accordance with the Improvement Act.

Each unit of the NWRS was established for specific purposes. We use these purposes as the foundation for developing and prioritizing the management goals and objectives for each refuge within the NWRS, and to determine how the public can use each refuge. The planning process is a way for us to evaluate management goals and objectives that will ensure the best possible approach to wildlife, plant, and habitat conservation, while providing for wildlife-dependent recreation opportunities that are compatible with each refuge's establishing purposes and the mission of the NWRS.

Additional Information

The final CCP may be found at *https://go.usa.gov/xPm3r.* The final CCP includes detailed information about the planning process, WMAs, issues, and management alternative selected. The website also includes an EA, prepared in accordance with the National Environmental Policy Act (NEPA) (43 U.S.C. 4321 *et seq.*). The EA includes discussion of three alternative management options. The Service's selected alternative is reflected in the final CCP, and also in the FONSI.

The selected alternative focuses on reducing the existing North Central Valley wetland easement acquisition objective by 19,000 acres, and adding an agricultural easement objective by the same amount. The CCP also describes limiting wetland easement acquisition to Butte, Colusa, Glenn, Placer, Sutter, Yolo, and Yuba Counties. All three alternatives included the acquisition of up to 3,321 additional acres of Service-owned lands from willing landowners in the North Central Valley WMA.

National Environmental Policy Act Compliance

We announce our decision and the availability of the FONSI for the Final CCP/EA for the Butte Sink, Willow Creek—Lurline, and North Central Valley Wildlife Management Areas, in accordance with the National Environmental Policy Act requirements (40 CFR 1506.6(b)). We completed a thorough analysis of impacts on the human environment, which we included in the draft EA that accompanied the Draft CCP. This notice is in addition to our announcement of the completion of the CCP process on the Refuge Complex website.

The final EA discusses the direct, indirect, and cumulative impacts of the alternatives on biological resources, cultural resources, water quality, and other environmental resources. Measures to minimize adverse environmental effects are identified and discussed in the final CCP/EA.

Priscilla Wheeler,

Acting Regional Director, Sacramento, California.

[FR Doc. 2020–08407 Filed 4–20–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–HQ–R–2020–N061; FXGO1664091HCC0–FF09D00000–190]

Hunting and Shooting Sports Conservation Council; Public Meeting by Teleconference

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of meeting.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce a public meeting via teleconference of the Hunting and Shooting Sports Conservation Council (Council), in accordance with the Federal Advisory Committee Act. The Council's purpose is to provide recommendations to the Federal Government, through the Secretary of the Interior and the Secretary of Agriculture, regarding policies and endeavors that benefit wildlife resources; encourage partnership among the public; sporting conservation organizations; and Federal, State, tribal, and territorial governments; and benefit recreational hunting and recreational shooting sports. The teleconference is open to the public.

DATES: *Teleconference:* Thursday, May 7, 2020, from 1:00 p.m. to 5:00 p.m. Eastern Daylight Saving Time.

Deadlines: For deadlines for registration, requests for accommodation, or comment submission, please see Public Input under **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Douglas Hobbs, Designated Federal Officer, by email at *doug_hobbs@fws.gov,* by telephone at 703–358–2336, via the Federal Relay Service at 800–877–8339, or by U.S. mail or hand-delivery at the U.S. Fish and Wildlife Service, MS:EA, 5275 Leesburg Pike, Falls Church, Virginia 22041.

SUPPLEMENTARY INFORMATION: The Council was established to further the provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701), the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd), other Acts applicable to specific bureaus, and Executive Order 13443 (August 16, 2007), ''Facilitation of Hunting Heritage and Wildlife Conservation.'' The Council's purpose is to provide recommendations to the Federal Government, through the Secretary of the Interior and the Secretary of Agriculture, regarding policies and endeavors that (a) benefit wildlife resources; (b) encourage partnership among the public; sporting conservation organizations; and Federal, State, tribal, and territorial governments; and (c) benefit recreational hunting and recreational shooting sports.

Meeting Agenda

- Council subcommittee reports.
- Review issues and recommendations from the 2018–2020 Council term.
- Discussion of issues for future Council consideration.
- Other miscellaneous Council business.
- Public comment period.

The final agenda and other related meeting information will be posted on the Council website at *https://www.fws.gov/hsscc.* The Designated Federal Officer will maintain detailed minutes of the meeting, which will be posted for public inspection within 90 days after the meeting at *https://www.fws.gov/hsscc.*

Public Input

If you wish to	You must contact the Council Designated Federal Officer (see **FOR FURTHER INFORMATION CONTACT**) no later than
Listen to the meeting via telephone (listen-only mode)	May 4, 2020.
Request special accommodations	May 4, 2020.
Submit written information before the meeting for the Council to consider during the teleconference	May 4, 2020.
Give an oral presentation during the teleconference	May 7, 2020.
Submit a copy of oral statement or expanded statement, or to submit statement because time constraints prevented presentation during the teleconference.	Up to 30 days after the teleconference date.

Submitting Written Information

Interested members of the public may submit relevant information for the Council to consider during the teleconference. Written statements must be received by the Council Designated Federal Officer no later than the date in Public Input so that the information may be made available to the Council for their consideration prior to the teleconference. Written statements must be supplied to the Council Designated Federal Officer via mail (for signed hard copies) or email (acceptable file formats are Adobe Acrobat PDF, MS Word, MS PowerPoint, or rich text file) (see **FOR FURTHER INFORMATION CONTACT**).

Giving an Oral Presentation

Depending on the number of people who want to comment and the time available, the amount of time for individual oral comments may be limited. Interested parties should contact the Council Designated Federal Officer, in writing (see **FOR FURTHER INFORMATION CONTACT**), for placement on the public speaker list for this teleconference. Registered speakers who wish to expand upon their oral statements, or those who had wished to speak but could not be accommodated on the agenda, may submit written statements to the Council Designated Federal Officer up to 30 days following the meeting. Requests to address the Council during the teleconference will be accommodated in the order the requests are received.

Accommodations

The Service is committed to providing access to this teleconference to all participants. Please direct all requests for accommodations to Douglas Hobbs (see **FOR FURTHER INFORMATION CONTACT**) by close of business on the date in Public Input. If you are hearing impaired or speech impaired, contact Douglas Hobbs via the Federal Relay Service at 800–877–8339.

Availability of Public Comments

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: Federal Advisory Committee Act (5 U.S.C. Appendix 2).

Barbara Wainman,

Assistant Director—External Affairs.

[FR Doc. 2020–08401 Filed 4–20–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0030070; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Tennessee Valley Authority, Knoxville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Tennessee Valley Authority (TVA) has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Federally-recognized Indian Tribes and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Federally-recognized Indian Tribes. Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the TVA. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Federally-recognized Indian Tribes stated in this notice may proceed.

DATES: Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the TVA at the address in this notice by May 21, 2020.

ADDRESSES: Dr. Thomas O. Maher, TVA, 400 West Summit Hill Drive, WT11C, Knoxville, TN 37902–1401, telephone (865) 632–7458, email *tomaher@tva.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control and possession of the Tennessee Valley Authority, Knoxville, TN. The human remains and associated funerary objects were removed from the Cox Site, 40AN19, in Anderson County, TN, by amateur archeologists digging at the site.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains and associated funerary objects was made by TVA's professional staff in consultation with representatives of the Absentee-Shawnee Tribe of Indians of Oklahoma; Alabama-Coushatta Tribe of Texas (previously listed as Alabama-Coushatta Tribes of Texas); Cherokee Nation; Coushatta Tribe of Louisiana;

Eastern Band of Cherokee Indians; Eastern Shawnee Tribe of Oklahoma; Kialegee Tribal Town; Shawnee Tribe; The Muscogee (Creek) Nation; Thlopthlocco Tribal Town; and the United Keetoowah Band of Cherokee Indians in Oklahoma (hereafter referred to as ''The Consulted Tribes'').

History and Description of the Remains

TVA has in its control and possession human remains representing, at minimum, four individuals. On December 18, 2018 a representative of the Office of Archaeology and Historic Preservation in Colorado contacted TVA on the behalf of the Arapahoe County Coroner. Human remains had been turned into the Coroner's Office. After examining the human remains the Coroner concluded that these were not modern human remains and contacted the Office of the State Archaeologist. Based on information found in a bag with some of the human remains, archeologists concluded these human remains likely were excavated from a site in the Tennessee Valley. These human remains were the result of amateur digging that took place at the Cox site, 40AN19, in 1961. Their context within the site and chronological placement is unknown.

The Cox mound site was first excavated by William S. Webb using labor provided by the Civil Works Administration in anticipation of the construction of the Norris Reservoir. Additional excavations by Charles McNutt and the University of Tennessee took place in 1960, in anticipation of the construction of the Melton Hill reservoir. In 1960 and 1961, members of the Knoxville chapter of the Tennessee Archaeological Society also dug at this site. Records from the 1961 excavations, which were carried out by amateurs, are incomplete. The funerary objects were not curated.

Excavations at 40AN19 revealed two dominate occupations: A Mississippian Dallas phase occupation (A.D. 1300–1550) and an earlier Woodland occupation. The associated funerary objects could have derived from the Dallas phase or the Woodland occupation. The lack of any contextual information on these human remains leads TVA to designate them as culturally unidentifiable.

The human remains represent one male, one female adult, one adolescent, and one infant. No known individuals were identified. The three associated funerary objects include one ground-stone object and two pieces of limestone-tempered pottery.

Determinations Made by the Tennessee Valley Authority

Officials of the Tennessee Valley Authority have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on their presence in prehistoric archeological contexts and osteological analysis.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of four individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the three objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and any present-day Indian Tribe.
- According to final judgments of the Indian Claims Commission or the Court of Federal Claims, the land from which the Native American human remains and associated funerary objects were removed is the aboriginal land of the Cherokee Nation; Eastern Band of Cherokee Indians; and the United Keetoowah Band of Cherokee Indians in Oklahoma.
- Pursuant to 43 CFR 10.11(c)(1)(ii), the disposal of the human remains and associated funerary objects may be to the Cherokee Nation; Eastern Band of Cherokee Indians; and the United Keetoowah Band of Cherokee Indians in Oklahoma.

Additional Requestors and Disposition

Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Thomas O. Maher, TVA, 400 West Summit Hill Drive, WT11C, Knoxville, TN 37902–1401, telephone (865) 632–7458, email *tomaher@tva.gov,* by May 21, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to the Cherokee Nation; Eastern Band of Cherokee Indians; and the United Keetoowah Band of Cherokee Indians in Oklahoma may proceed.

The Tennessee Valley Authority is responsible for notifying The Consulted Tribes that this notice has been published.

Dated: March 25, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–08367 Filed 4–20–20; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NAGPRA–NPS0030072; PPWOCRADN0–PCU00RP14.R50000]

Notice of Inventory Completion: Tennessee Valley Authority, Knoxville, TN

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The Tennessee Valley Authority (TVA) has completed an inventory of human remains and associated funerary objects in consultation with the appropriate Federally-recognized Indian Tribes, and has determined that there is no cultural affiliation between the human remains and associated funerary objects and any present-day Federally-recognized Indian Tribes. Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request to the TVA. If no additional requestors come forward, transfer of control of the human remains and associated funerary objects to the Federally-recognized Indian Tribe stated in this notice may proceed.

DATES: Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to the TVA at the address in this notice by May 21, 2020.

ADDRESSES: Dr. Thomas O. Maher, Tennessee Valley Authority, 400 West Summit Hill Drive, WT11C, Knoxville, TN 37902–1401, telephone (865) 632–7458, email *tomaher@tva.gov.*

SUPPLEMENTARY INFORMATION: Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects under the control of the Tennessee Valley Authority, Knoxville, TN, and stored at the McClung Museum of Natural History and Culture (MM) at the University of Tennessee, Knoxville, TN. The human remains and associated

funerary objects were excavated from 40BN25, the Ledbetter Landing archeological site in Benton County, TN.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003(d)(3) and 43 CFR 10.11(d). The determinations in this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations in this notice.

Consultation

A detailed assessment of the human remains and associated funerary objects was made by TVA professional staff in consultation with representatives of the Cherokee Nation; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; The Chickasaw Nation; The Muscogee (Creek) Nation; The Osage Nation (previously listed as Osage Tribe); The Seminole Nation of Oklahoma; Thlopthlocco Tribal Town; and the United Keetoowah Band of Cherokee Indians in Oklahoma (hereafter referred to as ''The Consulted Tribes'').

History and Description of the Remains

Site 40BN25 was excavated as part of TVA's Kentucky reservoir project by the University of Tennessee, using labor and funds provided by the Works Progress Administration. Details regarding these excavations have not been published. A field report by George Lindberg regarding this site can be found at the MM and TVA. The human remains and associated funerary objects listed in this notice have been in the physical custody of the University of Tennessee since excavation, but are under the control of the TVA.

From October-to-December 1940, human remains representing, at minimum, 128 individuals were removed from site 40BN25, in Benton County, TN. These human remains represent 39 females, 28 male and 61 individuals of undeterminable sex. They also represent adults, sub-adults, and infants. No known individuals were identified. The 1,478 associated funerary objects include 79 animal bones, nine antler tine fragments, three antler tools, one bannerstone, 14 bone awls, 19 bone awl fragments, five bone pin fragments, three chert drills, one chert graver, one conch shell pendant, two copper beads, one cut and polished mountain lion femur, seven pieces of debitage, one modified human femur, one metal fragment, one pebble in red ochre, one perforated copper object, one perforated pebble, one perforated shell discoidal, one perforated shell with copper, 23 projectile points, one sample of red ochre, three pieces of sediment, 1,281 shell beads, five sherds, one whetstone, one worked antler, and 11 worked bone or bone fragments.

Excavation on 40BN25 commenced after TVA had acquired the land encompassing this site on July 11, 1940. Excavations identified two strata. Stratum I was 60 centimeters thick and contained ceramics attributed to the Early Woodland period. Stratum II was 75 centimeters thick and represented a Late Archaic occupation. Stratum II was the least disturbed by plowing, construction of warehouses, and looting. No post mold patterns indicative of structures were identified. In his 2014 dissertation, Thaddeus Bissett presented three radiocarbon dates from this site. He generated a calibrated date of 2636 ±89 Before the Present (BP) from carbonized material from Stratum I. From Stratum II, he got two calibrated dates, 4489 ±88 BP and 4314 ±79 BP. Based on these radiocarbon dates and the stratigraphic distribution of projectile points, Bissett verifies that Stratum II was Late Archaic and Stratum I was an Early Woodland occupation.

Determinations Made by the Tennessee Valley Authority

Officials of the Tennessee Valley Authority have determined that:

- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice are Native American based on their presence in prehistoric archeological sites and osteological analysis.
- Pursuant to 25 U.S.C. 3001(9), the human remains described in this notice represent the physical remains of 128 individuals of Native American ancestry.
- Pursuant to 25 U.S.C. 3001(3)(A), the 1,478 objects described in this notice are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony.
- Pursuant to 25 U.S.C. 3001(2), a relationship of shared group identity cannot be reasonably traced between the Native American human remains and associated funerary objects and any present-day Indian Tribe.
- The Treaty of October 19, 1818, indicates that the land from which the cultural items were removed is the aboriginal land of The Chickasaw Nation.
- Pursuant to 43 CFR 10.11(c)(1)(ii), the disposition of the human remains and associated funerary objects may be to The Chickasaw Nation.

Additional Requestors and Disposition

Representatives of any Federally-recognized Indian Tribe not identified in this notice that wish to request transfer of control of these human remains and associated funerary objects should submit a written request with information in support of the request to Dr. Thomas O. Maher, Tennessee Valley Authority, 400 West Summit Hill Drive, WT11C, Knoxville, TN 37902–1401, telephone (865) 632–7458, email *tomaher@tva.gov,* by May 21, 2020. After that date, if no additional requestors have come forward, transfer of control of the human remains and associated funerary objects to The Chickasaw Nation may proceed.

The Tennessee Valley Authority is responsible for notifying The Consulted Tribes that this notice has been published.

Dated: March 25, 2020.

Melanie O'Brien,

Manager, National NAGPRA Program.

[FR Doc. 2020–08366 Filed 4–20–20; 8:45 am]

BILLING CODE 4312–52–P

INTERNATIONAL TRADE COMMISSION

Section 337 Investigations; Notice of Commission Determination To Extend Postponement of all In-Person Section 337 Hearings Until June 10, 2020

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to extend postponement of all in-person hearings under section 337 of the Tariff Act of 1930, as amended, until June 10, 2020.

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. 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 section 337 investigations 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: In light of the ongoing Coronavirus (COVID–19) outbreak, the Commission has determined to extend postponement of all section 337 in-person hearings until June 10, 2020. Commission Administrative Law Judges (''ALJ'') are directed to notify all affected parties and to schedule new dates for the hearings as appropriate. ALJs may otherwise conduct their investigations in accordance with their established procedures.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: April 15, 2020.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2020–08388 Filed 4–20–20; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–596]

Bulk Manufacturer of Controlled Substances Application: Cedarburg Pharmaceuticals

ACTION: Notice of application.

DATES: Registered bulk manufacturers of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before June 22, 2020.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.33(a), this is notice that on September 3, 2018, Cedarburg Pharmaceuticals, 870 Badger Circle, Grafton, Wisconsin 53024–0000 applied to be registered as a bulk manufacturer of the following basic class(es) of controlled substances:

Controlled substance	Drug code	Schedule
Tetrahydrocannabinols	7370	I
Methylphenidate	1724	II
Nabilone	7379	II
4-Anilino-N-phenethyl-4-piperidine (ANPP).	8333	II
Fentanyl	9801	II

The company plans to manufacture bulk active pharmaceutical ingredients (API) for distribution to its customers. In reference to drug code 7370 (Tetrahydrocannabinols) the company plans to bulk manufacture as synthetic. No other activity for this drug code is authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–08352 Filed 4–20–20; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No. DEA–606]

Importer of Controlled Substances Application: Sigma Aldrich Co., LLC

ACTION: Notice of application.

DATES: Registered bulk manufacturer of the affected basic class(es), and applicants therefore, may file written comments on or objections to the issuance of the proposed registration on or before May 21, 2020. Such persons may also file a written request for a hearing on the application on or before May 21, 2020.

ADDRESSES: Written comments should be sent to: Drug Enforcement Administration, Attention: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing must be sent to: Drug Enforcement Administration, Attn: Administrator, 8701 Morrissette Drive, Springfield, Virginia 22152. All requests for a hearing should also be sent to: (1) Drug Enforcement Administration, Attn: Hearing Clerk/OALJ, 8701 Morrissette Drive, Springfield, Virginia 22152; and (2) Drug Enforcement Administration, Attn: DEA Federal Register Representative/DPW, 8701 Morrissette Drive, Springfield, Virginia 22152.

SUPPLEMENTARY INFORMATION: In accordance with 21 CFR 1301.34(a), this is notice that on January 27, 2020, Sigma Aldrich Co., LLC, 3500 DeKalb Street, Saint Louis, Missouri 63118 applied to be registered as an importer of the following basic class(es) of controlled substances:

Controlled substance	Drug code	Schedule
Cathinone	1235	I
Methcathinone	1237	I
Mephedrone (4-Methyl-N-methylcathinone)	1248	I
Gamma Hydroxybutyric Acid	2010	I
Tetrahydrocannabinols	7370	I
4-Bromo-2,5-dimethoxyamphetamine	7391	I
4-Bromo-2,5-dimethoxyphenethylamine	7392	I
2,5-Dimethoxyamphetamine	7396	I
3,4-Methylenedioxyamphetamine	7400	I
3,4-Methylenedioxy-N-ethylamphetamine	7404	I
3,4-Methylenedioxymethamphetamine	7405	I
4-Methoxyamphetamine	7411	I
Dimethyltryptamine	7435	I
N-Benzylpiperazine	7493	I
Heroin	9200	I
Normorphine	9313	I
Amobarbital	2125	II
Secobarbital	2315	II
Nabilone	7379	II
Phencyclidine	7471	II
Ecgonine	9180	II
Ethylmorphine	9190	II

Controlled substance	Drug code	Schedule
Levorphanol	9220	II
Meperidine	9230	II
Thebaine	9333	II
Opium, powdered	9639	II
Levo-alphacetylmethadol	9648	II

The company plans to import the listed controlled substances for sale to research facilities for drug testing and analysis. In reference to drug code 7370 (Tetrahydrocannabinols) the company plans to import synthetic tetrahydrocannabinols. No other activities for these drug codes are authorized for this registration.

William T. McDermott,

Assistant Administrator.

[FR Doc. 2020–08354 Filed 4–20–20; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–2020–036]

Freedom of Information Act (FOIA) Advisory Committee; Meeting

AGENCY: Office of Government Information Services (OGIS), National Archives and Records Administration (NARA).

ACTION: Notice of Federal Advisory Committee meeting.

SUMMARY: We are announcing an upcoming Freedom of Information Act (FOIA) Advisory Committee meeting in accordance with the Federal Advisory Committee Act and the second United States Open Government National Action Plan.

DATES: The meeting will be on May 1, 2020, from 10:00 a.m. to 1:30 p.m. EST. You must register by midnight EST April 28, 2020, to attend the meeting.

Location: This meeting will be held virtually. Instructions on how to access will be sent to those who register according to instructions below.

FOR FURTHER INFORMATION CONTACT: Kirsten Mitchell, Designated Federal Officer for this committee, by email at *foia-advisory-committee@nara.gov* or by telephone at 202.741.5770.

SUPPLEMENTARY INFORMATION:

Agenda and meeting materials: This is the eighth meeting of the third committee term. The Committee will discuss the report of the committee and consider additional recommendations from the Committee's three subcommittees, focusing on FOIA vision, time/volume, and records management. We will post meeting materials online at *https://www.archives.gov/ogis/foia-advisory-committee/2018-2020-term/meetings.*

Procedures: This virtual meeting is open to the public. You must register through Eventbrite in advance if you wish to attend, and you must provide an email address so that we can provide information to you on accessing the meeting online. Because of scheduling complications related to the COVID–19 situation and notice processing time, we have not been able to provide the full 15-day notice before this advisory committee meeting. We apologize for the inconvenience. To request additional accommodations (*e.g.,* a transcript), email *foia-advisory-committee@nara.gov* or call 202.741.5775. Members of the media who wish to register, those who are unable to register online, and those who require special accommodations, should contact Kirsten Mitchell (contact information listed above).

Maureen MacDonald,

Designated Committee Management Officer.

[FR Doc. 2020–08357 Filed 4–20–20; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–20–0010; NARA–2020–035]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on regulations.gov for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive comments by June 5, 2020.

ADDRESSES: You may submit comments by either of the following methods. You must cite the control number, which appears on the records schedule in parentheses after the name of the agency that submitted the schedule.

- *Federal eRulemaking Portal: http://www.regulations.gov.*
- *Mail:* Records Appraisal and Agency Assistance (ACR); National Archives and Records Administration; 8601 Adelphi Road; College Park, MD 20740–6001.

FOR FURTHER INFORMATION CONTACT: Kimberly Keravuori, Regulatory and External Policy Program Manager, by email at *regulation_comments@nara.gov.* For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov,* by mail at the address above, or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule. We have uploaded the records schedules and accompanying appraisal memoranda to the regulations.gov docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third

party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the regulations.gov portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we have made to the proposed records schedule. We will then send the schedule for final approval by the Archivist of the United States. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Homeland Security, Agency-wide, Performance and Strategic Planning Files (DAA–0563–2019–0002).
2. Department of Homeland Security, U.S. Citizenship and Immigration Services, USCIS Mission-Related Employee Training Records (DAA–0566–2019–0022).
3. Department of the Interior, U.S. Geological Survey, Select Agent Records (DAA–0057–2019–0001).
4. Department of Transportation, Federal Aviation Administration, Low Altitude Authorization and Notification Capability (LAANC) Records (DAA–0237–2019–0011).
5. Farm Credit Administration, Office of Inspector General, Records of the Office of Inspector General (DAA–0103–2018–0001).
6. Securities and Exchange Commission, Division of Trading and Markets, Research, Analysis, and Monitoring Records (DAA–0266–2018–0006).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2020–08387 Filed 4–20–20; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings; National Science Board

The National Science Board's Vision 2030 Task Force, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business, as follows:

TIME AND DATE: Thursday, April 23, 2020, at 4:00–5:00 p.m. EDT.

PLACE: This meeting will be held by teleconference. An audio link will be available for the public upon request at *nationalsciencebrd@nsf.gov.* Email requests must be made one day in advance.

STATUS: Open.

MATTERS TO BE CONSIDERED: Committee chair's remarks; prepare for the discussion of at the May meeting of the Vision 2030 implementation plan.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Chris Blair, *cblair@nsf.gov,* 703–292–7000. To listen to this teleconference, members of the public must send an email to *nationalsciencebrd@nsf.gov* at least 24 hours prior to the teleconference. The National Science Board Office will send requesters a link to the audio. Meeting information and updates may be found at *http://www.nsf.gov/nsb/notices.jsp#sunshine.* Please refer to the National Science Board website at *www.nsf.gov/nsb* for general information.

Chris Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2020–08543 Filed 4–17–20; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings; National Science Board

The National Science Board's Committee on External Engagement, pursuant to NSF regulations (45 CFR part 614), the National Science Foundation Act, as amended (42 U.S.C. 1862n–5), and the Government in the Sunshine Act (5 U.S.C. 552b), hereby gives notice of the scheduling of a teleconference for the transaction of National Science Board business, as follows:

TIME AND DATE: Thursday, April 30, 2020, at 1:00–2:00 p.m. EDT.

PLACE: This meeting will be held by teleconference. An audio link will be available for the public upon request at *nationalsciencebrd@nsf.gov.* Email requests must be made one day in advance.

STATUS: Open.

MATTERS TO BE CONSIDERED: Committee chair's remarks; prepare the committee's agenda for the May NSB meetings, with particular focus on engagement ideas/plans for NSB's Vision report.

CONTACT PERSON FOR MORE INFORMATION: Point of contact for this meeting is: Chris Blair, *cblair@nsf.gov,* 703–292–7000. To listen to this teleconference, members of the public must send an email to *nationalsciencebrd@nsf.gov* at least 24 hours prior to the teleconference. The National Science Board Office will send requesters a link to the audio. Meeting information and

updates may be found at *http://www.nsf.gov/nsb/notices.jsp#sunshine.* Please refer to the National Science Board website at *www.nsf.gov/nsb* for general information.

Chris Blair,

Executive Assistant to the National Science Board Office.

[FR Doc. 2020–08547 Filed 4–17–20; 4:15 pm]

BILLING CODE 7555–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Education and Human Resources; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation announces the following meeting:

Name and Committee Code: Advisory Committee for Education and Human Resources (#1119).

Date and Time: May 21, 2020; 1:00 p.m.–3:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314 (Virtual).

To attend the meeting, all visitors must contact the Directorate for Education and Human Resources at least 48 hours prior to the meeting. The meeting is virtual. The final meeting agenda with instructions to register for the meeting will be posted to: *https://www.nsf.gov/ehr/advisory.jsp.*

Type of Meeting: Open.

Contact Person: Keaven M. Stevenson, National Science Foundation, 2415 Eisenhower Avenue, Room C11001, Alexandria, VA 22314; (703) 292–8600/*kstevens@nsf.gov.*

Summary of Minutes: Minutes and meeting materials will be available on the EHR Advisory Committee website at *http://www.nsf.gov/ehr/advisory.jsp* or can be obtained from Dr. Nafeesa Owens, National Science Foundation, 2415 Eisenhower Ave., Room C11000, Alexandria, VA 22314; (703) 292–8600/*ehr_ac@nsf.gov.*

Purpose of Meeting: To provide advice with respect to the Foundation's science, technology, engineering, and mathematics (STEM) education and human resources programming.

Agenda: Attached.

Dated: April 16, 2020.

Crystal Robinson,

Committee Management Officer.

Meeting of the Directorate for Education & Human Resources (EHR) Advisory Committee

Thursday, May 21, 2020; Location: Virtual

Members from the public must please register at least 48 hours in advance with Dr. Nafeesa Owens at *ehr_ac@nsf.gov.* Please provide name, title, and organization. A Zoom link will be provided.

Agenda (1:00 p.m.–3:00 p.m.)

1:00 p.m.–1:15 p.m.—Welcoming Remarks From the EHR AC Chair & the EHR Assistant Director
- Marilyn Strutchens, Chair, EHR Advisory Committee and Emily R. & Gerald S. Leischuck Endowed Professor, Mildred Cheshire Fraley Distinguished Professor, Department of Curriculum and Teaching, Auburn University
- Karen Marrongelle, Assistant Director, EHR

1:15 a.m.–1:40 p.m.—*Session 1:* NSF Response to COVID–19
- *Moderator:* Karen Marrongelle, Assistant Director, EHR
- Discussion, Questions, and Comments

1:40 p.m.–2:05 p.m.—*Session 2:* Committee of Visitors (COV)
- *Moderator:* Corby Hovis, EHR COV Coordinator and Program Director
- COV for the Division of Research on Learning in Formal and Informal Settings (DRL)
- *Introduction:* Evan Heit, Division Director, DRL, EHR
- *Report:* Okhee Lee, Professor, Steinhardt School of Culture, Education, and Human Development, New York University; and AC Subcommittee Chair and Darryl Williams, Senior Vice President of Science and Education, The Franklin Institute
- Discussion and Approval

2:05 p.m.–2:45 p.m.—*Session 3:* EHR AC Subcommittee: STEM Education of the Future
- *Moderator:* Robin Wright, Division Director, Division of Undergraduate Education, EHR
- *Report:* Margaret Honey, President and CEO, New York Hall of Science, and AC Subcommittee Chair
- Discussion and Approval

2:45 p.m.–3:00 p.m.—Closing Remarks
- Karen Marrongelle, Assistant Director, EHR
- Marilyn Strutchens, Chair, EHR Advisory Committee

[FR Doc. 2020–08428 Filed 4–20–20; 8:45 am]

BILLING CODE 7555–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meetings

TIME AND DATE: 9:30 a.m., Tuesday, April 28, 2020.

PLACE: Virtual.

STATUS: The one item may be viewed by the public through webcast only.

MATTERS TO BE CONSIDERED:

64907 Marine Accident Report—Sinking of Amphibious Passenger Vessel *Stretch Duck 7,* Table Rock Lake, near Branson, Missouri, July 19, 2018.

CONTACT PERSON FOR MORE INFORMATION: Candi Bing at (202) 590–8384 or by email at *bingc@ntsb.gov.*

Media Information Contact: Keith Holloway by email at *keith.holloway@ntsb.gov* or at (202) 314–6100.

This meeting will take place virtually. The public may view it through a live or archived webcast by accessing a link under ''Webcast of Events'' on the NTSB home page at *www.ntsb.gov.*

There may be changes to this event due to the evolving situation concerning the novel coronavirus (COVID–19). Schedule updates, including weather-related cancellations, are also available at *www.ntsb.gov.*

The National Transportation Safety Board is holding this meeting under the Government in the Sunshine Act, 5 U.S.C. 552(b).

Dated: April 17, 2020.

LaSean R. McCray,

Assistant Federal Register Liaison Officer.

[FR Doc. 2020–08523 Filed 4–17–20; 11:15 am]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. EA–20–044; NRC–2020–0095]

Order Suspending General License Authority To Export Byproduct Material to Pakistan

AGENCY: Nuclear Regulatory Commission.

ACTION: Order; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an Order suspending the general license authority under NRC regulations for exports of byproduct material to Pakistan. Exporters are no longer authorized to use the general license to export

byproduct material to Pakistan and now must apply for a specific license pursuant to NRC regulations.

DATES: This Order takes effect immediately.

FOR FURTHER INFORMATION CONTACT: Lauren Mayros, Office of International Programs, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone: 301–287–9088, email: *Lauren.Mayros@nrc.gov.*

ADDRESSES: Please refer to Docket ID NRC–2020–0095 when contacting the NRC about the availability of information regarding this document. You may obtain publicly-available information related to this document using any of the following methods:

- *Federal Rulemaking website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0095. Address questions about NRC dockets IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, 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.*

SUPPLEMENTARY INFORMATION: The text of the Order is attached.

Dated: April 16, 2020.

For the Nuclear Regulatory Commission.

Nader L. Mamish,

Director,Office of International Programs.

Attachment—Order Suspending General License Authority To Export Byproduct Material to Pakistan

In the matter of General License Holders

EA–20–044

Order Suspending General License Authority To Export Byproduct Material to Pakistan (Effective Immediately)

The licensees that are subject to this order are authorized by the NRC through the general license granted in section 110.23 of title 10 of the *Code of Federal Regulations* (CFR), pursuant to Section 82 of the Atomic Energy Act of 1954, as amended (AEA), to export byproduct material to Pakistan.

The Executive Branch has determined that suspending byproduct material exports to Pakistan under this 10 CFR part 110 general license is necessary to enhance the common defense and security of the United States and is consistent with the provisions of the Atomic Energy Act, as amended. For this reason, the Executive Branch has recommended that the NRC suspend the general license authority in 10 CFR 110.23 for any exports of byproduct material to Pakistan.

Accordingly, pursuant to Sections 161b., 161i., 183, and 186 of the AEA, and 10 CFR 110.20(b) and (f) and 10 CFR 110.50(a)(1) and (2), NRC general license authority for exports of byproduct material to Pakistan under Section 82 of the AEA and 10 CFR 110.23 is suspended, effective immediately. This suspension will remain in effect until further notice. Any person wishing to export byproduct material to Pakistan must apply for a specific license in accordance with 10 CFR 110.31.

Dated: April 16, 2020.

For the Nuclear Regulatory Commission.

Nader L. Mamish,

Director, Office of International Programs.

[FR Doc. 2020–08412 Filed 4–20–20; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2020–0094]

Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations

AGENCY: Nuclear Regulatory Commission.

ACTION: Biweekly notice.

SUMMARY: Pursuant to section 189.a.(2) of the Atomic Energy Act of 1954, as amended (the Act), the U.S. Nuclear Regulatory Commission (NRC) is publishing this regular biweekly notice. The Act requires the Commission to publish notice of any amendments issued, or proposed to be issued, and grants the Commission the authority to issue and make immediately effective any amendment to an operating license or combined license, as applicable, upon a determination by the Commission that such amendment involves no significant hazards consideration (NSHC), notwithstanding the pendency before the Commission of a request for a hearing from any person. This biweekly notice includes all amendments issued, or proposed to be issued, from March 24, 2020, to April 6, 2020. The last biweekly notice was published on April 7, 2020.

DATES: Comments must be filed by May 21, 2020. A request for a hearing or petitions for leave to intervene must be filed by June 22, 2020.

ADDRESSES: You may submit comments by any of the following methods:

- *Federal Rulemaking Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0094. Address questions about NRC Docket IDs in *Regulations.gov* to Jennifer Borges; telephone: 301–287–9127; email: *Jennifer.Borges@nrc.gov.* For technical questions, contact the individual(s) listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *Mail comments to:* Office of Administration, Mail Stop: TWFN–7–A60M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Program Management, Announcements and Editing Staff.

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: Kay Goldstein, Office of Nuclear Reactor Regulation, telephone: 301–415–1506, email: *Kay.Goldstein@nrc.gov,* U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

I. Obtaining Information and Submitting Comments

A. Obtaining Information

Please refer to Docket ID NRC–2020–0094, facility name, unit number(s), docket number(s), application date, and subject 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 Website:* Go to *https://www.regulations.gov* and search for Docket ID NRC–2020–0094.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly-available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, 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.* The ADAMS accession number

for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.

B. Submitting Comments

Please include Docket ID NRC–2020–0094, facility name, unit number(s), docket number(s), application date, and subject 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 will post all comment submissions at *https://www.regulations.gov* as well as enter 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 into ADAMS.

II. Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses and Proposed No Significant Hazards Consideration Determination

For the facility-specific amendment requests shown below, the Commission finds that the licensee's analyses provided, consistent with title 10 of the *Code of Federal Regulations* (10 CFR) section 50.91, are sufficient to support the proposed determination that these amendment requests involve no significant hazards consideration (NSHC). Under the Commission's regulations in 10 CFR 50.92, operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of 60 days after the date of publication of this notice. The Commission may issue the license amendment before expiration of the 60-day period provided that its final determination is that the amendment involves NSHC. In addition, the Commission may issue the amendment prior to the expiration of the 30-day comment period if circumstances change during the 30-day comment period such that failure to act in a timely way would result, for example in derating or shutdown of the facility. If the Commission takes action prior to the expiration of either the comment period or the notice period, it will publish in the **Federal Register** a notice of issuance. If the Commission makes a final NSHC determination, any hearing will take place after issuance. The Commission expects that the need to take action on an amendment before 60 days have elapsed will occur very infrequently.

A. Opportunity To Request a Hearing and Petition for Leave To Intervene

Within 60 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 website at *https://www.nrc.gov/reading-rm/doc-collections/cfr/.* 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 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 60 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 Submissions (E-Filing)'' section of this document.

If a hearing is requested, and the Commission has not made a final determination on the issue of no significant hazards consideration, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to establish when the hearing is held. If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing would take place after issuance of the amendment. If the final determination is that the amendment request involves a

significant hazards consideration, then any hearing held would take place before the issuance of the amendment unless the Commission finds an imminent danger to the health or safety of the public, in which case it will issue an appropriate order or rule under 10 CFR part 2.

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 60 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.

B. 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 website at *https://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,* 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 website at *https://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 website at *https://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 website at *https://www.nrc.gov/site-help/e-submittals.html,* by email to *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 table below provides the plant name, docket number, date of application, ADAMS accession number, and location in the application of the licensee's proposed NSHC determination. For further details with respect to these license amendment applications, see the application for amendment which is available for public inspection in ADAMS. For additional direction on accessing information related to this document, see the ''Obtaining Information and Submitting Comments'' section of this document.

Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit No. 2; Waterford, CT	
Application Date	March 3, 2020.
ADAMS Accession No	ML20065K976.
Location in Application of NSHC	Pages 9 and 10 of Attachment 1.
Brief Description of Amendments	The proposed amendment would revise Action 3 in Technical Specification Table 3.3–11, ''Accident Monitoring Instrumentation,'' to address unnecessary restrictions for monitoring valve position when any of the three valve position monitoring indications (i.e., Instruments 4, 5, and 6) become inoperable. The table would be revised, in part, to add an alternate method for determining if there is loss of coolant through a power-operated relief valve or pressurizer safety valve flow path, in the event that any of the instruments identified in the current action statement are not available.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Lillian M. Cuoco, Esq., Senior Counsel, Dominion Energy, Inc., 120 Tredegar Street, RS–2, Richmond, VA 23219.
Docket Nos	50–336.
NRC Project Manager, Telephone Number	Richard Guzman, 301–415–1030.

Duke Energy Progress, LLC; Brunswick Steam Electric Plant, Units 1 and 2; Brunswick County, NC	
Application Date	March 9, 2020.
ADAMS Accession No	ML20070H939.
Location in Application of NSHC	Pages 2 and 3 of Enclosure 1.
Brief Description of Amendments	The proposed amendments would adopt Technical Specifications Task Force Traveler, TSTF–564, Revision 2, ''Safety Limit MCPR [Minimum Critical Power Ratio],'' which is an NRC-approved change to the Improved Standard Technical Specifications. The amendments would revise the technical specifications safety limit on minimum critical power ratio to reduce the need for cycle-specific changes to the value, while still meeting the regulatory requirement for a safety limit.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Kathryn B. Nolan, Deputy General Counsel, Duke Energy Corporation, 550 South Tryon Street (DEC45A), Charlotte, NC 28202.
Docket Nos	50–325, 50–324.
NRC Project Manager, Telephone Number	Andrew Hon, 301–415–8480.

Exelon Generation Company, LLC; Calvert Cliffs Nuclear Power Plant, Units 1 and 2; Calvert County, MD	
Application Date	November 21, 2019.
ADAMS Accession No	ML19325C128.
Location in Application of NSHC	Attachment 1, Pages 5 and 6.
Brief Description of Amendments	The proposed amendments would revise the reactor coolant pump flywheel inspection program. Specifically, the proposed amendments would extend the reactor coolant pump motor flywheel examinations to an interval not to exceed 20 years. The license amendment request relies on PWROG–17011–NP[–A], Revision 2, ''Update for Subsequent License Renewal: WCAP–14535A, 'Topical Report on Reactor Coolant Pump Flywheel Inspection Elimination,' and WCAP–15666–A, 'Extension of Reactor Coolant Pump Motor Flywheel Examination.'"
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–317, 50–318.
NRC Project Manager, Telephone Number	Michael L. Marshall, Jr., 301–415–2871.

Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA	
Application Date	February 5, 2020.
ADAMS Accession No	ML20036E488.
Location in Application of NSHC	Pages 11–13 of Attachment 1.

Brief Description of Amendments	The proposed changes would modify the technical specification (TS) surveillance requirements for testing of the safety relief valves to retain the frequency and certain testing requirements only in the inservice testing program. The changes would remove duplication of requirements contained in both the Limerick TSs and the inservice testing program and relocate to the TS Bases other requirements not required to be contained in the TSs. The TS Bases is a licensee-controlled document.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–352, 50–353.
NRC Project Manager, Telephone Number	V. Sreenivas, 301–415–2597.

Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA

Application Date	March 18, 2020.
ADAMS Accession No	ML20078G307.
Location in Application of NSHC	Pages 5–7 of Attachment 1.
Brief Description of Amendments	The proposed amendments would revise Limiting Condition for Operation 3.10.8 to include provisions for temperature excursions greater than 212 °F as a consequence of inservice leak and hydrostatic testing, and scram time testing, while considering operational conditions. This change is consistent with Technical Specification Task Force (TSTF) Traveler, TSTF–484, ''Use of TS [Technical Specification] 3.10.1 for Scram Time Testing Activities.''
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Tamra Domeyer, Associate General Counsel, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.
Docket Nos	50–352, 50–353.
NRC Project Manager, Telephone Number	V. Sreenivas, 301–415–2597.

NextEra Energy Point Beach, LLC; Point Beach Nuclear Plant, Units 1 and 2; Manitowoc County, WI

Application Date	February 6, 2020.
ADAMS Accession No	ML20037A007.
Location in Application of NSHC	Pages 7 and 8 of the Enclosure.
Brief Description of Amendments	The proposed amendments would modify the Point Beach current licensing basis for tornado missile protection by describing the historical plant design for safe shutdown equipment located external to Seismic Class I structures. The amendments would resolve the licensing basis non-conformances associated with the extended enforcement discretion.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Debbie Hendell, Managing Attorney—Nuclear, Florida Power & Light Company, 700 Universe Blvd., MS LAW/JB, Juno Beach, FL 33408–0420.
Docket Nos	50–266, 50–301.
NRC Project Manager, Telephone Number	Mahesh Chawla, 301–415–8371.

Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN

Application Date	March 2, 2020.
ADAMS Accession No	ML20062F243.
Location in Application of NSHC	Enclosure, page E16 of 19.
Brief Description of Amendments	The proposed amendments would revise the Watts Bar Nuclear, Units 1 and 2 Technical Specification (TS) 3.2.1, ''Heat Flux Hot Channel Factor ($F_Q(Z)$),'' to implement the methodology in WCAP–17661–P–A, Revision 1, ''Improved RAOC and CAOC FQ Surveillance Technical Specifications''; modify the WBN, Unit 1 and Unit 2 TS 5.9.5, ''Core Operating Limits Report (COLR),'' to include the methodology in the list of the U.S. Nuclear Regulatory Commission (NRC) approved methodologies used to develop the cycle-specific COLR; and delete WBN, Unit 2 Operating License (OL) Condition 2.C.10.
Proposed Determination	NSHC.
Name of Attorney for Licensee, Mailing Address	Sherry Quirk, Executive VP and General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, WT 6A, Knoxville, TN 37902.
Docket Nos	50–390, 50–391.
NRC Project Manager, Telephone Number	Kimberly Green, 301–415–1627.

III. Notice of Issuance of Amendments to Facility Operating Licenses and Combined Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendment.

A notice of consideration of issuance of amendment to facility operating license or combined license, as applicable, proposed NSHC determination, and opportunity for a hearing in connection with these actions, was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment

under the special circumstances provision in 10 CFR 51.22(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action, see (1) the application for amendment; (2) the amendment; and (3) the Commission's related letter, Safety Evaluation, and/or Environmental Assessment as indicated. All of these items can be accessed as described in the ''Obtaining Information and Submitting Comments'' section of this document.

Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit No. 2; Waterford, CT

Date Issued	March 26, 2020.
ADAMS Accession No	ML20027B970.
Amendment Nos	338.
Brief Description of Amendments	The amendment revised the technical specification surveillance requirement for the enclosure building filtration system by decreasing ventilation system flow test requirements from 10 continuous hours to 15 continuous minutes. Additionally, the amendment removed the requirement to run the flow test with the duct heaters energized. The amendment is consistent with NRC-approved Technical Specifications Task Force (TSTF) Traveler TSTF–522, Revision 0, ''Revise Ventilation System Surveillance Requirements to Operate for 10 hours per Month.''
Docket Nos	50–336.

Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit No. 3; Waterford, CT

Date Issued	March 26, 2020.
ADAMS Accession No	ML20027C560.
Amendment Nos	275.
Brief Description of Amendments	The amendment revised the technical specification surveillance requirements to change the required operating time of the ventilation systems with charcoal filters from 10 continuous hours to 15 continuous minutes at a frequency controlled in accordance with the surveillance frequency control program. The amendment is consistent with NRC-approved Technical Specifications Task Force (TSTF) Traveler TSTF–522, Revision 0, ''Revise Ventilation System Surveillance Requirements to Operate for 10 hours per Month.''
Docket Nos	50–423.

Entergy Operations, Inc.; Arkansas Nuclear One, Unit 2; Pope County, AR

Date Issued	April 1, 2020.
ADAMS Accession No	ML20041F035.
Amendment Nos	319.
Brief Description of Amendments	The amendment revised the current Technical Specification instrumentation testing definitions of Channel Calibration and Channel Functional Test to permit determination of the appropriate frequency to perform the surveillance requirement based on the devices being tested in each step. The proposed changes are based on Technical Specifications Task Force (TSTF) Traveler TSTF-563, Revision 0, ''Revise Instrument Testing Definitions to Incorporate the Surveillance Frequency Control Program.''
Docket Nos	50–368.

Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2, Will County, IL; Byron Station, Unit Nos. 1 and 2, Ogle County, IL

Date Issued	March 30, 2020.
ADAMS Accession No	ML20037B221.
Amendment Nos	206, 206, 212, 212.
Brief Description of Amendments	The amendments revise technical specification requirements to permit the use of risk informed completion times for actions to be taken when limiting conditions for operation are not met. The changes are based on Technical Specifications Task Force (TSTF) Traveler TSTF 505, Revision 2, ''Provide Risk Informed Extended Completion Times—RITSTF Initiative 4b,'' dated July 2, 2018 (ADAMS Accession No. ML18183A493).
Docket Nos	50–454, 50–455, 50–456, 50–457.

Exelon Generation Company, LLC; Braidwood Station, Units 1 and 2; Will County, IL; Exelon Generation Company, LLC; Byron Station, Unit Nos. 1 and 2, Ogle County, IL; Exelon Generation Company, LLC, Clinton Power Station, Unit No. 1, DeWitt County, IL; Exelon Generation Company, LLC; Dresden Nuclear Power Station, Units 1, 2, and 3; Grundy County, IL; Exelon Generation Company, LLC and Exelon FitzPatrick, LLC; James A. FitzPatrick Nuclear Power Plant; Oswego County, NY; Exelon Generation Company, LLC, LaSalle County Station, Units 1 and 2; LaSalle County, IL; Exelon Generation Company, LLC; Limerick Generating Station, Units 1 and 2; Montgomery County, PA; Exelon Generation Company, LLC; Nine Mile Point Nuclear Station, Units 1 and 2; Oswego County, NY; Exelon Generation Company, LLC and PSEG Nuclear LLC; Peach Bottom Atomic Power Station, Units 1, 2, and 3; York and Lancaster Counties, PA; Exelon Generation Company, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Rock Island County, IL; Exelon Generation Company, LLC; R. E. Ginna Nuclear Power Plant; Wayne County, NY

Date Issued	April 6, 2020.
ADAMS Accession No	ML20021A070.
Amendment Nos	Braidwood (208/208), Byron (214/214), Clinton (230), Dresden (48/267/260), FitzPatrick (334), LaSalle (243/249), Limerick (244/207), Nine Mile Point (242/180), Peach Bottom (16/333/336), Quad Cities (280/275), and R. E. Ginna (140).

Brief Description of Amendments	The amendments delete certain license conditions that specify requirements for decommissioning trust agreements for these facilities. The amendments also delete some obsolete license conditions associated with completed license transfers for these facilities. Upon the implementation of the amendments, the decommissioning trust fund requirements in 10 CFR 50.75(h)(1) and (3) will apply to Exelon Generation Company, LLC; PSEG Nuclear LLC; Nine Mile Point Nuclear Station, LLC; and R. E. Ginna Nuclear Power Plant, LLC.
Docket Nos	50–456, 50–457, 50–454, 50–455, 50–461, 50–010, 50–237, 50–249, 50–333, 50–373, 50–374, 50–352, 50–353, 50–220, 50–410, 50–171 50–277, 50–278, 50–254, 50–265, and 50–244.

Exelon Generation Company, LLC; R. E. Ginna Nuclear Power Plant, Wayne County, NY

Date Issued	April 3, 2020.
ADAMS Accession No	ML20057E091.
Amendment Nos	139.
Brief Description of Amendments	The amendment revised Technical Specifications 3.4.7, ''RCS [Reactor Coolant System] Loops—MODE 5, Loops Filled''; 3.4.8, ''RCS Loops—MODE 5, Loops Not Filled''; 3.9.4, ''Residual Heat Removal (RHR) and Coolant Circulation—Water Level ≥ 23 Ft''; and 3.9.5, ''Residual Heat Removal (RHR) and Coolant Circulation—Water Level < 23 Ft,'' to allow the use of alternative means for residual heat removal. This one-time change is requested to support Ginna in the shutdown of the reactor during the upcoming refueling outage scheduled to start in April 2020.
Docket Nos	50–244.

NextEra Energy Seabrook, LLC; Seabrook Station, Unit No. 1; Rockingham County, NH

Date Issued	March 27, 2020.
ADAMS Accession No	ML20070Q071.
Amendment Nos	165.
Brief Description of Amendments	The amendment modified the technical specifications associated with the emergency core cooling system accumulators. Specifically, the amendment modified the technical specification actions for an inoperable accumulator, relocated the actions for inoperable accumulator instrumentation, and deleted an unnecessary surveillance requirement. The amendment also deleted a duplicate surveillance requirement associated with the accumulator isolation valves.
Docket Nos	50–443.

Omaha Public Power District; Fort Calhoun Station, Unit No. 1; Washington County, NE

Date Issued	March 25, 2020.
ADAMS Accession No	ML20071E104.
Amendment Nos	301.
Brief Description of Amendments	The amendment revises the 10 CFR Part 50 license to reflect the requirements associated with the security changes set forth in the revised Fort Calhoun Station Security Plan, Training and Qualification Plan, and Safeguards Contingency Plan (the Plans) for the independent spent fuel storage installation (ISFSI) only configuration, consistent with the permanent removal of all spent fuel from the spent fuel pool., The amendment revises the 10 CFR Part 50 license to reflect the requirements associated with the security changes set forth in the revised Fort Calhoun Station Security Plan, Training and Qualification Plan, and Safeguards Contingency Plan for the independent spent fuel storage installation (ISFSI) only configuration, consistent with the permanent removal of all spent fuel from the spent fuel pool.
Docket Nos	50–285.

Pacific Gas and Electric Company; Diablo Canyon Power Plant, Units 1 and 2; San Luis Obispo County, CA

Date Issued	March 26, 2020.
ADAMS Accession No	ML20044D292.
Amendment Nos	235 (Unit 1) and 237 (Unit 2).
Brief Description of Amendments	The amendments revised the physical security classification of the intake structure at Diablo Canyon Nuclear Power Plant, Units 1 and 2, from a vital area within a surrounding protected area to an owner-controlled area.
Docket Nos	50–275, 50–323.

PSEG Nuclear LLC; Hope Creek Generating Station; Salem County, NJ

Date Issued	March 24, 2020.
ADAMS Accession No	ML20050E128.
Amendment Nos	223.
Brief Description of Amendments	The amendments adopted Technical Specifications Task Force (TSTF) Traveler TSTF–563, Revision 0, ''Revise Instrument Testing Definitions to Incorporate the Surveillance Frequency Control Program.'' TSTF–563 revised the technical specification definitions of ''channel calibration'' and ''channel functional test.
Docket Nos	50–354.

Southern Nuclear Operating Company, Inc.; Joseph M Farley Nuclear Plant, Units 1 and 2; Houston County, AL, Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 1 and 2; Burke County, GA	
Date Issued	March 31, 2020.
ADAMS Accession No	ML20006E760.
Amendment Nos	227, 224, 203, 186.
Brief Description of Amendments	The amendments adopt Technical Specifications Task Force (TSTF) traveler TSTF–569, ''Revise Response Time Testing Definition,'' which is an NRC-approved change to the Improved Standard Technical Specifications, into the Farley, Units 1 and 2, and Vogtle, Units 1 and 2, TSs. The amendments revise the TS Definitions for ''Engineered Safety Feature (ESF) Response Time'' and ''Reactor Trip System (RTS) Response Time.''
Docket Nos	50–348, 50–364, 50–424, 50–425.

Southern Nuclear Operating Company, Inc.; Joseph M Farley Nuclear Plant, Units 1 and 2; Houston County, AL, Southern Nuclear Operating Company, Inc.; Vogtle Electric Generating Plant, Units 1 and 2; Burke County, GA	
Date Issued	April 1, 2020.
ADAMS Accession No	ML20007D063.
Amendment Nos	228, 225, 204, 187.
Brief Description of Amendments	The amendments adopt Technical Specifications Task Force (TSTF) Traveler TSTF–491, Revision 2, ''Removal of Main Steam and Feedwater Valve Isolation Times,'' which was proposed by the TSTF by letter on May 18, 2006 (ADAMS Accession No. ML061500078). The amendments revised Technical Specification (TS) 3.7.2, ''MSIVs [Main Steam Valves Isolation Valves],'' and TS 3.7.3, '''Main FW [Feedwater] Stop Valves and MFRVs [Main Feedwater Regulation Valves] and Associated Bypass Valves,'' for Joseph M. Farley Nuclear Plant, Units 1 and 2, and Vogtle Electric Generating Plant, Units 1 and 2.

Tennessee Valley Authority; Watts Bar Nuclear Plant, Units 1 and 2; Rhea County, TN	
Date Issued	March 30, 2020.
ADAMS Accession No	ML20057E242.
Amendment Nos	133 and 37.
Brief Description of Amendments	The amendments revised Technical Specification 3.3.5, ''LOP [Loss of Power] DG [Diesel-Generator] Start Instrumentation,'' Condition C, to require restoration of inoperable channels to operable status within one hour when one or more channels per bus are inoperable.
Docket Nos	50–390, 50–391.

Previously Published Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The following notices were previously published as separate individual notices. The notice content was the same as above. They were published as individual notices either because time did not allow the commission to wait for this biweekly notice or because the action involved exigent circumstances. They are repeated here because the biweekly notice lists all amendments issued or proposed to be issued involving no significant hazards consideration.

For details, including the applicable notice period, see the individual notice in the **Federal Register** on the day and page cited.

Entergy Louisiana, LLC, and Entergy Operations, Inc.; River Bend Station, Unit 1; West Feliciana Parish, LA	
Application Date	March 23, 2020.
ADAMS Accession No	ML20083N719.
Brief Description of Amendment	The amendment would extend the implementation date for License Amendment No. 197 (ADAMS Accession No. ML19070A062) for River Bend Station, Unit 1, from May 13, 2020 to September 30, 2020. License Amendment No. 197, which was issued on May 14, 2019, approved the emergency action levels (EALs) scheme based on Nuclear Energy Institute (NEI) guidance in NEI 99–01, Revision 6, ''Development of Emergency Action Levels for Non-Passive Reactors.'' Additionally, the licensee indicated in the application that the EALs implementation extension is necessary due to unforeseen circumstances related to the ongoing COVID–19 pandemic.
Date & Cite of **Federal Register** Individual Notice.	April 2, 2020; 85 FR 18590.
Expiration Dates for Public Comments & Hearing Requests.	May 4, 2020 (comments); June 1, 2020 (hearing requests).
Docket Nos	50–458.

Dated: April 9, 2020.

For the Nuclear Regulatory Commission.

Craig G. Erlanger,

Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2020–07978 Filed 4–20–20; 8:45 am]

BILLING CODE 7590–01–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2020–117 and CP2020–125; MC2020–118 and CP2020–126; MC2020–119 and CP2020–127]

New Postal Products

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recent Postal Service filing for the Commission's consideration concerning a negotiated service agreement. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* April 23, 2020.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Docketed Proceeding(s)

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the market dominant or the competitive product list, or the modification of an existing product currently appearing on the market dominant or the competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3007.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern market dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3010, and 39 CFR part 3020, subpart B. For request(s) that the Postal Service states concern competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3015, and 39 CFR part 3020, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2020–117 and CP2020–125; *Filing Title:* USPS Request to Add Priority Mail Contract 606 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* April 23, 2020.

2. *Docket No(s).:* MC2020–118 and CP2020–126; *Filing Title:* USPS Request to Add Priority Mail Contract 607 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* April 23, 2020.

3. *Docket No(s).:* MC2020–119 and CP2020–127; *Filing Title:* USPS Request to Add Priority Mail Contract 608 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 15, 2020; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3020.30 *et seq.,* and 39 CFR 3015.5; *Public Representative:* Gregory Stanton; *Comments Due:* April 23, 2020.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2020–08413 Filed 4–20–20; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88645; File No. SR–CboeEDGX–2019–048]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On August 1, 2019, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On September 30, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP. On February 12, 2020, pursuant to Section 19(b)(2) of the Act,[8] the Commission designated a longer period within which to approve or disapprove the proposed rule change.[9] On April 9, 2020, the Exchange withdrew the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86678 (August 14, 2019), 84 FR 43246 (August 20, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87163 (September 30, 2019), 84 FR 53203 (October 4, 2019).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Securities Exchange Act Release No. 88178 (February 12, 2020), 85 FR 9503 (February 19, 2020).

proposed rule change (SR–CboeEDGX–2019–048).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08382 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88640; File No. SR–CboeBZX–2019–086]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On October 1, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BZX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on October 21, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On November 26, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP.

On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeBZX–2019–086).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 87312 (October 15, 2019), 84 FR 56235 (October 21, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87629 (November 26, 2019), 84 FR 66245 (December 3, 2019).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08370 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88644; File No. SR–CboeEDGX–2019–059]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On October 1, 2019, Cboe EDGX Exchange, Inc. (''Exchange'' or ''EDGX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on October 17, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On November 26, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP.

On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeEDGX–2019–059).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86678 (October 11, 2019), 84 FR 55624 (October 17, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87635 (November 26, 2019), 84 FR 66242 (December 3, 2019).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08381 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88639; File No. SR–DTC–2020–008]

Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing of Proposed Rule Change To Modify the Clearing Agency Model Risk Management Framework

April 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 10, 2020, The Depository Trust Company (''DTC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

(a) The proposed rule change of DTC would amend the Clearing Agency Model Risk Management Framework (''Framework'') of DTC and its affiliates National Securities Clearing Corporation (''NSCC'') and Fixed Income Clearing Corporation (''FICC,'' and together with NSCC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[3] Specifically, the proposed

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Framework sets forth the model risk management practices adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. *See* Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008; SR–FICC–2017–014; SR–NSCC–2017–008) (''2017 Notice''). The Framework is managed by the Clearing Agencies' risk management areas generally responsible for model validation and control matters, DTCC Model Validation and Control (''MVC''), on behalf of each Clearing Agency, with review and oversight by senior management and the Risk Committee of the Board of Directors of each of DTC, FICC, and NSCC (collectively, ''Boards''). *See Id.*

rule change would amend the Framework to (i) change the governance structure for approval of a model[4] validation (''Model Validation''), (ii) incorporate a model risk tolerance statement (''Model Risk Tolerance Statement'') and related provisions, (iii) clarify the definition of Model Owner (as defined below), (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (''DTC Rules''), the Rulebook of the Government Securities Division (''GSD'') of Fixed Income Clearing Corporation (such Rulebook hereinafter referred to as ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division (''MBSD'') of Fixed Income Clearing Corporation (''such Clearing Rules hereinafter referred to as ''MBSD Rules''), or the Rules & Procedures of NSCC (''NSCC Rules''), as the Framework would be a standalone document.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) change the governance structure for approval of a Model Validation, (ii) incorporate the Model Risk Tolerance Statement with respect to related forward-looking provisions associated with maintaining multiple model risk-related tolerance statements, (iii) clarify the definition of Model Owner, (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the DTC Rules, GSD Rules, MBSD Rules, or NSCC Rules, as the Framework would be a standalone document.

Background

The Framework is maintained by the Clearing Agencies for compliance with Rule 17Ad–22(e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii) under the Act,[6] and sets forth the model risk management practices adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is managed by MVC, on behalf of each Clearing Agency, with review and oversight by senior management of each Clearing Agency and the Boards.[7]

Pursuant to the Framework, a model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' is included and tracked within a model inventory (''Model Inventory'') maintained by MVC.[8]

As Model Validation and the process for approval of Model Validations is a key concept that flows through the Framework, DTC is providing the following background regarding Model Validation to supplement the proposed rule changes discussed further below.

Model Validation

Pursuant to Section 3.3 (Full Model Validation) of the Framework, each new model undergoes a Model Validation (unless provisionally approved, as discussed below) pursuant to which MVC verifies that the model is performing as expected in accordance with its design objectives and business purpose. The Model Validation standards, referred to in the Framework as the full Model Validation standards for any new model include, but are not be limited to, the following core Model Validation activities, as listed in the Framework:

- Evaluation of the model development documentation and testing;
- evaluation of model theory and assumptions, and identification of potential limitations;
- evaluation of data inputs and parameters;
- review of numerical implementation including replication for certain key model components, which would vary from model to model;
- independent testing: Sensitivity analysis, stress testing, and benchmarking, as appropriate; and
- evaluation of model outputs, model performance, and back testing.

Pursuant to the Framework, Full Model Validation is applied under the following circumstances: (i) For all new models prior to their use in production; (ii) during periodic Model Validations (as described below); and (iii) when model changes are made that require independent Model Validation (as further described below).

Pursuant to Section 3.4 (Periodic Model Validation) of the Framework, models approved for use in production are subject to what is currently referred to in the Framework as periodic Model Validations for purposes of confirming that the models continue to operate as intended, identifying any deficiencies that would call into question the continuing validity of any such model's

[4] The Clearing Agencies have adopted the following definition for the term ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: An information input component, which delivers assumptions and data to the model; a processing component, which transforms inputs into estimates; and a reporting component, which translates the estimates into useful business information. The definition of ''model'' also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* Supervisory Guidance on Model Risk Management, SR Letter 11–7, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, at 3.

[5] Capitalized terms not defined herein are defined in the DTC Rules, NSCC Rules, GSD Rules or MBSD Rules, as applicable, *available at http://dtcc.com/legal/rules-and-procedures.*

[6] 17 CFR 240.17Ad–22(e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii). Each of DTC, NSCC and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with subsection (e) of Rule 17Ad–22. References to Rule 17Ad–22(e)(6) and its subparagraphs cited herein, and compliance therewith, apply to the CCPs only and do not apply to DTC.

[7] The parent company of the Clearing Agencies is The Depository Trust & Clearing Corporation (''DTCC''). DTCC operates on a shared services model with respect to the Clearing Agencies. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a Clearing Agency.

[8] *See* 2017 Notice, *supra* note 3.

original approval and evaluating whether the model and its prior validation remain valid within the dynamics of current market conditions.

In this regard, the Framework describes that MVC performs a Model Validation for each model approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[9] liquidity risk model,[10] and in the case of FICC and NSCC, as central counterparties, on their margin systems and related models.[11]

Periodic Model Validations and a full Model Validation follow identical standards. The Framework states that in certain cases, MVC may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a model warrants extra validation.

Pursuant to the Framework all findings that result from a new Model Validation, a change Model Validation, a periodic Model Validation, or in connection with implementation of a new model or model change, are centrally tracked by MVC.

Proposed Rule Changes

Section 3.1 Model Inventory

Section 3.1 of the Framework currently explains how any model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' would be subject to tracking within the Model Inventory. MVC is charged with responsibility for adding models to the Model Inventory and for tracking models listed in the Model Inventory. Section 3.1 also describes how a Model Inventory survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current. During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MVC to review and assess whether such proposed model will be added to the Model Inventory.

Proposed Change To Enhance Flow and Readability of Text

Pursuant to the proposed rule change, DTC would remove the use of the modifier ''Clearing Agency'' with respect to references to models in this section and throughout the Framework. The Framework relates solely to models of the Clearing Agencies and the use of this modifier is redundant. This change would enhance the flow and readability of the text by eliminating a redundancy.

Model Owner

Also, the proposed rule change would move the first reference to the defined term ''Model Owner'' from the last paragraph of the section to the second paragraph of the section and clarify the meaning of the term. This reference would appear in a new sentence that would describe that a Model Owner is the person designated by the applicable business area or support function to be responsible for a particular model, and that the Model Owner is recorded as the Model Owner for such model by MVC in the Model Inventory. The Framework currently describes the Model Owner as responsible for the development or operation of the model being validated by MVC, without noting that the Model Owner is an individual designated by the applicable business unit or support function. In this regard, the proposed change would provide clarification that an individual is designated as the Model Owner by the applicable business area or support function.

The proposed rule change would also change the Clearing Agency title of the individual that is the head of MVC that is referred to in a footnote in this section from being an Executive Director to Managing Director of each Clearing Agency to reflect that a more senior officer of the Clearing Agencies would be responsible for supervising the MVC.[12] The footnote also states that the head of MVC reports to the Group Chief Risk Officer [13] rather than to any Model Owner.[14] This statement would be amended to clarify the independence of the MVC extends so that it is independent from anyone who develops and operates a model and not only a Model Owner. Also relating to the status of the head of MVC within the governance structure of the Clearing Agencies, this footnote would note that the head of MVC is a member of the Management Risk Committee (''MRC'').

Replacement of Term ''Vendor'' With ''Externally Purchased''

Section 3.1 currently contains a paragraph which describes that all models, whether internally developed or purchased from a ''vendor,'' are subject to Model Validation. Pursuant to the proposed rule change, DTC would revise the text of this paragraph to replace the term ''vendor'' with ''externally purchased.'' DTC believes use of the term ''externally purchased'', rather than vendor, would provide clarity with respect to sections of the Framework that apply to models developed internally versus externally.

Section 3.2 Model Materiality and Complexity

Section 3.2 of the Framework outlines that MVC assigns a materiality rating and a complexity rating to each model after it is added to the Model Inventory and describes that the applicable rating impacts the model's validation in terms of prioritization and approval authority.

As more fully described below regarding Section 3.6 of the Framework, the proposed rule change would provide for the delegation of approval authority for all Model Validations from the Clearing Agencies' management level committee responsible for model risk management matters to MVC, and the authority to approve model validations would vest solely in MVC.[15]

In this regard, a materiality rating and complexity rating would no longer be determinative of approval authority and the text that describes approval authority as impacted by materiality and complexity ratings would be deleted.

As a related change in the model governance structure, the forum currently referred to as the Model Risk Governance Committee would no longer maintain oversight authority in the model validation process and the text in this section would reflect that it is the forum for review of Model Risk matters rather than the formal forum for addressing Model Risk matters. The Model Risk Governance Committee's name would be revised in this section and throughout to refer to it instead as the Model Risk Governance Council (''MRGC'') to reflect its proposed role as an advisory body rather than being part of the formal model governance process. In this regard, the text of Section 3.2 would be revised to reflect that the

[9] *See* Rule 17Ad–22(e)(4)(vii). *See supra* note 6.

[10] *See* Rule 17Ad–22(e)(7)(vii). *See supra* note 6.

[11] *See* Rule 17Ad–22(e)(6)(vi) and (vii). *See supra* note 6.

[12] A Managing Director is senior to an Executive Director.

[13] The Clearing Agencies' Model Risk management standards and practices are subject to the oversight and direction of the Group Chief Risk Officer, who is the head of the Group Chief Risk Office.

[14] The purpose of the footnote is to make clear that MVC management has an independent reporting line to the Group Chief Risk Office, without potential conflict of reporting to any person that could be a Model Owner.

[15] Currently, Model Validations that have a materiality rating of 'Medium' or 'High,' must be approved by the MRC, after the model has been reviewed and recommended to the MRC for approval by the MRGC. Additionally, all periodic Model Validations must currently be approved by the MRC to be deemed complete through review and recommendation by the MRGC.

MRGC is a forum for review of, rather than addressing, Model Risk matters and a footnote would be added to state that MRGC is an advisory body that has no decision-making authority but would discuss and/or review certain model risk related matters which could result in advice and/or recommendation, which is generally directed to the interested party of a given model that brings the matter, as applicable.

The proposed change to shift responsibility for Model Risk matters, including approval of Model Validations, to MVC would ensure that MVC has sole responsibility for approving Model Validations, as MVC is best suited within the Clearing Agencies to manage the quantitative and technical expertise to carry out the related functions.

Section 3.5—Model Change Management

Section 3.5 (Model Change Management) currently states that an active model may require changes in either structure or technique. Details for any model change request are provided to MVC for review and a determination of whether full Model Validation is required. This section also includes text that states to the extent that a vendor's version change may impact any existing model used in production, an impact study of the version change along with any other analysis/benchmarking shall be conducted as appropriate in MVC's reasonable business discretion.

The process described in this section will not be amended pursuant to the proposed rule change, however, to remain consistent with the use of terminology as described with respect to Section 3.1 above, references to ''vendor'' models in this section would be revised to reflect that models not developed by the Clearing Agencies would instead be referred to as externally purchased.

Section 3.6—Model Approval and Control

Section 3.6 (Model Approval and Control) currently provides that all new models, and all material changes to existing models, undergo Model Validation by MVC and must be approved prior to business use. Currently, in cases where such model's materiality is ''Medium'' or ''High,'' such Model Validation is reviewed by the MRGC and recommended by the MRGC to MRC, for approval.

As stated above, the proposed rule change would redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight.

With respect to the first line, the proposed rule change would remove a reference to the Financial Engineering Unit (''FEU'') within Quantitative Risk Management (''QRM''). QRM is a risk management function within the Group Chief Risk Office, and a representative of QRM is the Model Owner for all margin Models used by the CCPs under the Standards for Covered Clearing Agencies (''Standards'') under the Securities Exchange Act of 1934. Because the Model Owner resides in QRM, QRM is responsible for developing, testing, and signing-off on new models and enhancements to existing models before submitting any such model to MVC for Model Validation and approval. Due to an organizational restructuring, FEU was eliminated, and pursuant to the proposed rule change, the responsibilities of FEU described above would vest in the Model Owners, who as described with respect to the proposed changes to Section 3.1 above, would have responsibility for the models.

With respect to the second line, the proposed rule change would revise this section to remove the requirement that MRC approve any Model Validation. In this regard, MVC would have the sole and exclusive authority to approve a model. As stated above, the Clearing Agencies' believe that the MVC is best suited to address Model Validation issues based on its quantitative and technical expertise and knowledge, and the section would be revised accordingly to reflect MVC's proposed role in this regard. As such, the proposed rule change would remove any text that indicates that MRC approval is required for any Model Validation to be complete and/or for a model to remain in production.

Also, consistent with the change in the role of MRGC from one of oversight to instead acting in an advisory capacity, as described above, the proposed rule change would also remove text indicating that MRGC would review and recommend Model Validations to MRC or have any role in provisional approvals [16] of models.

[16] In this regard, Section 3.6 that states that models may be provisionally approved by MVC for a limited period, not to exceed six months unless also approved by the MRGC, would be revised to delete the reference to MRGC's role. Consistent with the changes relating to the second line as described above, MVC would assume full responsibility for provisional approvals and, and consistent with text in Section 3.6, would continue to track all provisional approvals to confirm provisional periods and control measures are met.

Section 3.8—Model Performance Monitoring

Pursuant to the Framework, MVC is currently responsible for model performance monitoring and for each Clearing Agency's backtesting process, which are integral parts of each Clearing Agency's model risk management framework. In this regard, Section 3.8 (Model Performance Monitoring) of the Framework states that model performance monitoring is the process of (i) evaluating an active model's ongoing performance based on theoretical tests, (ii) monitoring the model's parameters through the use of threshold indicators, and/or (iii) backtesting using actual historical data/realizations to test a Value-at-Risk (''VaR'') model's predictive power.

The proposed rule change would eliminate references to ''theoretical tests'' and ''threshold indicators'' and ''historical data/realizations'' to represent a real-world depiction of the model performance monitoring process. These changes are being proposed because the process of model performance monitoring does not always take into account theoretical tests, threshold indicators, and/or historical data/realizations, but ''could'' take some or all of these into account and appropriate under the circumstances. Therefore, the elimination of the ties to these tests, thresholds and use of historical data/realizations are a more accurate representation of the model performance monitoring process.

In addition, Section 3.8 would be revised to reflect changes to the roles of Model Owners and the MVC consistent with the roles of the first and second lines described above, and add text stating that Model Owners are responsible for the design and execution of model performance monitoring and preparation of model performance monitoring reports. The proposed text would also state that MVC is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying Model issues and/or limitations.[17]

One paragraph within Section 3.8 contains a statement that MVC is responsible for model performance monitoring, including review of risk-based models used to calculate margin requirements and relevant parameters/threshold indicators, sensitivity analysis, and model backtesting results, and preparation of related reports. It

[17] The organizational standards apply to DTCC's subsidiaries, as applicable.

also states that review of these model performance measures is subject to review by MRGC. To remain consistent with the change in the role of MRGC and the related consolidation of primary responsibility for oversight in the model governance process in MVC, as described above, this paragraph would be deleted.

Also, consistent with the shift of the responsibility in this regard to Model Owners, Section 3.8 would be clarified to indicate that QRM, because the Model Owner for all margin models used by the CCPs under the Standards would reside in QRM, would be responsible for model performance monitoring the CCP's margin models

Section 3.9—Backtesting

Section 3.9 states that MVC is responsible for each Clearing Agency's VaR backtesting processes for the central counterparties, including for model backtesting and Clearing Fund Requirement (''CFR'') backtesting. Consistent with the changes described above, this section would be revised to state that this backtesting function for models and CFR would reside with QRM, as it is the owner of margin models and would be responsible for performance monitoring functions with respect to margin models.

Section 4.1—Board of Directors and Senior Management Reporting

Section 4.1 describes MRGC as the primary forum for MVC's regular reporting of Model Validation activities and material Model Risks identified through regular Model performance monitoring. Reports and recommendations with respect to Model Risk management are made to the MRC as described in *Section 3.*

Periodic reporting to the Risk Committee of the Clearing Agencies' Boards (''BRC'') regarding Model Risk matters may include:

- Updates of Model Validation findings and the status of annual validations.
- Updates on significant Model Risk matters, and on compliance matters with respect to Model Risk policies and procedures (including this Framework).
- Escalation of Model Risk matters as set forth in the Market Risk Tolerance Statement, and subsequent, regular updates with respect thereto.

The proposed rule change would revise Section 4.1 to reflect the changes to the roles of MVC and MRGC as described above. In this regard, the proposed rule change would delete the description of MRGC's role as it would no longer have oversight of Model Validation and model performance monitoring and would add MRC as a recipient of periodic reporting. The proposed rule change would also generalize the statement relating to escalation of matters as set forth in the Market Risk Tolerance Statement to instead refer to ''the Risk Tolerance Statements'' to reflect the addition of a reference to the Model Risk Tolerance Statement as a supporting document for the Framework, as more fully described below.

Section 4.2—Escalation

Section 4.2 describes, among other things, how on at least a monthly basis, the key metrics identified in Section 3.9 (Backtesting) are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and MVC and reported to MRC. Given MVC's reduced role with respect to backtesting in this regard, the proposed rule change would eliminate the provision that MVC would review the metrics.[18]

The proposed rule change would also revise text for clarity and readability with respect to statements on the review of the Market Risk Tolerance Statement, to reference ''Risk Tolerance Statements'' more generally to reflect the changes described herein. Also, the proposed rule change would remove MRGC's role in review and approval of changes to backtesting methodology and instead vest that responsibility with MVC, to reflect the change in oversight of Model Validation from MRGC to MVC.

Also, to enhance the readability and flow of the text in this section, the proposed rule change would move text describing that (i) the review of the Risk Tolerance Statements by the Managing Director of the Market and Liquidity Risk Management unit (''MDMLRM'') within the Group Chief Risk Office will occur on an at least annual basis, and (ii) the BRC's review and approval of the Risk Tolerance Statements will occur on an at least annual basis, to the end of Section 4.2.[19] The proposed change would also replace the reference to specific title of the MDMLRM to instead refer to the owner of the Risk Tolerance Statements, to provide for more generic terminology that would not require formal amendment in the Framework if the title of the MDMLRM were to change.

Other Changes

The Framework inconsistently uses the term ''model'' without and with initial capitalization, but currently refers throughout to the risks relating to models referred to in the Framework as a defined term using initial capitalization—''Model Risk.'' To remain consistent with the usage of ''model'' throughout the Framework, DTC would conform all references to the term ''model'', so they appear without initial capitalization and change references to Model Risk throughout the Framework to eliminate the initial capitalization of the term and refer to it as ''model risk.''

The Executive Summary of the Framework includes a description of internal DTCC policies and procedures that support the Framework, including the (a) DTCC Model Risk Management Policy, (b) DTCC Model Validation Procedures, (c) DTCC Model Risk Performance Monitoring Procedures, (d) the DTCC Backtesting Procedures and (e) Market Risk Tolerance Statement (''Related Procedures''). In addition to the policies and procedures described in the Executive Summary, the proposed rule change would list in the Executive Summary as a supporting policy, the Model Risk Tolerance Statement. The Model Risk Tolerance Statement articulates, among other things, risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance. The conclusion, based on risk tolerance levels, focuses on model remediation.

Since the risk tolerance levels in both the Market Risk Tolerance Statement[20] and the Model Risk Tolerance Statement consider model remediation as the basis of risk control, both are applicable to the Framework. In this regard, the proposed rule change would add a footnote after the listing of the Model Risk Tolerance Statement and the existing reference to the Market Risk Tolerance Statement to describe that with respect to the key risks[21] of model risk and market risk,

[18] Text would be added to clarify that the risk metrics are reported to MRC by the group within Group Chief Risk Office responsible for risk reporting. Currently, this function is known as Risk Reporting.

[19] The Risk Tolerance Statements are also reviewed on an at least annual basis by Operational Risk Management, which, among other things, is the business line responsible for enabling the identification of the Clearing Agencies' plausible sources of operational risk in order to mitigate the impact of a potential event related to those sources using tailored risk profiles and monitoring risk profiles in accordance with the relevant Risk Tolerance Statements.

[20] The Market Risk Tolerance Statement articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves. The conclusion, based on tolerance levels, focuses on model enhancement or model remediation, as applicable.

[21] DTCC has identified a set of key risks to better guide the content, measurement, frequency, and

Continued

each risk tolerance statement documents the overall risk reduction or mitigation objectives as it relates to model risk and market risk activities and documents the risk controls and other measures used to manage such activities, including escalation requirements in the event of risk metric breaches. The footnote would also state that the Risk Tolerance Statements are reviewed, revised, retired, and/or replaced, as the case may be, and approved by the BRC (as defined herein) annually, based upon the circumstances, and the reasonable best judgement of management, then existing relating to model risk management matters. Consistent with proposed terminology described above with respect to Sections 4.1 and 4.2, the Model Risk Tolerance Statement and the Market Risk Tolerance Statement would be referred to collectively in the Executive Summary as the ''Risk Tolerance Statements.''

The Executive Summary also indicates that the Related Procedures may be updated or amended. The Clearing Agencies regularly review their internal policies and procedures, and in addition to updating or amending them as an administrative matter as they deem appropriate, may also retire or replace internal policies and procedures as they deem appropriate. In this regard, the proposed rule change would also include text to the effect that each of the Related Procedures and the Model Risk Tolerance Statement may retired or replaced (in addition to updated or amended).

Effective Date

The proposed rule change would become effective upon approval by the Commission.

2. Statutory Basis

The Clearing Agencies believe that the Framework is consistent with Section 17A(b)(3)(F) of the Act,[22] as well as Rule 17Ad–22(e)(4)(vii), and (e)(7)(vii) thereunder,[23] for the reasons described below.

Section 17A(b)(3)(F) of the Act[24] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the Framework describes the process by which the Clearing Agencies identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The quantitative models covered by the Framework are applied by the Clearing Agencies, as applicable, to evaluate and address their respective risk exposures associated with their settlement activity and facilitate their ability to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. In this regard, the proposed changes to the Framework support their ability to develop models that are applied to evaluate and address risk exposure and facilitate the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they are responsible by (i) changing the governance structure for approval of a Model Validation to transfer the responsibility for approval of model validations to the MVC, which is composed of individuals with a higher level of expertise relating to model validations than members of the MRC, which is currently responsible for such approvals, thereby enhancing the ability of the group conducting Model Validations to evaluate risk exposures relating to models, (ii) incorporating the Model Risk Tolerance Statement into the Framework which describes risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance, and therefore including a cross-reference to a document which describes an important gauge with respect to the level of risk that may be tolerated as part of managing the risk presented to the Clearing Agencies relating to models, (iii) clarifying the definition of Model Owner, therefore defining the first line responsible for evaluating risk exposure, (iv) reflecting changes in the role of the Model Risk Governance Committee and a change its name, which relates to the change in governance structure that is designed to enhance the independence in its new role of responsibility for approval of Model Validations which would support the Clearing Agencies' ability to evaluate risk exposure, (v) redefining the first and second line responsibilities and incentives relating to model performance monitoring and oversight, therefore enhancing the process by which risk relating to models is evaluated, and (vi) making other technical and clarifying changes to the text, as described above, to improve the text in defining roles and responsibilities for the processes established by the Clearing Agencies to monitor risk. Therefore, DTC believes the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act,[25] because it would facilitate the ability of the Clearing Agencies to continue to develop models that are applied to evaluate and address risk exposure and allow them to maintain a Framework that facilitates the ability of the Clearing Agencies to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, as described above.

Rule 17Ad–22(e)(4)(vii)[26] and (e)(7)(vii)[27] under the Act requires, *inter alia,* that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to perform Model Validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the clearing agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[28] As discussed above, the proposed rule change would amend the Framework to provide for enhanced clarity in the text and enhanced efficiency with respect to the approval process for Model Validations at least annually. In this regard, and as noted above, pursuant to the Framework, Model Validations are performed not less than annually on its credit risk models and liquidity risk models. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rule 17Ad–22(e)(4)(vii)[29] and (e)(7)(vii)[30] under the Act.

(B) Clearing Agency's Statement on Burden on Competition

None of the Clearing Agencies believe that the Framework would have any impact, or impose any burden, on competition because the proposed rule change reflects clarifying changes and provides for a more efficient internal governance process and would not effectuate any changes to the Clearing Agencies' model risk management tools as they currently apply to their respective Members or Participants.

focus of our discussion and management of risk generally across the Organization.

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] *Supra* note 6.

[24] 15 U.S.C. 78q–1(b)(3)(F).

[25] *Id.*

[26] 17 CFR 240.17Ad–22(e)(4) (in particular, 17 CFR 240.17Ad–22(e)(4)(vii)). *See supra* note 6.

[27] 17 CFR 240.17Ad–22(e)(7) (in particular, 17 CFR 240.17Ad–22(e)(7)(vii)). *See supra* note 6.

[28] 17 CFR 240.17Ad–22(e)(3). *See supra* note 6.

[29] *Supra* note 6.

[30] *Supra* note 6.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not solicited or received any written comments relating to this proposal. The Clearing Agencies will notify the Commission of any written comments received by the Clearing Agencies.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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.* Please include File Number SR–DTC–2020–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–DTC–2020–008. 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 website (*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 website 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 DTC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–DTC–2020–008 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08369 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88654; File No. SR–OCC–2020–004]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change To Modify the Sequence for Processing Options Transactions

April 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 6, 2020, the Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

This proposed rule change by OCC would amend Interpretations and Policies .04 to Rule 801 and Interpretations and Policies .04 to Rule 805 to describe a proposed change to the sequence in which options transactions are processed, as described below. The proposed changes to OCC's Rules are included in Exhibit 5 of the filing. Material proposed to be added to OCC's Rules as currently in effect is marked by underlining and material proposed to be deleted is marked with strikethrough text. All terms with initial capitalization that are not otherwise defined herein have the same meaning as set forth in the By-Laws and Rules.[3]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(1) Purpose

Background

OCC currently processes all securities and commodity futures options transactions in the following order:[4]

Options Processing Sequence for All Accounts

Opening Buys
Opening Sells
Closing Buys
Exercises
Closing Sells
Assignments

Based on discussions with Clearing Members, OCC is proposing to modify the sequence in which options transactions are processed at OCC for all account types to provide that all sell transactions are processed before exercises (*i.e.,* closing sells would be processed before exercises under the proposed change).[5] For instance, for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] OCC's By-Laws and Rules can be found on OCC's public website: *http://optionsclearing.com/about/publications/bylaws.jsp.*

[4] A ''commodity future'' is defined in Article I(c)(24) of By-Laws as ''a futures contract within the exclusive jurisdiction of the Commodity Futures Trading Commission that is traded on, through the facilities of, or subject to the rules of a futures market.'' Options on securities futures currently do not exist.

[5] Opening buys increase long positions and closing sells decrease long positions. Opening sells

Continued

securities options transactions, this proposal would change the order in which such transactions are processed in ''customers' accounts,'' ''firm accounts,'' and ''Market-Maker accounts'' such that all sell transactions are processed prior to exercises.[6] OCC is proposing to amend Interpretations and Policies .04 to Rule 801 and Interpretations and Policies .04 to Rule 805 to reflect this change in the processing sequence for options transactions.

This proposed change is made possible by increased proficiency in Clearing Member position processing and is intended to help Clearing Members comply with certain exchange requirements that are described below.[7] OCC's current processing sequence was adopted at a time when trade processing was a far different process than it is today. OCC used to receive a batch file from each exchange at the end of the trading day showing the trades that had been executed on the exchange that day. OCC would then process those trades on a batch basis prior to the open of trading the following business day. Now, OCC receives, and Clearing Members can see, trades executed on an exchange on a near real-time basis.[8] Clearing Members utilize this information as well as certain tools provided by OCC (described below) to balance exercise notices against existing long positions during the trading day.

Customers' and Firm Account Processing for Securities Options Transactions

As noted, OCC's current processing sequence has been in place for many years and was designed when options transactions were processed on a batch basis. It originally was designed to protect a Clearing Member against the risk that an erroneously coded transaction could result in the Clearing Member not exercising a customer's long position. In particular, because the vast majority of customer securities options positions are maintained on a gross basis at OCC, a miscoded sell transaction of one customer could close out a long position in the same series of another customer, thereby preventing that customer from exercising that option.[9] For example, Customer A and Customer B use the same Clearing Member. Customer A wants to exercise a long position, and on the same day Customer B directs the Clearing Member to execute an opening sell. If the Customer B trade is erroneously marked as a closing sell, the long position that Customer A seeks to exercise could be closed out by that closing sell and thus be unavailable for exercise.

Processing exercises before closing sells ensured that all intended exercises would be processed irrespective of a mismarked customer transaction. OCC believes this is no longer necessary due to increased proficiency in Clearing Member position processing. In particular, Clearing Members now have the ability to use certain functions provided by OCC to confirm that submitted exercises have sufficient long positions. These functions include a screen in OCC's ENCORE clearing system called the Exercise screen that shows Clearing Members during a trading day whether they have ''Insufficient Longs'' (*i.e.,* insufficient long positions) for the exercise notices they have received during that trading day.[10] These functions also include OCC's On Demand Position file (''ODP'') that allows Clearing Members during a trading day to balance long positions versus exercises that are received during that trading day to ensure that the Clearing Members have sufficient long positions for those exercises. In addition, they have the ability to correct open/close errors by entering a position adjustment in ENCORE prior to exercises being processed. In the example above, where Customer B's trade is erroneously marked as a closing sell, Customer A's long position could be closed out by that closing sell and thus be unavailable for exercise. Position Adjustments allow a firm to correct open/close errors associated with a trade. This correction functionality can only be used for non-critical aspects of a trade and cannot be used, for instance, to change the price, symbol or other critical aspects of a trade.

Clearing Members have indicated that they believe this change will help them comply with certain exchange rules that require customers to only exercise ''outstanding'' net long positions. As an example, BATS Rule 23.1(a) provides that, ''an outstanding options contract may be exercised during the time period specified in the Rules of [OCC] by the tender to [OCC] of an exercise notice in accordance with the Rules of [OCC].''[11] BATS Rule 16.1(a)(43) defines ''outstanding'' as ''an options contract which has been issued by [OCC] and has neither been the subject of a closing writing transaction nor has reached its expiration date.'' Clearing Members have indicated that issues could arise under the rule in situations where a customer position is subject to conflicting closing sale and exercise instructions, which could lead to a position being exercised that was intended to be closed out under OCC's current processing sequence.

Market Maker and Other Net Account Processing for Securities Options Transactions

The processing sequence set forth above for customer and firm accounts also applies to Market-Maker accounts held by Clearing Members. Market-Maker accounts, however, are held on a net basis. This means that at the end of each trading day, OCC nets offsetting positions in the same options series in each Market-Maker account.[12] Prior to 2014, this netting occurred at the end of the processing sequence immediately before assignments.

In response to operational risk concerns related to the processing of dividend play transactions by Market-Makers, a modification to OCC's systems was approved by OCC's Board of Directors to insert a step in the processing sequence that would limit Market-Maker exercises to net long positions.[13] From a systems perspective,

increase short positions and closing buys decrease short positions.

[6] OCC Clearing Members hold omnibus accounts at OCC for customer positions (*i.e.,* a ''customers' account'' as defined in Article I, Section 1.C.(37) of the By-Laws) to the extent they conduct a customer business. They also hold omnibus accounts at OCC for non-customer positions (*i.e.,* a ''firm account'' as defined in Article I, Section 1.F.(6) of the By-Laws) to the extent they conduct a proprietary business. To the extent they clear for Market-Makers, they also hold ''Market-Maker accounts'' as defined in Article I, Section 1.M.(1) of the By-Laws.

[7] The proposed rule change also is designed to help facilitate the ability to run OCC's current clearing system, known as ENCORE, in parallel with a new clearing system on which OCC is working, as the proposed processing sequence is the one expected to be used in the new clearing system. As OCC's core clearing system, ENCORE processes trades received from OCC's participant exchanges and settlements among OCC's Clearing Members.

[8] This functionality has been available in ENCORE since 2002.

[9] There are a small subset of customer and firm sub-accounts that have elected to be held on a net basis. These accounts are discussed below.

[10] *See supra* note 7.

[11] *See also* FINRA Rule 2360(b)(23), NYSE American Options Rule 980(a), and NYSE Arca Rule 6.24–O(a).

[12] A few Clearing Members have established the functionality to designate sub-accounts within their omnibus customer and firm accounts held at OCC. These sub-accounts are established for a specific customer or joint back office account and the account holders can elect to hold these accounts on a net basis to assist with the position reconciliation process. When the account holders elect to hold the accounts in this manner, they are subject to the same netting process to which Market-Maker accounts are subject. *See* Interpretation and Policy .04 to Article VI, Section 3 of OCC's By-Laws.

[13] A dividend play is a trading strategy that historically was primarily engaged in by Market-Makers and involved buying and selling an equal number of call options right before a dividend date

this change was implemented by moving up the netting in the processing sequence such that it occurred before exercises, as set forth below.

Options Processing Sequence for Market Maker and Other Net Accounts

Opening Buys

Opening Sells

Closing Buys

Net Positions in Net Accounts (location after 2014 change)

Exercises

Closing Sells

[*Net Positions in Net Accounts* (location prior to 2014 change)]

Assignments

From a Rules perspective, this change was implemented by adopting Interpretations and Policies .04 to Rule 801 and Interpretations and Policies .04 to Rule 805.[14] In relevant part, these provisions provide that, ''[w]ith respect to any Market-Maker account, the Corporation shall process sell transactions in respect of option contracts prior to exercises in respect of such contracts.'' Despite this rule text, as indicated in the net processing sequence list immediately above, closing sells continued to be processed after exercises for Market-Maker and other net accounts after the 2014 change. As described below, the proposed change to the options processing sequence that is the subject of this rule filing would modify the sequence for all accounts, including Market-Maker and other net accounts, such that closing sells would be processed before exercises.

Customer and House Account Processing for Options on Commodity Futures

While OCC currently uses the same processing sequence for options on commodity futures, OCC understands that futures customers and Clearing Members are indifferent to the processing sequence for futures transactions. Futures firms submit very few trades marked as closing transactions, and as a result, are accustomed to submitting nightly adjustments to correct their open interest. This process reduces the potential of an exercise error since the firms verify their long positions on a daily basis.

Proposed Change to Processing Sequence

OCC proposes to modify the processing sequence for all securities and futures options transactions for all account types to process all *closing sell* transactions prior to all *exercise* transactions. The proposed processing sequence is set forth below.

Proposed Options Processing Sequence for All Accounts

Opening Buys
Opening Sells
Closing Buys
Closing Sells
Exercises
Assignments

For Market-Maker and other accounts held on a net basis, OCC proposes to net offsetting positions after closing sells but before exercises. Each Market-Maker account is held individually (*i.e.,* on a Market-Maker by Market-Maker basis) at a Clearing Member on a net basis, unlike customer accounts. Holding each Market-Maker account in this manner helps with the position reconciliation process at Market-Makers and allows them to see a single net position in each options series for risk management purposes.

OCC has discussed the proposed change with its Clearing Members at the OCC Roundtable, which is an OCC-sponsored advisory group comprised of representatives from OCC's participant exchanges, a cross-section of OCC Clearing Members, and OCC staff, and during regular monthly operations update calls with Clearing Members and exchanges.[15] OCC also issued Information Memos on its public website to inform Clearing Members of the proposed change.[16] Based upon the feedback from these discussions, OCC believes that its current processing sequence for options transactions no longer needs to be designed to protect Clearing Members from errors in customers' accounts that would result in closing out a position that was intended to be exercised. As noted, Clearing Members have increased their position processing proficiency and can now use OCC tools to confirm that submitted exercises have sufficient long positions. They also have the ability to correct any errors prior to exercises being processed. Clearing Members also have indicated that they believe this change will help them comply with certain exchange rules that require customers to exercise only ''outstanding'' net long positions. By processing all buys and sells prior to exercises, they believe that the proposed change would help address situations in which a customer position is subject to conflicting closing sale and exercise instructions, which could lead to a position being exercised that was intended to be closed out under the current processing sequence.

(2) Statutory Basis

Section 17A(b)(3)(F) of the Act[17] requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities and derivatives transactions. OCC believes that the proposed rule change will promote the prompt and accurate clearance and settlement of securities transactions. In this regard, the proposed rule change would provide for the processing of closing sell transactions prior to exercises, which OCC's Clearing Members have indicated would help promote compliance with exchange rules noted above that require that only outstanding options positions be exercised. As indicated above, OCC's system no longer needs to be designed to protect Clearing Members from customer transaction marking errors in which a sell transaction is miscoded as a closing sell transaction. The near real-time processing of options transactions by OCC and OCC tools have helped Clearing Members increase their position processing proficiency. The proposed change to the position processing sequence would result in OCC's system allowing only net long positions to be exercised in all accounts, including individual customer accounts. This result is designed to promote compliance with exchange rules and further the goal of promoting the prompt and accurate clearance and settlement of securities transactions.

In addition, the proposed rule change is not inconsistent with the existing By-Laws and Rules of OCC, including any rules proposed to be amended.

(B) Clearing Agency's Statement on Burden on Competition

Section 17A(b)(3)(I) of the Act[18] requires that the rules of a clearing agency not impose any burden on competition not necessary or appropriate in furtherance of the Act. OCC does not believe that the proposed

on the underlying equity and exercising the long call options with the goal of capturing the dividend on the underlying equity.

[14] *See* Exchange Act Release No. 73438 (October 27, 2014), 79 FR 64843 (October 31, 2014) (SR–OCC–2014–15).

[15] OCC provided supplemental materials to its Clearing Members after the August 2019 Monthly Operations Update meeting to help illustrate the proposed change in the processing sequence. OCC provided these materials as Exhibit 3A to File No. SR–OCC–2020–004.

[16] *See* OCC Information Memo #45781, dated October 9, 2019, and Information Memo #46129, dated December 10, 2019. OCC provided these Information Memos as Exhibits 3B and 3C to File No. SR–OCC–2020–004.

[17] 15 U.S.C. 78q–1(b)(3)(F).

[18] 15 U.S.C. 78q–1(b)(3)(I).

rule change would impact or impose any burden on competition. The proposed rule change would not affect the competitive dynamics between Clearing Members in that it would apply to all Clearing Members equally. The proposed rule change also would not inhibit access to OCC's services or disadvantage or favor any particular user in relationship to another. In this regard, as described above, the proposed rule change is designed to further facilitate the prompt and accurate clearance and settlement of securities transactions. It would change the processing sequence so that closing sells are processed before exercises, which would ensure from a systematic perspective that only net long positions can be exercised.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments on the proposed rule change were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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.* Please include File Number SR–OCC–2020–004 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–OCC–2020–004. 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 website (*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 website 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 such filing also will be available for inspection and copying at the principal office of OCC and on OCC's website at *https://www.theocc.com/about/publications/bylaws.jsp.*

All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR–OCC–2020–004 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08386 Filed 4–20–20; 8:45 am]

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[19] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88648; File No. SR–NYSEArca–2020–32]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a New NYSE Arca Rule 8.900–E

April 15, 2020.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on April 9, 2020, NYSE Arca, Inc. (''NYSE Arca'' or the ''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 adopt a new NYSE Arca Rule 8.900–E to permit it to list and trade Managed Portfolio Shares, which are shares of actively managed exchange-traded funds (''ETFs'') for which the portfolio is disclosed in accordance with standard mutual fund disclosure rules. The proposed rule change is available on the Exchange's website at *www.nyse.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 self-regulatory organization 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 those 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 parts of such statements.

[1] 15 U.S.C.78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to add new NYSE Arca Rule 8.900–E for the purpose of permitting the listing and trading, or trading pursuant to unlisted trading privileges (''UTP''), of Managed Portfolio Shares, which are securities issued by an actively managed open-end investment management company.

Proposed Listing Rules

Proposed Rule 8.900–E(a) provides that the Exchange will consider for trading, whether by listing or pursuant to UTP, Managed Portfolio Shares that meet the criteria of Rule 8.900–E.

Proposed Rule 8.900–E(b) provides that Rule 8.900–E is applicable only to Managed Portfolio Shares and that, except to the extent inconsistent with Rule 8.900–E, or unless the context otherwise requires, the rules and procedures of the Exchange's Board of Directors shall be applicable to the trading on the Exchange of such securities. Proposed Rule 8.900(b) provides further that Managed Portfolio Shares are included within the definition of ''security'' or ''securities'' as such terms are used in the Rules of the Exchange.

Proposed Rule 8.900–E(b)(1) provides that the Exchange will file separate proposals under Section 19(b) of the Act before the listing and trading of a series of Managed Portfolio Shares. The proposed rule further provides that all statements or representations contained in such rule filing regarding (a) the description of the portfolio or reference asset, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of Exchange listing rules specified in such rule filing will constitute continued listing requirements. An issuer of such securities must notify the Exchange of any failure to comply with such continued listing requirements.

Proposed Rule 8.900–E(b)(2) provides that transactions in Managed Portfolio Shares will occur during the trading hours specified in NYSE Arca Rule 7.34–E(a).

Proposed Rule 8.900–E(b)(3) provides that the Exchange will implement and maintain written surveillance procedures for Managed Portfolio Shares. As part of these surveillance procedures, the Investment Company's investment adviser will upon request by the Exchange or FINRA, on behalf of the Exchange, make available to the Exchange or FINRA the daily portfolio holdings of each series of Managed Portfolio Shares.

Proposed Rule 8.900–E(b)(4) provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliates, as applicable, with respect to access to information concerning the composition of and/or changes to such Investment Company portfolio and/or the Creation Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket.

Proposed Rule 8.900–E(b)(5) provides that any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

Proposed Rule 8.900–E(c)(1) defines the term ''Managed Portfolio Share'' as a security that (a) represents an interest in an investment company registered under the Investment Company Act of 1940 (''Investment Company'') organized as an open-end management investment company, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies; (b) is issued in a Creation Unit, or multiples thereof, in return for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value and delivered to the Authorized Participant (as defined in the Investment Company's Form N–1A filed with the Commission) through a Confidential Account; (c) when aggregated into a Redemption Unit, or multiples thereof, may be redeemed for a designated portfolio of instruments (and/or an amount of cash) with a value equal to the next determined net asset value delivered to the Confidential Account for the benefit of the Authorized Participant; and (d) the portfolio holdings for which are disclosed within at least 60 days following the end of every fiscal quarter.[4]

Proposed Rule 8.900–E(c)(2) defines the term ''Verified Intraday Indicative Value (''VIIV'') as the indicative value of a Managed Portfolio Share based on all of the holdings of a series of Managed Portfolio Shares as of the close of business on the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, priced and disseminated in one second intervals during the Core Trading Session by the Reporting Authority.

Proposed Rule 8.900–E(c)(3) defines the term ''AP Representative'' as an unaffiliated broker-dealer, with which an Authorized Participant has signed an agreement to establish a Confidential Account for the benefit of such Authorized Participant, that will deliver or receive, on behalf of the Authorized Participant, all consideration to or from the Investment Company in a creation or redemption. An AP Representative will not be permitted to disclose the Creation Basket to any person, including the Authorized Participants.

Proposed Rule 8.900–E(c)(4) defines the term ''Confidential Account'' as an account owned by an Authorized Participant and held with an AP Representative on behalf of the Authorized Participant. The account will be established and governed by contractual agreement between the AP Representative and the Authorized Participant solely for the purposes of creation and redemption, while keeping confidential the Creation Basket constituents of each series of Managed Portfolio Shares, including from the Authorized Participant. The books and records of the Confidential Account will

[4] For purposes of this filing, references to a series of Managed Portfolio Shares are referred to interchangeably as a series of Managed Portfolio Shares or as a ''Fund'' and shares of a series of Managed Portfolio Shares are generally referred to as the ''Shares''.

be maintained by the AP Representative on behalf of the Authorized Participant.

Proposed Rule 8.900–E(c)(5) defines the term ''Creation Basket'' as on any given business day the names and quantities of the specified instruments (and/or an amount of cash) that are required for an AP Representative to deposit in-kind on behalf of an Authorized Participant in exchange for a Creation Unit and the names and quantities of the specified instruments (and/or an amount of cash) that will be transferred in-kind to an AP Representative on behalf of an Authorized Participant in exchange for a Redemption Unit, which will be identical and will be transmitted to each AP Representative before the commencement of trading.

Proposed Rule 8.900–E(c)(6) defines the term ''Creation Unit'' as a specified minimum number of Managed Portfolio Shares issued by an Investment Company at the request of an Authorized Participant in return for a designated portfolio of instruments and/or cash.

Proposed Rule 8.900–E(c)(7) defines the term ''Redemption Unit'' as a specified minimum number of Managed Portfolio Shares that may be redeemed to an Investment Company at the request of an Authorized Participant in return for a portfolio of instruments and/or cash.

Proposed Rule 8.900–E(c)(8) defines the term ''Reporting Authority'' in respect of a particular series of Managed Portfolio Shares as the Exchange, an institution, or a reporting service designated by the Exchange or by the exchange that lists a particular series of Managed Portfolio Shares (if the Exchange is trading such series pursuant to unlisted trading privileges), as the official source for calculating and reporting information relating to such series, including, but not limited to, the net asset value, the Verified Intraday Indicative Value, or other information relating to the issuance, redemption or trading of Managed Portfolio Shares. A series of Managed Portfolio Shares may have more than one Reporting Authority, each having different functions.

Proposed Rule 8.900–E(c)(9) provides that the term ''Normal Market Conditions'' includes, but is not limited to, the absence of trading halts in the applicable financial markets generally; operations issues (*e.g.,* systems failure) causing dissemination of inaccurate market information; or force majeure type events such as natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruptions or any similar intervening circumstance.

Proposed Rule 8.900–E(d) sets forth initial listing criteria applicable to Managed Portfolio Shares. Proposed Rule 8.900–E(d)(1)(A) provides that, for each series of Managed Portfolio Shares, the Exchange will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading on the Exchange. In addition, proposed Rule 8.900–E(d)(1)(B) provides that the Exchange will obtain a representation from the issuer of each series of Managed Portfolio Shares that the net asset value (''NAV'') per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time.[5] Proposed Rule 8.900–E(d)(1(C) provides that all Managed Portfolio Shares shall have a stated investment objective, which shall be adhered to under Normal Market Conditions.

Proposed Rule 8.900–E(d)(2) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the following continued listing criteria. Proposed Rule 8.900–E(d)(2)(A) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by the Reporting Authority and/or by one or more major market data vendors in one second intervals during the Exchange's Core Trading Session (as defined in NYSE Arca Rule 7.34–E) and will be disseminated to all market participants at the same time.

Proposed Rule 8.900–E(d)(2)(B) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5–E(m) for, a series of Managed Portfolio Shares under any of the following circumstances: (i) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares; (ii) if the Exchange has halted trading in a series of Managed Portfolio Shares because the VIIV is interrupted pursuant to Rule 8.900–E(d)(2)(C)(ii) and such interruption persists past the trading day in which it occurred or is no longer available; (iii) if the Exchange has halted trading in a series of Managed Portfolio Shares because the NAV with respect to such series of Managed Portfolio Shares is not disseminated to all market participants at the same time, the holdings of such series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the Investment Company Act of 1940 (the ''1940 Act''), or such holdings are not made available to all market participants at the same time pursuant to Rule 8.900–E(d)(2)(C)(ii) and such issue persists past the trading day in which it occurred; (iv) if the Exchange has halted trading in a series of Managed Portfolio Shares pursuant to Rule 8.900–E(d)(2)(C)(i), such issue persists past the trading day in which it occurred; (v) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in compliance with the conditions of any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares; (vi) if any of the continued listing requirements set forth in Rule 8.900–E are not continuously maintained; (vii) if any of the statements or representations regarding (a) the description of the portfolio, (b) limitations on portfolio holdings, or (c) the applicability of Exchange listing rules, specified in the Exchange's rule filing pursuant to Section 19(b) of the Securities Exchange Act of 1934 to permit the listing and trading of a series of Managed Portfolio Shares, are not continuously maintained; or (viii) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable.

Proposed Rule 8.900–E(d)(2)(C)(i) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

Proposed Rule 8.900–E(d)(2)(C)(ii) provides that, if the Exchange becomes

[5] NYSE Arca Rule 7.18–E(d)(2) (''Trading Halts of Derivative Securities Products Listed on the NYSE Arca Marketplace)'' provides that, with respect to Derivative Securities Products listed on the NYSE Arca Marketplace for which a NAV is disseminated, if the Exchange becomes aware that the NAV is not being disseminated to all market participants at the same time, it will halt trading in the affected Derivative Securities Product on the NYSE Arca Marketplace until such time as the NAV is available to all market participants.

aware that: (a) the Verified Intraday Indicative Value of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (b) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (c) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (d) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the Verified Intraday Indicative Value, the net asset value, or the holdings are available, as required.

Proposed Rule 8.900–E(d)(2)(D) provides that, upon termination of an Investment Company, the Exchange requires that Managed Portfolio Shares issued in connection with such entity be removed from Exchange listing.

Proposed Rule 8.900–E(d)(2)(E) provides that voting rights shall be as set forth in the applicable Investment Company prospectus and/or statement of additional information.

Proposed Rule 8.900–E(e), which relates to limitation of Exchange liability, provides that neither the Exchange, the Reporting Authority, when the Exchange is acting in the capacity of a Reporting Authority, nor any agent of the Exchange shall have any liability for damages, claims, losses or expenses caused by any errors, omissions, or delays in calculating or disseminating any current portfolio value; the current value of the portfolio of securities required to be deposited to the open-end management investment company in connection with issuance of Managed Portfolio Shares; the VIIV; the amount of any dividend equivalent payment or cash distribution to holders of Managed Portfolio Shares; NAV; or other information relating to the purchase, redemption, or trading of Managed Portfolio Shares, resulting from any negligent act or omission by the Exchange, the Reporting Authority when the Exchange is acting in the capacity of a Reporting Authority, or any agent of the Exchange, or any act, condition, or cause beyond the reasonable control of the Exchange, its agent, or the Reporting Authority, when the Exchange is acting in the capacity of a Reporting Authority, including, but not limited to, an act of God; fire; flood; extraordinary weather conditions; war; insurrection; riot; strike; accident; action of government; communications or power failure; equipment or software malfunction; or any error, omission, or delay in the reports of transactions in one or more underlying securities.

Proposed Rule 8.900–E(f), which relates to disclosures, provides that the provisions of subparagraph (f) apply only to series of Managed Portfolio Shares that are the subject of an order by the Commission exempting such series from certain prospectus delivery requirements under Section 24(d) of the 1940 Act and are not otherwise subject to prospectus delivery requirements under the Securities Act of 1933. The Exchange will inform its ETP Holders regarding application of subparagraph (f) to a particular series of Managed Portfolio Shares by means of an information circular prior to commencement of trading in such series.

The Exchange requires that ETP Holders provide to all purchasers of a series of Managed Portfolio Shares a written description of the terms and characteristics of those securities, in a form prepared by the open-end management investment company issuing such securities, not later than the time a confirmation of the first transaction in such series is delivered to such a purchaser. In addition, ETP Holders shall include such a written description with any sales material relating to a series of Managed Portfolio Shares that is provided to customers or the public. Any other written materials provided by an ETP Holder to customers or the public making specific reference to a series of Managed Portfolio Shares as an investment vehicle must include a statement in substantially the following form: ''A circular describing the terms and characteristics of (the series of Managed Portfolio Shares) has been prepared by the (open-end management investment company name) and is available from your broker. It is recommended that you obtain and review such circular before purchasing (the series of Managed Portfolio Shares).''

An ETP Holder carrying an omnibus account for a non-ETP Holder broker-dealer is required to inform such non-ETP Holder that execution of an order to purchase a series of Managed Portfolio Shares for such omnibus account will be deemed to constitute agreement by the non-ETP Holder to make such written description available to its customers on the same terms as are directly applicable to ETP Holders under this rule.

Upon request of a customer, an ETP Holder shall also provide a prospectus for the particular series of Managed Portfolio Shares.

Additionally, the Exchange proposes to amend current Rule 5.3–E to include Managed Portfolio Shares listed pursuant to proposed Rule 8.900–E among the derivative or special purpose securities that are subject to a limited set of corporate governance and disclosure policies. Similarly, the Exchange proposes to amend Rule 5.3–E(e) to include Managed Portfolio Shares listed pursuant to proposed Rule 8.900–E among the derivative or special purpose securities to which the requirements concerning shareholder/annual meetings do not apply.

Key Features of Managed Portfolio Shares

While each series of Managed Portfolio Shares will be actively managed and, to that extent, will be similar to Managed Fund Shares (as defined in Rule 8.600–E),[6] Managed Portfolio Shares differ from Managed Fund Shares in the following important respects. First, in contrast to Managed Fund Shares, which require a ''Disclosed Portfolio'' to be disseminated at least once daily,[7] the portfolio for a series of Managed Portfolio Shares will be disclosed quarterly in accordance with normal disclosure requirements otherwise applicable to open-end investment companies registered under the 1940

[6] The Commission approved a proposed rule change to adopt rules permitting the listing and trading of Managed Fund Shares. *See* Securities Exchange Act Release No. 57619 (April 4, 2008), 73 FR 19544 (April 10, 2008) (SR–NYSEArca–2008–25) (Order Granting Accelerated Approval of Rules Permitting the Listing and Trading of Managed Fund Shares, Trading Hours and Halts, Listing Fees Applicable To Managed Fund Shares). The Commission has also previously approved listing and trading on the Exchange of a number of issues of Managed Fund Shares under Rule 8.600–E. *See, e.g.,* Securities Exchange Act Release Nos. 57801 (May 8, 2008), 73 FR 27878 (May 14, 2008) (SR–NYSEArca–2008–31) (order approving Exchange listing and trading of twelve actively-managed funds of the WisdomTree Trust); 60460 (August 7, 2009), 74 FR 41468 (August 17, 2009) (SR–NYSEArca–2009–55) (order approving listing of Dent Tactical ETF); 63076 (October 12, 2010), 75 FR 63874 (October 18, 2010) (SR–NYSEArca–2010–79) (order approving Exchange listing and trading of Cambria Global Tactical ETF); 63802 (January 31, 2011), 76 FR 6503 (February 4, 2011) (SR–NYSEArca–2010–118) (order approving Exchange listing and trading of the SiM Dynamic Allocation Diversified Income ETF and SiM Dynamic Allocation Growth Income ETF).

[7] NYSE Arca Rule 8.600–E(c)(2) defines the term ''Disclosed Portfolio'' as the identities and quantities of the securities and other assets held by the Investment Company that will form the basis for the Investment Company's calculation of net asset value at the end of the business day. NYSE Arca Equities Rule 8.600–E(d)(2)(B)(i) requires that the Disclosed Portfolio be disseminated at least once daily and be made available to all market participants at the same time.

Act.[8] The composition of the portfolio of a series of Managed Portfolio Shares would not be available at commencement of Exchange listing and/or trading. Second, in connection with the creation and redemption of shares in Creation Unit or Redemption Unit size (as described below), the delivery of any portfolio securities in kind will be effected through a Confidential Account (as described below) for the benefit of the creating or redeeming AP (as described below in ''Creation and Redemption of Shares'') without disclosing the identity of such securities to the AP.

For each series of Managed Portfolio Shares, an estimated value—the VIIV—that reflects an estimated intraday value of a fund's portfolio will be disseminated. Specifically, the VIIV will be based upon all of a series' holdings as of the close of the prior business day and, for corporate actions, based on the applicable holdings as of the opening of business on the current business day, and will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange's Core Trading Session. The dissemination of the VIIV will allow investors to determine the estimated intra-day value of the underlying portfolio of a series of Managed Portfolio Shares and will provide a close estimate of that value throughout the trading day.

The Exchange, after consulting with various Lead Market Makers (''LMMs'')[9] that trade ETFs on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the ETF's intraday value as long as a VIIV is disseminated in one second intervals, and market makers employ market making techniques such as ''statistical arbitrage,'' including correlation hedging, beta hedging, and dispersion trading, which is currently used throughout the financial services industry, to make efficient markets in exchange-traded products.[10] For Managed Portfolio Shares, market makers may use the knowledge of a Fund's means of achieving its investment objective, as described in the applicable Fund registration statement (the ''Registration Statement''), to construct a hedging proxy for a Fund to manage a market maker's quoting risk in connection with trading Fund Shares. Market makers can then conduct statistical arbitrage between their hedging proxy (for example, the Russell 1000 Index) and Shares of a Fund, buying and selling one against the other over the course of the trading day. This ability should permit market makers to make efficient markets in an issue of Managed Portfolio Shares without precise knowledge[11] of a Fund's underlying portfolio.[12] This is similar to certain other existing exchange-traded products (for example, ETFs that invest in foreign securities that do not trade during U.S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

To protect the identity and weightings of the portfolio holdings, a series of Managed Portfolio Shares would sell and redeem their shares in Creation Units and Redemption Units to APs only through an AP Representative. As such, on each business day, before commencement of trading in Shares on the Exchange, each series of Managed Portfolio Shares will provide to an AP Representative of each AP the names and quantities of the instruments comprising a Creation Basket, *i.e.,* the Deposit Instruments or ''Redemption Instruments'' and the estimated ''Balancing Amount'' (if any),[13] for that day (as further described below). This information will permit APs to purchase Creation Units or redeem Redemption Units through an in-kind transaction with a Fund, as described below.

Creation and Redemptions of Shares

In connection with the creation and redemption of Creation Units and Redemption Units, the delivery or receipt of any portfolio securities in-kind will be required to be effected through a Confidential Account[14] with an AP Representative,[15] which will be a broker-dealer such as broker-dealer affiliates of JP Morgan Chase, State Street Bank and Trust, or Bank of New York Mellon, for the benefit of an AP.[16]

[8] Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A Fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

[9] The term ''Lead Market Maker'' is defined in Rule 1.1(w) to mean a registered Market Maker that is the exclusive Designated Market Maker in listings for which the Exchange is the primary market.

[10] Statistical arbitrage enables a trader to construct an accurate proxy for another instrument, allowing it to hedge the other instrument or buy or sell the instrument when it is cheap or expensive in relation to the proxy. Statistical analysis permits traders to discover correlations based purely on trading data without regard to other fundamental drivers. These correlations are a function of differentials, over time, between one instrument or group of instruments and one or more other instruments. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging proxy has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period making corrections where warranted. In the case of correlation hedging, the analysis seeks to find a proxy that matches the pricing behavior of a fund. In the case of beta hedging, the analysis seeks to determine the relationship between the price movement over time of a fund and that of another stock. Dispersion trading is a hedged strategy designed to take advantage of relative value differences in implied volatilities between an index and the component stocks of that index. Such trading strategies will allow market participants to engage in arbitrage between series of Managed Portfolio Shares and other instruments, both through the creation and redemption process and strictly through arbitrage without such processes.

[11] Using the various trading methodologies described above, both APs and other market participants will be able to hedge exposures by trading correlative portfolios, securities or other proxy instruments, thereby enabling an arbitrage functionality throughout the trading day. For example, if an AP believes that Shares of a Fund are trading at a price that is higher than the value of its underlying portfolio based on the VIIV, the AP may sell Shares short and purchase securities that the AP believes will track the movements of a Fund's portfolio until the spread narrows and the AP executes offsetting orders or the AP enters an order through its AP Representative to create Fund Shares. Upon the completion of the Creation Unit, the AP will unwind its correlative hedge. Similarly, a non-AP market participant would be able to perform an identical function but, because it would not be able to create or redeem directly, would have to employ an AP to create or redeem Shares on its behalf.

[12] APs that enter into their own separate Confidential Accounts shall have enough information to ensure that they are able to comply with applicable regulatory requirements. For example, for purposes of net capital requirements, the maximum Securities Haircut applicable to the securities in a Creation Basket, as determined under Rule 15c3–1, will be disclosed daily on each Fund's website.

[13] The Balancing Amount is the cash amount necessary for the applicable Fund to receive or pay to compensate for the difference between the value of the securities delivered as part of a redemption and the NAV, to the extent that such values are different.

[14] Transacting through a Confidential Account is designed to be very similar to transacting through any broker-dealer account, except that the AP Representative will be bound to keep the names and weights of the portfolio securities confidential. Each service provider that has access to the identity and weightings of securities in a Fund's Creation Basket or portfolio securities, such as a Fund's custodian or pricing verification agent, shall be restricted contractually from disclosing that information to any other person, or using that information for any purpose other than providing services to the Fund. To comply with certain recordkeeping requirements applicable to APs, the AP Representative will maintain and preserve, and make available to the Commission, certain required records related to the securities held in the Confidential Account.

[15] Each AP shall enter into its own separate Confidential Account with an AP Representative.

[16] Each Fund will identify one or more entities to enter into a contractual arrangement with the Fund

An AP must be a Depository Trust Company (''DTC'') Participant that has executed a ''Participant Agreement'' with the applicable distributor (the ''Distributor'') with respect to the creation and redemption of Creation Units and Redemption Units and formed a Confidential Account for its benefit in accordance with the terms of the Participant Agreement. For purposes of creations or redemptions, all transactions will be effected through the respective AP's Confidential Account, for the benefit of the AP without disclosing the identity of such securities to the AP. The Funds will offer and redeem Creation Units and Redemption Units on a continuous basis at the NAV per Share next determined after receipt of an order in proper form. The NAV per Share of each Fund will be determined as of the close of regular trading each business day. Funds will sell and redeem Creation Units and Redemption Units only on business days.

Each AP Representative will be given, before the commencement of trading each business day, the Creation Basket for that day. The published Creation Basket will apply until a new Creation Basket is announced on the following business day, and there will be no intra-day changes to the Creation Basket except to correct errors in the published Creation Basket. In order to keep costs low and permit Funds to be as fully invested as possible, Shares will be purchased and redeemed in Creation Units and Redemption Units and generally on an in-kind basis. Accordingly, except where the purchase or redemption will include cash under the circumstances required or determined permissible by the Fund, APs will be required to purchase Creation Units by making an in-kind deposit of specified instruments (''Deposit Instruments''), and APs redeeming their Shares will receive an in-kind transfer of Redemption Instruments through the AP Representative in their Confidential Account.[17]

In the case of a creation, the AP[18] would enter into an irrevocable creation order with a Fund and then direct the AP Representative to purchase the necessary basket of portfolio securities. The AP Representative would then purchase the necessary securities in the Confidential Account. In purchasing the necessary securities, the AP Representative would use methods such as breaking the purchase into multiple purchases and transacting in multiple marketplaces. Once the necessary basket of securities has been acquired, the purchased securities held in the Confidential Account would be contributed in-kind to the applicable Fund.

Other market participants that are not APs will not have the ability to create or redeem shares directly with a Fund. Rather, if other market participants wish to create or redeem Shares in a Fund, they will have to do so through an AP.

Placement of Purchase Orders

Each Fund will issue Shares through the Distributor on a continuous basis at NAV. The Exchange represents that the issuance of Shares will operate in a manner substantially similar to that of other ETFs. Each Fund will issue Shares only at the NAV per Share next determined after an order in proper form is received.

The Distributor will furnish acknowledgements to those placing orders that the orders have been accepted, but the Distributor may reject any order which is not submitted in proper form, as described in a Fund's prospectus or Statement of Additional Information (''SAI''). The NAV of each Fund is expected to be determined once each business day at a time determined by the board of the Investment Company (''Board''), currently anticipated to be as of the close of the regular trading session on the NYSE (ordinarily 4:00 p.m. E.T.) (the ''Valuation Time''). Each Fund will establish a cut-off time (''Order Cut-Off Time'') for purchase orders in proper form. To initiate a purchase of Shares, an AP must submit to the Distributor an irrevocable order to purchase such Shares after the most recent prior Valuation Time.

Purchases of Shares will be settled in-kind and/or cash for an amount equal to the applicable NAV per Share purchased plus applicable ''Transaction Fees,'' as discussed below.

Generally, all orders to purchase Creation Units must be received by the Distributor no later than the end of Core Trading Session on the date such order is placed (''Transmittal Date'') in order for the purchaser to receive the NAV per Share determined on the Transmittal Date. In the case of custom orders made in connection with creations or redemptions in whole or in part in cash, the order must be received by the Distributor, no later than the Order Cut-Off Time.[19]

Authorized Participant Redemption

The Shares may be redeemed to a Fund in Redemption Unit size or multiples thereof as described below. Redemption orders of Redemption Units must be placed by or through an AP (''AP Redemption Order''). Each Fund will establish an Order Cut-Off Time for redemption orders of Redemption Units in proper form. Redemption Units of a Fund will be redeemable at their NAV per Share next determined after receipt of a request for redemption by the Investment Company in the manner specified below before the Order Cut-Off Time. To initiate an AP Redemption Order, an AP must submit to the Distributor an irrevocable order to redeem such Redemption Unit after the most recent prior Valuation Time but not later than the Order Cut-Off Time.

In the case of a redemption, the AP would enter into an irrevocable redemption order, and then instruct the AP Representative to sell the underlying basket of securities that it will receive in the redemption. As with the purchase of securities, the AP Representative would be required to obfuscate the sale of the portfolio securities it will receive as redemption proceeds using similar tactics.

Consistent with the provisions of Section 22(e) of the 1940 Act and Rule 22e–2 thereunder, the right to redeem will not be suspended, nor payment upon redemption delayed, except for: (1) Any period during which the Exchange is closed other than customary weekend and holiday closings, (2) any period during which trading on the Exchange is restricted, (3) any period during which an emergency exists as a result of which disposal by a Fund of securities owned by it is not reasonably practicable or it is not reasonably practicable for a Fund to determine its NAV, and (4) for such other periods as the Commission may by

to serve as an AP Representative. In selecting entities to serve as AP Representatives, a Fund will obtain representations from the entity related to the confidentiality of the Fund's Creation Basket and portfolio securities, the effectiveness of information barriers, and the adequacy of insider trading policies and procedures. In addition, as a broker-dealer, Section 15(g) of the Act requires the AP Representative to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the misuse of material, non-public information by the AP Representative or any person associated with the AP Representative.

[17] Funds must comply with the federal securities laws in accepting Deposit Instruments and satisfying redemptions with Redemption Instruments, including that the Deposit Instruments and Redemption Instruments are sold in transactions that would be exempt from registration under the 1933 Act.

[18] An AP will issue execution instructions to the AP Representative and be responsible for all associated profit or losses. Like a traditional ETF, the AP has the ability to sell the basket securities at any point during the Core Trading Session.

[19] A ''custom order'' is any purchase or redemption of Shares made in whole or in part on a cash basis, as provided in the Registration Statement.

order permit for the protection of shareholders.

It is expected that redemptions will occur primarily in-kind, although redemption payments may also be made partly or wholly in cash. The Participant Agreement signed by each AP will require establishment of a Confidential Account to receive distributions of securities in-kind upon redemption.[20] Each AP will be required to open a Confidential Account with an AP Representative in order to facilitate orderly processing of redemptions.

After receipt of a Redemption Order, a Fund's custodian (''Custodian'') will typically deliver securities to the Confidential Account with a value approximately equal to the value of the Shares [21] tendered for redemption at the Cut-Off time. The Custodian will make delivery of the securities by appropriate entries on its books and records transferring ownership of the securities to the AP's Confidential Account, subject to delivery of the Shares redeemed. The AP Representative of the Confidential Account will in turn liquidate the securities based on instructions from the AP. The AP Representative will pay the liquidation proceeds net of expenses plus or minus any cash Balancing Amount to the AP through DTC. The redemption securities that the Confidential Account receives are expected to mirror the portfolio holdings of a Fund pro rata. To the extent a Fund distributes portfolio securities through an in-kind distribution to more than one Confidential Account for the benefit of the accounts' respective APs, each Fund expects to distribute a pro rata portion of the portfolio securities selected for distribution to each redeeming AP.

If the AP would receive a security that it is restricted from receiving, for example if the AP is engaged in a distribution of the security, a Fund will deliver cash equal to the value of that security. APs will provide the AP Representative with a list of restricted securities applicable to the AP on a daily basis, and a Fund will substitute cash for those securities in the applicable Confidential Account.

The Investment Company will accept a Redemption Order in proper form. A Redemption Order is subject to acceptance by the Investment Company and must be preceded or accompanied by an irrevocable commitment to deliver the requisite number of Shares. At the time of settlement, an AP will initiate a delivery of the Shares plus or minus any cash Balancing Amounts, and less the expenses of liquidation.

Surveillance

The Exchange believes that its surveillance procedures are adequate to properly monitor the trading of Managed Portfolio Shares on the Exchange during all trading sessions and to deter and detect violations of Exchange rules and the applicable federal securities laws. Trading of Managed Portfolio Shares through the Exchange will be subject to the Exchange's surveillance procedures for derivative products. The Exchange will require the issuer of each series of Managed Portfolio Shares, upon initial listing and periodically thereafter, to provide a representation that it is in compliance with Rule 8.900–E. In addition, the Exchange will require issuers to represent that they will notify the Exchange of any failure to comply with the terms of applicable exemptive and no-action relief. As part of its surveillance procedures, the Exchange will rely on the foregoing procedures to become aware of any non-compliance with the requirements of Rule 8.900–E.

The Exchange will require each issuer of a Fund to represent that it will advise the Exchange of any failure by a Fund to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Exchange Act, the Exchange will monitor for compliance with the continued listing requirements. If a Fund is not in compliance with the applicable listing requirements, the Exchange will commence delisting proceedings under Exchange Rule 5.5–E(m).

Specifically, the Exchange will implement real-time surveillances that monitor for the continued dissemination of the VIIV. The Exchange will also have surveillances designed to alert Exchange personnel where shares of a series of Managed Portfolio Shares are trading away from the VIIV. As noted in proposed Rule 8.900–E(b)(3), the Investment Company's investment adviser will upon request make available to the Exchange and/or FINRA, on behalf of the Exchange, the daily portfolio holdings of each series of Managed Portfolio Shares. The Exchange believes that this is appropriate because it will provide the Exchange or FINRA, on behalf of the Exchange, with access to the daily portfolio holdings of any series of Managed Portfolio Shares upon request on an as needed basis. The Exchange believes that the ability to access the information on an as needed basis will provide it with sufficient information to perform the necessary regulatory functions associated with listing and trading series of Managed Portfolio Shares on the Exchange, including the ability to monitor compliance with the initial and continued listing requirements as well as the ability to surveil for manipulation of the shares.

The Exchange notes that any equity instruments or futures held by a Fund operating under an exemptive order would trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[22] While future exemptive relief applicable to Managed Portfolio Shares may expand the investable universe, the Exchange notes that proposed Rule 8.900–E(b)(1) would require the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares and such proposal would describe the investable universe for any such series of Managed Portfolio Shares along with the Exchange's surveillance procedures applicable to such series.

FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, will communicate as needed regarding trading in the Shares, underlying exchange-traded instruments with other markets and other entities that are members of the Intermarket Surveillance Group (''ISG''), and FINRA, on behalf of the Exchange, or the regulatory staff of the Exchange, or both, may obtain trading information regarding trading such securities from such markets and other entities. In addition, the Exchange may obtain information regarding trading in the Shares, underlying exchange-traded instruments from other markets and other entities that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[20] The terms of each Confidential Account will be set forth as an exhibit to the applicable Participant Agreement, which will be signed by each AP. The Authorized Participant will be free to choose an AP Representative for its Confidential Account from a list of broker-dealers that have signed confidentiality agreements with the Fund. The Authorized Participant will be free to negotiate account fees and brokerage charges with its selected AP Representative. The Authorized Participant will be responsible to pay all fees and expenses charged by the AP Representative of its Confidential Account.

[21] If the NAV of the Shares redeemed differs from the value of the securities delivered to the applicable Confidential Account, the applicable Fund will receive or pay a cash Balancing Amount to compensate for the difference between the value of the securities delivered and the NAV.

[22] For a list of the current members of ISG, *see www.isgportal.com*. The Exchange notes that cash equivalents may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

In addition, the Exchange also has a general policy prohibiting the distribution of material, non-public information by its employees.

Trading Halts

As proposed above, the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (1) The extent to which trading is not occurring in the securities and/or the financial instruments comprising the portfolio; or (2) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Additionally, the Exchange would halt trading as soon as practicable where the Exchange becomes aware that: (1) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (2) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (3) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (4) such holdings are not made available to all market participants at the same time, (except as otherwise permitted under a currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares) (collectively, ''Availability of Information Halts''). The Exchange would halt trading in such series of Managed Portfolio Shares until such time as the VIIV, the NAV, or the holdings are available, as required.

Availability of Information

As noted above, Form N–PORT requires reporting of a fund's complete portfolio holdings on a position-by-position basis on a quarterly basis within 60 days after fiscal quarter end. Investors can obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.*

Information regarding market price and trading volume of the Shares will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services. Information regarding the previous day's closing price and trading volume information for the Shares will be published daily in the financial section of newspapers. Quotation and last sale information for the Shares will be available via the Consolidated Tape Association (''CTA'') high-speed line. In addition, the VIIV, as defined in proposed Rule 8.900–E(c)(2), will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange's Core Trading Session.

Trading Rules

The Exchange deems Managed Portfolio Shares to be equity securities, thus rendering trading in the Shares subject to the Exchange's existing rules governing the trading of equity securities. Managed Portfolio Shares will trade on the Exchange only during the trading hours specified in Rule 7.34–E(a). As provided in NYSE Arca Rule 7.6–E, the minimum price variation (''MPV'') for quoting and entry of orders in equity securities traded on the NYSE Arca Marketplace is $0.01, with the exception of securities that are priced less than $1.00 for which the MPV for order entry is $0.0001.

Information Bulletin

Prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin (''Bulletin'') of the special characteristics and risks associated with trading the Shares. Specifically, the Bulletin will discuss the following: (1) The procedures for purchases and redemptions of Shares; (2) NYSE Arca Rule 9.2–E(a), which imposes a duty of due diligence on its ETP Holders to learn the essential facts relating to every customer prior to trading the Shares; (3) how information regarding the VIIV is disseminated; (4) the requirement that ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; (5) trading information; and (6) that the portfolio holdings of the Shares are not disclosed on a daily basis.

In addition, the Bulletin will reference that Funds are subject to various fees and expenses described in the Registration Statement. The Bulletin will discuss any exemptive, no-action, and interpretive relief granted by the Commission from any rules under the Act. The Bulletin will also disclose that the NAV for the Shares will be calculated after 4:00 p.m., E.T. each trading day.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[23] in general, and furthers the objectives of Section 6(b)(5) of the Act,[24] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 proposed Rule 8.900–E is designed to prevent fraudulent and manipulative acts and practices in that the proposed rules relating to listing and trading of Managed Portfolio Shares provide specific initial and continued listing criteria required to be met by such securities. Proposed Rule 8.900–E(d) sets forth initial and continued listing criteria applicable to Managed Portfolio Shares. Proposed Rule 8.900–E(d)(1)(A) provides that, for each series of Managed Portfolio Shares, the Exchange will establish a minimum number of Managed Portfolio Shares required to be outstanding at the time of commencement of trading. In addition, proposed Rule 8.900–E(d)(1)(B) provides that the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share for the series will be calculated daily and that the NAV will be made available to all market participants at the same time.[25] Proposed Rule 8.900–E(d)(2) provides that each series of Managed Portfolio Shares will be listed and traded subject to application of the specified continued listing criteria, as described above. Proposed Rule 8.900–E(d)(2)(A) provides that the VIIV for Managed Portfolio Shares will be widely disseminated by the Reporting Authority and/or one or more major market data vendors in one second intervals during the Exchange's Core Trading Session, and will be disseminated to all market participants

[23] 15 U.S.C. 78f(b).

[24] 15 U.S.C. 78f(b)(5).

[25] Proposed Rule 8.900–E(d)(2)(C)(ii) provides that if the Exchange becomes aware that the NAV with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the NAV is available to all market participants at the same time.

at the same time. Proposed Rule 8.900–E(d)(2)(B) provides that the Exchange will consider the suspension of trading in, and will commence delisting proceedings under Rule 5.5–E(m) for, a series of Managed Portfolio Shares under any of the following circumstances: (a) If, following the initial twelve-month period after commencement of trading on the Exchange of a series of Managed Portfolio Shares, there are fewer than 50 beneficial holders of the series of Managed Portfolio Shares; (b) if the Exchange has halted trading in a series of Managed Portfolio Shares because the Verified Intraday Indicative Value is interrupted pursuant to Rule 8.900–E(d)(2)(C)(ii) and such interruption persists past the trading day in which it occurred or is no longer available; (c) if the Exchange has halted trading in a series of Managed Portfolio Shares because the net asset value with respect to such series of Managed Portfolio Shares is not disseminated to all market participants at the same time, the holdings of such series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act, or such holdings are not made available to all market participants at the same time pursuant to Rule 8.900–E(d)(2)(C)(ii) and such issue persists past the trading day in which it occurred; (d) if the Exchange has halted trading in a series of Managed Portfolio Shares pursuant to Rule 8.900–E(d)(2)(C)(i), such issue persists past the trading day in which it occurred; (e) if the Investment Company issuing the Managed Portfolio Shares has failed to file any filings required by the Commission or if the Exchange is aware that the Investment Company is not in compliance with the conditions of any currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares; (f) if any of the continued listing requirements set forth in Rule 8.900–E are not continuously maintained; (g) if any of the statements or representations regarding (a) the description of the portfolio, (b) limitations on portfolio holdings, or (c) the applicability of Exchange listing rules, specified in the Exchange's rule filing pursuant to Section 19(b) of the Securities Exchange Act of 1934 to permit the listing and trading of a series of Managed Portfolio Shares, are not continuously maintained; or (h) if such other event shall occur or condition exists which, in the opinion of the Exchange, makes further dealings on the Exchange inadvisable. Proposed Rule 5.900–E(d)(2)(C)(i) provides that the Exchange may consider all relevant factors in exercising its discretion to halt trading in the series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present.

Proposed Rule 8.900–E(d)(2)(C)(ii) provides that, if the Exchange becomes aware that: (a) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (b) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (c) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (d) such holdings are not made available to all market participants at the same time (except as otherwise permitted under the currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares), it will halt trading in such series until such time as the VIIV, the net asset value, or the holdings are available, as required. Proposed Rule 8.900–E(d)(2)(D) provides that, upon termination of an Investment Company, the Exchange requires that Managed Portfolio Shares issued in connection with such entity be removed from Exchange listing. Proposed Rule 8.900–E(d)(2)(E) provides that voting rights shall be as set forth in the applicable Investment Company prospectus and/or Statement of Additional Information. The Exchange also notes that pursuant to its exemptive order, an issuer must comply with Regulation Fair Disclosure, which prohibits selective disclosure of any material non-public information, which otherwise do not apply to issuers of Managed Fund Shares.

Proposed Rule 8.900–E(b)(4) provides that, if the investment adviser to the Investment Company issuing Managed Portfolio Shares is registered as a broker-dealer or is affiliated with a broker-dealer, such investment adviser will erect and maintain a ''fire wall'' between the investment adviser and personnel of the broker-dealer or broker-dealer affiliates, as applicable, with respect to access to information concerning the composition of and/or changes to such Investment Company portfolio and/or the Creation Basket. Any person related to the investment adviser or Investment Company who makes decisions pertaining to the Investment Company's portfolio composition or has access to information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket must be subject to procedures designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Proposed Rule 8.900–E(b)(5) provides that, any person or entity, including an AP Representative, custodian, Reporting Authority, distributor, or administrator, who has access to non-public information regarding the Investment Company's portfolio composition or changes thereto or the Creation Basket, must be subject to procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the applicable Investment Company portfolio or changes thereto or the Creation Basket. Moreover, if any such person or entity is registered as a broker-dealer or affiliated with a broker-dealer, such person or entity will erect and maintain a ''fire wall'' between the person or entity and the broker-dealer with respect to access to information concerning the composition and/or changes to such Investment Company portfolio or Creation Basket.

The Exchange believes that these proposed rules are designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares because they provide meaningful requirements about both the data that will be made publicly available about the Shares as well as the information that will only be available to certain parties and the controls on such information. Specifically, the Exchange believes that the requirements related to information protection enumerated under proposed Rule 8.900–E(b)(5) will act as a strong safeguard against any misuse and improper dissemination of non-public information related to a Fund's portfolio composition, the Creation Basket, or changes thereto. The requirement that any person or entity implement procedures reasonably designed to prevent the use and dissemination of material non-public information regarding the portfolio or

Creation Basket will act to prevent any individual or entity from sharing such information externally and the internal ''fire wall'' requirements applicable where an entity is a registered broker-dealer or affiliated with a broker-dealer will act to make sure that no entity will be able to misuse the data for their own purpose. As such, the Exchange believes that this proposal is designed to prevent fraudulent and manipulative acts and practices.

The Exchange, after consulting with various LMMs that trade ETFs on the Exchange, believes that market makers will be able to make efficient and liquid markets priced near the VIIV, as long as market makers have knowledge of a Fund's means of achieving its investment objective, even without daily disclosure of a fund's underlying portfolio. The Exchange believes that market makers will employ risk-management techniques to make efficient markets in exchange traded products. This ability should permit market makers to make efficient markets in shares without knowledge of a fund's underlying portfolio.

The Exchange understands that traders use statistical analysis to derive correlations between different sets of instruments to identify opportunities to buy or sell one set of instruments when it is mispriced relative to the others. For Managed Portfolio Shares, market makers utilizing statistical arbitrage use the knowledge of a fund's means of achieving its investment objective, as described in the applicable fund registration statement, to construct a hedging proxy for a fund to manage a market maker's quoting risk in connection with trading fund shares. Market makers will then conduct statistical arbitrage between their hedging proxy (for example, the Russell 1000 Index) and shares of a fund, buying and selling one against the other over the course of the trading day. Eventually, at the end of each day, they will evaluate how their proxy performed in comparison to the price of a fund's shares, and use that analysis as well as knowledge of risk metrics, such as volatility and turnover, to enhance their proxy calculation to make it a more efficient hedge.

Market makers have indicated to the Exchange that there will be sufficient data to run a statistical analysis which will lead to spreads being tightened substantially around the VIIV. This is similar to certain other existing exchange-traded products (for example, ETFs that invest in foreign securities that do not trade during U.S. trading hours), in which spreads may be generally wider in the early days of trading and then narrow as market makers gain more confidence in their real-time hedges.

The LMMs also indicated that, as with some other new exchange-traded products, spreads would tend to narrow as market makers gain more confidence in the accuracy of their hedges and their ability to adjust these hedges in real-time relative to the published VIIV and gain an understanding of the applicable market risk metrics such as volatility and turnover, and as natural buyers and sellers enter the market. Other relevant factors cited by LMMs were that a fund's investment objectives are clearly disclosed in the applicable prospectus, the existence of quarterly portfolio disclosure and the ability to create shares in creation unit size or redeem in redemption unit size through an AP.

The real-time dissemination of a Fund's VIIV together with the right of APs to create and redeem each day at the NAV will be sufficient for market participants to value and trade Shares in a manner that will not lead to significant deviations between the Shares' bid/ask price and NAV.

The pricing efficiency with respect to trading a series of Managed Portfolio Shares will generally rest on the ability of market participants to arbitrage between the Shares and a fund's portfolio, in addition to the ability of market participants to assess a fund's underlying value accurately enough throughout the trading day in order to hedge positions in shares effectively. Professional traders can buy Shares that they perceive to be trading at a price less than that which will be available at a subsequent time, and sell Shares they perceive to be trading at a price higher than that which will be available at a subsequent time. It is expected that, as part of their normal day-to-day trading activity, market makers assigned to Shares by the Exchange, off-exchange market makers, firms that specialize in electronic trading, hedge funds and other professionals specializing in short-term, non-fundamental trading strategies will assume the risk of being ''long'' or ''short'' shares through such trading and will hedge such risk wholly or partly by simultaneously taking positions in correlated assets [26] or by netting the exposure against other, offsetting trading positions—much as such firms do with existing ETFs and other equities. Disclosure of a fund's investment objective and principal investment strategies in its prospectus and SAI, along with the dissemination of the VIIV in one second intervals, should permit professional investors to engage easily in this type of hedging activity.[27]

With respect to trading of the Shares, the ability of market participants to buy and sell Shares at prices near the VIIV is dependent upon their assessment that the VIIV is a reliable, indicative real-time value for a Fund's underlying holdings. Market participants are expected to accept the VIIV as a reliable, indicative real-time value because (1) the VIIV will be calculated and disseminated based on a Fund's actual portfolio holdings, (2) the securities in which a Fund plans to invest are generally highly liquid and actively traded and therefore generally have accurate real time pricing available, and (3) market participants will have a daily opportunity to evaluate whether the VIIV at or near the close of trading is indeed predictive of the actual NAV.

In a typical index-based ETF, it is standard for APs to know what securities must be delivered in a creation or will be received in a

[26] Price correlation trading is used throughout the financial industry. It is used to discover both trading opportunities to be exploited, such as currency pairs and statistical arbitrage, as well as for risk mitigation such as dispersion trading and beta hedging. These correlations are a function of differentials, over time, between one or multiple securities pricing. Once the nature of these price deviations have been quantified, a universe of securities is searched in an effort to, in the case of a hedging strategy, minimize the differential. Once a suitable hedging basket has been identified, a trader can minimize portfolio risk by executing the hedging basket. The trader then can monitor the performance of this hedge throughout the trade period, making corrections where warranted.

[27] With respect to trading in the Shares, market participants would manage risk in a variety of ways. It is expected that market participants will be able to determine how to trade Shares at levels approximating the VIIV without taking undue risk by gaining experience with how various market factors (*e.g.,* general market movements, sensitivity of the VIIV to intraday movements in interest rates or commodity prices, etc.) affect VIIV, and by finding hedges for their long or short positions in Shares using instruments correlated with such factors. Market participants will likely initially determine the VIIV's correlation to a major large capitalization equity benchmark with active derivative contracts, such as the Russell 1000 Index, and the degree of sensitivity of the VIIV to changes in that benchmark. For example, using hypothetical numbers for illustrative purposes, market participants should be able to determine quickly that price movements in the Russell 1000 Index predict movements in a Fund's VIIV 95% of the time (an acceptably high correlation) but that the VIIV generally moves approximately half as much as the Russell 1000 Index with each price movement. This information is sufficient for market participants to construct a reasonable hedge—buy or sell an amount of futures, swaps or ETFs that track the Russell 1000 equal to half the opposite exposure taken with respect to Shares. Market participants will also continuously compare the intraday performance of their hedge to a Fund's VIIV. If the intraday performance of the hedge is correlated with the VIIV to the expected degree, market participants will feel comfortable they are appropriately hedged and can rely on the VIIV as appropriately indicative of a Fund's performance.

redemption. For Managed Portfolio Shares, however, APs do not need to know the securities comprising the portfolio of a Fund since creations and redemptions are handled through the Confidential Account mechanism. In-kind creations and redemptions through a Confidential Account are expected to preserve the integrity of the active investment strategy and reduce the potential for ''free riding'' or ''front-running,'' while still providing investors with the advantages of the ETF structure.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange will obtain a representation from the Investment Company that issues each series of Managed Portfolio Shares that the NAV per share of a fund will be calculated daily and that the NAV will be made available to all market participants at the same time. Investors can also obtain a fund's Statement of Additional Information, its Shareholder Reports, its Form N–CSR, filed twice a year, and its Form N–CEN, filed annually. A fund's SAI and Shareholder Reports are available free upon request from the Investment Company, and those documents and the Form N–PORT, Form N–CSR, and Form N–CEN may be viewed on-screen or downloaded from the Commission's website at *www.sec.gov.* In addition, a large amount of information will be publicly available regarding the Funds and the Shares, thereby promoting market transparency. Quotation and last sale information for the Shares will be available via the CTA high-speed line. Information regarding the VIIV will be widely disseminated in one second intervals throughout the Core Trading Session by the Reporting Authority and/or one or more major market data vendors. The website for each Fund will include a form of the prospectus for the Fund that may be downloaded, and additional data relating to NAV and other applicable quantitative information, updated on a daily basis. Moreover, prior to the commencement of trading, the Exchange will inform its members in an Information Bulletin of the special characteristics and risks associated with trading the Shares.

The Exchange further believes that the proposal is designed to prevent fraudulent and manipulative acts and practices related to the listing and trading of Managed Portfolio Shares and to promote just and equitable principles of trade and to protect investors and the public interest in that the Exchange would halt trading under certain circumstances under which trading in the shares of a Fund may be inadvisable. Specifically, the Exchange may consider all relevant factors in exercising its discretion to halt trading in a series of Managed Portfolio Shares. Trading may be halted because of market conditions or for reasons that, in the view of the Exchange, make trading in the series of Managed Portfolio Shares inadvisable. These may include: (a) The extent to which trading is not occurring in the securities and/or the financial instruments composing the portfolio; or (b) whether other unusual conditions or circumstances detrimental to the maintenance of a fair and orderly market are present. Additionally, the Exchange would halt trading as soon as practicable where the Exchange becomes aware that: (a) The VIIV of a series of Managed Portfolio Shares is not being calculated or disseminated in one second intervals, as required; (b) the net asset value with respect to a series of Managed Portfolio Shares is not disseminated to all market participants at the same time; (c) the holdings of a series of Managed Portfolio Shares are not made available on at least a quarterly basis as required under the 1940 Act; or (d) such holdings are not made available to all market participants at the same time, (except as otherwise permitted under a currently applicable exemptive order or no-action relief granted by the Commission or Commission staff to the Investment Company with respect to the series of Managed Portfolio Shares). The Exchange would halt trading in such series of Managed Portfolio Shares until such time as the VIIV, the NAV, or the holdings are available, as required.

The Exchange is proposing to retain discretion to halt trading in a series of Managed Portfolio Shares based on market conditions or where the Exchange determines that trading in such series is inadvisable (each a ''Discretionary Halt'') and is also proposing the four Availability of Information Halts described above. The Exchange believes that retaining discretion to implement a Discretionary Halt as specified is consistent with the Act. The proposed rule retaining discretion related to halts is designed to ensure the maintenance of a fair and orderly market and protect investors and the public interest in that it provides the Exchange with the ability to halt when it determines that trading in the shares is inadvisable. This could be based on the Exchange's own analysis of market conditions being detrimental to a fair and orderly market and/or information provided by the Investment Company or its agent. There are certain circumstances related to the trading and dissemination of information related to the underlying holdings of a series of Managed Portfolio Shares, such as the extent to which trading is not occurring in the securities and/or financial instruments composing the portfolio, that the Exchange may not be in a position to know or become aware of as expeditiously as the Investment Company or its agent. There are certain circumstances where the Investment Company or its agent may request that the Exchange halt trading in the applicable series of Managed Portfolio Shares. Upon receipt of information and/or a request from the Investment Company, the Exchange would consider the information and/or circumstances leading to the request as well as other factors both specific to such issue of Managed Portfolio Shares and the broader market in determining whether trading in the series of Managed Portfolio Shares is inadvisable and that halting trading is necessary in order to maintain a fair and orderly market. As such, the Exchange believes that the proposal to provide the Exchange with discretion to implement a Discretionary Halt is consistent with the Act.

The Exchange believes that the proposed Availability of Information Halts to halt trading in shares of a series of Managed Portfolio Shares are consistent with the Act because: (i) The Commission has already determined that the requirement that the VIIV be disseminated every second is appropriate; (ii) the other Availability of Information Halts are generally consistent with and designed to address the same concerns about asymmetry of information that Rule 8.600–E(d)(2)(D) related to trading halts in Managed Fund Shares [28] is intended to address,

[28] Rule 8.600–E(d)(2)(D) provides that ''If the Portfolio Indicative Value (as defined in Rule 8.600–E(c)(3)) of a series of Managed Fund Shares is not being disseminated as required, the Exchange may halt trading during the day in which the interruption to the dissemination of the Portfolio Indicative Value occurs. If the interruption to the dissemination of the Portfolio Indicative Value persists past the trading day in which it occurred, the Exchange will halt trading no later than the beginning of the trading day following the interruption. If a series of Managed Fund Shares is trading on the Exchange pursuant to unlisted trading privileges, the Exchange will halt trading in that series as specified in Rule 7.34–E(a). In addition, if the Exchange becomes aware that the net asset value or the Disclosed Portfolio with respect to a series of Managed Fund Shares is not disseminated to all market participants at the same time, it will halt trading in such series until such time as the net asset value or the Disclosed Portfolio is available to all market participants.'' These are generally consistent with the proposed Availability of Information Halts, specifically as it relates to whether the NAV or Disclosed Portfolio is not being

specifically that the availability of such information is intended to reduce the potential for manipulation and help ensure a fair and orderly market in Managed Portfolio Shares;[29] and (iii) the quarterly disclosure of portfolio holdings is a fundamental component of Managed Portfolio Shares that allows market participants to better understand the strategy of the funds and to monitor how closely trading in the funds is tracking the value of the underlying portfolio and when such information is not being disclosed as required, trading in the shares is inadvisable and it is necessary and appropriate to halt trading. The Exchange notes, however, that an Investment Company that issues Managed Portfolio Shares will still be subject to Rule 5.2–E(b), which requires that an ''Issuer with securities listed under Rule 5.2–E or Rule 8–E must provide the Exchange with prompt notification after the issuer becomes aware of any noncompliance by the issuer with the applicable continued listing requirements of Rule 5.2–E, Rule 5.5–E or Rule 8–E.''

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of an additional type of actively-managed exchange-traded product that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. Additionally, any equity instruments or futures held by a Fund operating under an exemptive order would trade on markets that are a member of Intermarket Surveillance Group (''ISG'') or affiliated with a member of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.[30] While future exemptive relief applicable to Managed Portfolio Shares may expand the investable universe, the Exchange notes that proposed Rule 8.900–E(b)(1) would require the Exchange to file separate proposals under Section 19(b) of the Act before listing and trading any series of Managed Portfolio Shares and such proposal would describe the investable universe for any such series of Managed Portfolio Shares along with the Exchange's surveillance procedures applicable to such series. In addition, as noted above, investors will have ready access to information regarding the VIIV and quotation and last sale information for the Shares.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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 Exchange notes that the proposed rule change, rather will facilitate the listing and trading of a new type of actively-managed exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

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) of the Act[31] and Rule 19b–4(f)(6) thereunder.[32]

A proposed rule change filed under Rule 19b–4(f)(6)[33] normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[34] the Commission may 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 so that the proposal may become operative immediately upon filing. The Exchange states that waiver of the operative delay would allow for the immediate listing and trading of Managed Portfolio Shares on the Exchange and therefore would provide issuers with an additional listing and trading venue. The Commission notes that the proposed rule change is based on and substantively identical to the rules of the Cboe BZX Exchange, Inc. (''BZX'') relating to the listing of Managed Portfolio Shares.[35] For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.[36]

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 necessary or appropriate in the public interest, for the protection of

made available to all market participants at the same time.

[29] *See, e.g.,* Securities Exchange Act Release No. 80169 (March 7, 2017), 82 FR 13536 (March 13, 2017); Securities Exchange Act Release Nos. 54739 (November 9, 2006), 71 FR 66993, 66997 (November 17, 2006) (SR–AMEX–2006–78) (approving generic listing standards for Portfolio Depositary Receipts and Index Fund Shares based on international or global indexes, and stating that ''the proposed listing standards are designed to preclude ETFs from becoming surrogates for trading in unregistered securities'' and that ''the requirement that each component security underlying an ETF be listed on an exchange and subject to last-sale reporting should contribute to the transparency of the market for ETFs'' and that ''by requiring pricing information for both the relevant underlying index and the ETF to be readily available and disseminated, the proposal is designed to ensure a fair and orderly market for ETFs''); 53142 (January 19, 2006), 71 FR 4180, 4186 (January 25, 2006) (SR–NASD–2006–001) (approving generic listing standards for Index-Linked Securities and stating that ''[t]he Commission believes that by requiring pricing information for both the relevant underlying index or indexes and the Index Security to be readily available and disseminated, the proposed listing standards should help ensure a fair and orderly market for Index Securities'').

[30] The Exchange notes that cash equivalents may trade on markets that are members of ISG or with which the Exchange has in place a comprehensive surveillance sharing agreement.

[31] 15 U.S.C. 78s(b)(3)(A).

[32] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) 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 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.

[33] 17 CFR 240.19b–4(f)(6).

[34] 17 CFR 240.19b–4(f)(6)(iii).

[35] *See* BZX Rule 14.11(k). *See also* Securities Exchange Act Release No. 87759 (December 16, 2019), 84 FR 70223 (December 20, 2019) (SR–CboeBZX–2019–047) (Notice of Filing of Amendment Nos. 4 and 5, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 4 and 5, To Adopt BZX Rule 14.11(k) To Permit the Listing and Trading of Managed Portfolio Shares).

[36] 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).

investors, or otherwise in furtherance of the purposes of the Act.

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.* Please include File Number SR–NYSEArca–2020–32 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–NYSEArca–2020–32. 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 website (*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 website 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSEArca–2020–32 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[37]

J. Matthew DeLesDernier,

Assistant Secretary.

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[37] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88647; File No. SR–CboeBYX–2019–012]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On August 1, 2019, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BYX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On September 30, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP. On February 12, 2020, pursuant to Section 19(b)(2) of the Act,[8] the Commission designated a longer period within which to approve or disapprove the proposed rule change.[9] On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeBYX–2019–012).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

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[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207 (August 20, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87166 (September 30, 2019), 84 FR 53197 (October 4, 2019).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Securities Exchange Act Release No. 88179 (February 12, 2020), 85 FR 9505 (February 19, 2020).

[10] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88638; File No. SR–CBOE–2020–032]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fees Schedule

April 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 1, 2020, Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III 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

Cboe Exchange, Inc. (the ''Exchange'' or ''Cboe Options'') proposes to amend its fees schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (*http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx*), at the Exchange's Office of the Secretary, 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to make various amendments to its Fees Schedule, including amending Footnote 12 of the Fees Schedule, effective April 1, 2020. By way of background, Footnote 12 governs pricing changes in the event the Exchange trading floor becomes inoperable. Particularly, in the event the trading floor becomes inoperable, the Exchange will continue to operate in a screen-based only environment using a floorless configuration of the System that is operational while the trading floor facility is inoperable. The Exchange would operate using that configuration only until the Exchange's trading floor facility became operational. Open outcry trading would not be available in the event the trading floor becomes inoperable. The exchange initially adopted Footnote 12 in anticipation of the temporary closing of the trading floor in the middle of March 2020 to help prevent the spread of the novel coronavirus. As of March 16, 2020, the Exchange suspended open outcry trading and is currently operating in an all-electronic configuration. In light of the extended closure of the trading floor, the Exchange proposes to update a number of its previous fee changes and adopt new pricing changes that the Exchange believes is appropriate when the trading floor is inoperable for an extended period of time.

Footnote 12 of the Fees Schedule currently provides that in the event the trading floor becomes inoperable, holders of a Market-Maker Floor Permit will be entitled to act as an electronic Market-Maker and holders of a Floor Broker Permit will be entitled to access the Exchange electronically to submit orders to the Exchange, at no further cost. Generally, in order to act as a Market-Maker electronically a Trading Permit Holder (''TPH'') must purchase a Market-Maker Electronic Access Permit (''MM EAP''). In order to access the Exchange electronically and submit orders to the Exchange, a TPH must purchase an ''Electronic Access Permit'' (''EAP''). Conversely, TPHs that wish to act as a Market-Maker on the floor have to purchase a Market-Maker Permit and TPHs that wish to act as a Floor Broker on the floor of the Exchange have to purchase a Floor Broker Permit. Effective March 16, 2020, the Exchange proposed to provide that holders of a Market-Maker Floor Permit and Floor Broker Permit were entitled to operate electronically in their registered capacity at no additional cost (*i.e.,* not charge for an additional Market-Maker Electronic Access Permit or Electronic Access Permit). This proposal was adopted in order to encourage floor-based market participants to continue to participate on the Exchange electronically if the trading floor becomes inoperable for the remainder of the month.[3] The Exchange now proposes to provide that any floor Market-Maker or Floor Broker that did not also already hold a MM EAP or EAP, respectively, will be assessed the monthly fee for one MM EAP or EAP, respectively, should such participant wish to continue to participate electronically on the Exchange while the trading floor is inoperable. The Exchange also proposes to provide that in the event that the trading floor reopens mid-month, that floor Trading Permit fees would be pro-rated based on the remaining trading days in that calendar month.

The Exchange next proposes to eliminate an exception relating to the Market-Maker EAP Appointments Sliding Scale. Currently, Footnote 12 provides that for purposes of the Market-Maker EAP Appointments Sliding Scale, the total quantity will be determined by the highest quantity used at any point during the month excluding additional quantity added during the time the Exchange operates in a screen-based only environment. By of way of background, Electronic Market-Makers must select appointments and are charged for one or more ''Appointment Units'' (which are scaled from 1 ''unit'' to more than 5 ''units''), depending on which classes they elect appointments in. Appointment weights for each appointed class are set forth in Cboe Options Rule 5.50(g) and are summed for each Market-Maker in order to determine the total Appointment Units, to which fees will be assessed. To determine final fees, historically the total quantity was determined by the highest quantity used at any point during the month. In anticipation of the trading floor closing mid-month, the Exchange amended its fees schedule to exclude from the total Appointment Units any additional quantity added during the time the Exchange operates in a screen-based only environment, in order to encourage continued participation on the Exchange by Market-Makers for the remainder of the month. The Exchange wishes to eliminate this exclusion in light of the continued trading floor closure, as Market-Makers would otherwise be able to add appointments unrelated to the floor closure throughout the month at no cost.

The Exchange next proposes to waive the following Facility Fees for as long as the trading floor is inoperable as such services and products cannot be utilized while the trading floor is closed:

Description	Fee
Standard Booth Rental Fees	$195/month (Perimeter); $550/month (OEX, Dow Jones/MNX/VIX).
Non Standard Booth Rental Fees	$1,250/month; $1.70 per sq ft./month.
Access Badges	$130/month (Floor Manager); $70/month (Clerks).
Printer Maintenance	$75/month.
Wireless Phone Rental	$110/month.
ExchangeFone Maintenance	$57/month.
Single Line Maintenance	$11.50/month.
Lines—Intra Floor	$57.75/per month.
Lines—Voice Circuits	$16/month.
Data Circuits (DC) at Local Carrier (entrance)	$16/month.
DC @In-House Frame—Lines Between Comms Center and Trading Floor.	$12.75/month.

[3] *See* Securities and Exchange Act Release No. 88426 (March 19, 2020), 85 FR 16978 (March 25, 2020) (SR–CBOE–2020–021).

Description	Fee
DC @In-House Frame—Lines between Local Carrier and Comms Center.	$12.75/month.
DC @In-House Frame—Lines Direct from Local Carrier to Trading Floor.	$12.75/month.
Arbitrage Phone Positions	$550/month.
PAR Workstation	$125/month.
Satellite TV	$50/month.
Cboe Options Trading Floor Terminal	$250/month.
Thomas/Refinitive/Other (Basic Service)	$425/month.

Should the trading floor re-open mid-month, the Exchange shall assess the fees listed above on a pro-rated basis for the remainder of the month.

The Exchange next proposes to amend a current waiver of Routing Fees. Currently, the Exchange assesses certain fees in connection with orders routed to other exchanges. The Fees Schedule provides however, that it will not pass through or otherwise charge customer orders (of any size) routed to other exchanges that were originally transmitted to the Exchange from the trading floor through an Exchange-sponsored terminal (*e.g.,* a PULSe Workstation).[4] The Exchange proposes to eliminate the requirement that a customer order be transmitted to the Exchange from the trading floor in the event the trading floor is inoperable. More specifically, the Exchange proposes to provide that it will not pass through or otherwise charge customer orders (of any size) routed to other exchanges that were originally transmitted to the Exchange from a registered Floor Broker through an Exchange-sponsored terminal (*e.g.,* a PULSe Workstation). The Exchange notes that the primary objective of routing fees are to recoup some of the costs associated with large electronic orders that are initially transmitted to the Exchange by parties who, in many instances, could be seeking to avoid being assessed another market's transaction fees. The Exchange adopted the current waiver because orders that are initially transmitted from the trading floor are not attempting to avoid fees since they incur brokerage commission charges in connection with manual handling.[5] Rather, orders that are generally transmitted from the floor are large, complex orders that are primarily executed on the Exchange, which only are transmitted to away markets if, during their execution on the Exchange, it is necessary to sweep some away markets. As such, the Exchange believed it was appropriate to waive linkage fees for these orders. The Exchange believes the waiver should apply to the same type of orders even when the Exchange operates in a screen-based only environment. Particularly, the Exchange notes that customer orders may still incur brokerage commission charges when the operates in a screen-based only environment in connection with handling by registered Floor Brokers (who may participate electronically when the trading floor is inoperable, as discussed above). As such, the Exchange believes it's appropriate to continue to apply the waiver to such orders that are still handled by Floor Brokers, albeit in a screen-based only environment instead of the trading floor, and still otherwise incur brokerage commission charges.

Lastly, the Exchange proposes to eliminate language in the notes section of the Logical Connectivity Fees Table. Currently, fees for one FIX Logical Port used to access PULSe and one FIX Logical Port connection used to access Cboe Silexx (for FLEX trading purposes) will be waived per TPH. The Exchange notes that when it adopted this fee waiver, Cboe Silexx only supported direct access to the Exchange for trading of FLEX options. The Exchange anticipates expanding the current Cboe Silexx platform to also support the trading of non-FLEX options in the near future. As such, the Exchange proposes to eliminate ''(for FLEX trading purposes)'' such that the waiver may apply to the use of Silexx for trading of FLEX and non-FLEX options.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the ''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[6] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[7] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[8] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes the proposed rule change to allow holders of Floor Trading Permits to operate in their registered capacity electronically at the cost of one MM EAP or EAP, respectively, is reasonable as such market participants would be paying the same amount as any other market participant that holds a MM EAP or EAP, respectively. The Exchange notes floor participants would also pay less than the amount otherwise charged for floor Trading Permits. The Exchange notes that it wishes to encourage floor-based market participants to continue to participate on the Exchange electronically when the Exchange must operate in a screen-based only environment, but also notes it does not believe it's appropriate to allow such TPHs to participate on the Exchange indefinitely at no cost, while other participants are still subject to Trading Permit fees. The Exchange believes the proposed rule change is equitable and not unfairly discriminatory as all such floor participants will be treated equally. Indeed, all similarly situated market participants will be treated equally as all such market participants will be subject to the same electronic Trading Permit fees.

The Exchange believes the proposal to eliminate the exclusion of Appointment

[4] *See* Cboe Options Fees Schedule, Routing Fees.

[5] *See* Securities and Exchange Act Release No. 87799 (December 18, 2019), 84 FR 71021 (December 26, 2019) (SR–CBOE–2019–124).

[6] 15 U.S.C. 78f(b).

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(b)(4).

Units added during a time when the Exchange operates in a screen-based only environment toward the total quantity of Appointment Units for purposes of calculating the Market-Maker EAP Appointments Sliding Scale is reasonable, as the Exchange now expects the trading floor to be inoperable for an extended period of time. Particularly, as noted above, the Exchange adopted the current exclusion in anticipation of closing the trading floor mid-month (in March 2020) in order to encourage Market-Makers to continue to quote for the remainder of the month in classes electronically that they quoted on the trading floor. The Exchange notes however, that if the trading floor remains closed for an extended period of time, the current exclusion would ''freeze'' each Market-Makers Appointment Unit weight to the highest quantity maintained between March 1–March 13, 2020 (the last day the trading floor was open). For example, absent the proposed change, if the trading floor remains closed for the entire calendar months of April and May, any Market-Maker, including Market-Makers that historically only participated electronically, would be able to continuously add new appointments at no further cost, even if such appointment was unrelated to the trading floor being unavailable. The Exchange also notes that it is not required to maintain the current exclusion in the Fees Schedule. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all similarly situated market participants, as it will apply to all Market-Makers.

The Exchange believes the proposal to waive the identified facility fees is reasonable as market participants won't be subject to such fees. The listed facility fees each apply to a product or service that may only be utilized when the trading floor is open and operable. The Exchange believes it's therefore appropriate to waive such fees when the Exchange operates in a screen-based only environment. The Exchange also believes its appropriate to pro-rate such fees if the trading floor reopens mid-month as market participants will have the benefit of using such services/products for the remainder of the month. The Exchange believes the proposed rule change is equitable and not unfairly discriminatory as it applies equally to all market participants.

The Exchange next believes it's reasonable and appropriate to waive certain routing fees for customer orders that were transmitted by a registered Floor Broker through an Exchange sponsored terminal (currently only PULSe workstation) when the trading floor is inoperable as customers would not be subject to these fees. As noted above, the Exchange adopted the current waiver because orders that are initially transmitted from the trading floor are not attempting to avoid fees since they incur brokerage commission charges in connection with manual handling.[9] Rather, orders that are generally transmitted from the floor are large, complex orders that are primarily executed on the Exchange, which only are transmitted to away markets if, during their execution on the Exchange, it is necessary to sweep some away markets. As such, the Exchange believed it was appropriate to waive linkage fees for these orders. The Exchange believes it's reasonable and appropriate that the waiver should apply to the same type of orders even when the Exchange operates in a screen-based only environment. As discussed, customer orders may still incur brokerage commission charges when the Exchange operates in a screen-based only environment in connection with handling by registered Floor Brokers (who may participate electronically when the trading floor is inoperable). As such, the Exchange believes it's appropriate to modify the waiver to eliminate the requirement that such order be transmitted from the trading floor and instead provide that it be transmitted by a registered Floor Broker, as such order is still incurring a brokerage commission charge and otherwise being handled by a Floor Broker (albeit in an electronic environment instead of on the trading floor). The proposed waiver is equitable and not unfairly discriminatory as it would apply to all similarly situated market participants.

Lastly, the Exchange believes its proposal to modify the notes section of the Logical Connectivity Fees Table in order to provide that the current fee waiver for one FIX Logical Port may apply to Cboe Silexx for both FLEX and non-FLEX trading purposes is reasonable as such users of Cboe Silexx that trade non-FLEX options will not be subject to the FIX Logical Port fee. As discussed, when the Exchange adopted the current logical connectivity fees, Cboe Silexx only supported direct access for trading of FLEX options only. As the Exchange proposes to expand the Cboe Silexx platform shortly to support the trading of non-FLEX options, the Exchange believes it's appropriate to eliminate the ''for FLEX trading purposes'' language and apply the fee waiver to Cboe Silexx generally. The proposed waiver is equitable and not unfairly discriminatory as it would apply to all similarly situated market participants.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule changes will impose any burden on competition that are not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes the proposed changes relating to Footnote 12 are not intended to address any competitive issue, but rather to address fee changes it believes are reasonable because the trading floor remains inoperable, thereby only permitting electronic participation on the Exchange. The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply equally to all similarly situated market participants. Additionally, the proposed change to eliminate the restriction that the FIX Logical Port fee waivers applies to Cboe Silexx for FLEX trading only is also not intended to address any competitive issue, but rather extend the current waiver to the new version of Silexx that will also support non-FLEX trading, which would apply to all users of Silexx. The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes only affect trading on the Exchange in limited circumstances.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[10] and paragraph (f) of Rule 19b–4[11] thereunder. 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 necessary or appropriate in the

[9] *See* Securities and Exchange Act Release No. 87799 (December 18, 2019), 84 FR 71021 (December 26, 2019) (SR–CBOE–2019–124).

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f).

public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change 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.* Please include File Number SR–CBOE–2020–032 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–CBOE–2020–032. 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 website (*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 website 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2020–032 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08368 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88641; File No. SR–CboeBYX–2019–015]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On October 1, 2019, Cboe BYX Exchange, Inc. (''Exchange'' or ''BYX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BYX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on October 21, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On December 10, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP.

On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeBYX–2019–015).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 87305 (October 15, 2019), 84 FR 56210 (October 21, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87713 (December 10, 2019), 84 FR 68530 (December 16, 2019).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08371 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[8] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88643; File No. SR–CboeEDGA–2019–013]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On August 1, 2019, Cboe EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGA fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On September 30, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP. On February 12, 2020, pursuant to Section 19(b)(2) of the Act,[8] the Commission designated a longer period within which to approve or disapprove the proposed rule change.[9] On April 9, 2020, the Exchange withdrew the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86676 (August 14, 2019), 84 FR 43218 (August 20, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87165 (September 30, 2019), 84 FR 53205 (October 4, 2019).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Securities Exchange Act Release No. 88177 (February 12, 2020), 85 FR 9493 (February 19, 2020).

proposed rule change (SR–CboeEDGA–2019–013).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08380 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88646; File No. SR–CboeBZX–2019–069]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On August 1, 2019, Cboe BZX Exchange, Inc. (''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the BZX fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on August 20, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On September 30, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act[5] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP. On February 12, 2020, pursuant to Section 19(b)(2) of the Act,[8] the Commission designated a longer period within which to approve or disapprove the proposed rule change.[9] On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeBZX–2019–069).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08383 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 86667 (August 14, 2019), 84 FR 43233 (August 20, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87164 (September 30, 2019), 84 FR 53208 (October 4, 2019).

[8] 15 U.S.C. 78s(b)(2).

[9] *See* Securities Exchange Act Release No. 88180 (February 12, 2020), 85 FR 9504 (February 19, 2020).

[10] 17 CFR 200.30–3(a)(57) and (58).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33839; File No. 812–15019]

Great Elm Capital Corp., et al.

April 15, 2020.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the ''Act'') and rule 17d–1 under the Act to permit certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and rule 17d–1 under the Act.

SUMMARY OF APPLICATION: Applicants request an order to permit certain business development companies (''BDCs'') and closed-end management investment companies to co-invest in portfolio companies with each other and with affiliated investment funds.

APPLICANTS: Great Elm Capital Corp. (''GECC''), Great Elm Capital Management, Inc. (''Great Elm Adviser''), each on behalf of itself and its successors,[1] and Great Elm Opportunities Fund I, LP (''Existing Affiliated Fund'').

FILING DATES: The application was filed on April 11, 2019, and amended on October 2, 2019 and January 16, 2020.

HEARING OR NOTIFICATION OF HEARING: An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by emailing the Commission's Secretary at *Secretarys-Office@sec.gov* and serving applicants with a copy of the request by email. Hearing requests should be received by the Commission by 5:30 p.m. on May 11, 2020 and should be accompanied by proof of service on the applicants, in the form of an affidavit, or, for lawyers, a certificate of service. Pursuant to rule 0–5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by emailing the Commission's Secretary at *Secretarys-Office@sec.gov.*

ADDRESSES: ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: Great Elm Capital Corp. *geccoperations@greatelmcap.com.*

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, Senior Counsel, at (202) 551–6819, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551–6821 (Division of Investment Management, Chief Counsel's Office).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the Company name box, at *http://www.sec.gov/search/search.htm* or by calling (202) 551–8090.

Applicants' Representations

1. GECC is a Maryland corporation organized as a closed-end management investment company that has elected to be regulated as a BDC under section 54(a) of the Act.[2] GECC's Objectives and Strategies[3] are to seek to generate both current income and capital appreciation, while seeking to protect against risk of capital loss, by investing predominantly in the debt securities of middle market companies, which GECC defines as companies with enterprise values between $100.0 million and $2.0 billion. The business and affairs of GECC are managed under the direction of a Board,[4] a majority of whose

[1] For the purposes of the requested order, a ''successor'' includes an entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

[2] Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

[3] ''Objectives and Strategies'' means the investment objectives and strategies of a Regulated Fund (as defined below), as described in the Regulated Fund's registration statement, other filings the Regulated Fund has made with the Commission under the Securities Act of 1933 (the ''Securities Act''), or under the Securities Exchange Act of 1934, and the Regulated Fund's reports to shareholders.

[4] The term ''Board'' means, with respect to any Regulated Fund, the board of directors of that Regulated Fund.

members are persons who are Non-Interested Directors.[5]

2. The Existing Affiliated Fund was formed as a Delaware limited partnership and would be an investment company but for section 3(c)(7) of the Act. The Existing Affiliated Fund's investment objective is to seek total returns by investing throughout the capital structures of leveraged issuers. From time to time, certain positions that are suitable for the Existing Affiliated Fund may also fit the investment objectives of GECC.

3. Great Elm Adviser, a Delaware corporation, is registered with the Commission as an investment adviser under the Investment Advisers Act of 1940 (''Advisers Act''). Great Elm Adviser serves as the investment adviser to GECC and the Existing Affiliated Fund.

4. Applicants seek an order (''Order'') to permit a Regulated Fund[6] and one or more other Regulated Funds and/or one or more Affiliated Funds[7] to (a) co-invest with each other in investment opportunities in which an Adviser (as defined below) negotiates terms in addition to price and (b) make additional investments in such issuers, including through the exercise of warrants, conversion privileges, and other rights to purchase securities of the issuers (''Follow-On Investments'') through a proposed co-investment program (the ''Co-Investment Program'') where such participation would otherwise be prohibited under section 17(d) or section 57(a)(4) and the rules under the Act. ''Co-Investment Transaction'' means any transaction in which a Regulated Fund (or its ''Wholly-Owned Investment Sub,'' as defined below) participates together with one or more other Regulated Funds and/or one or more Affiliated Funds in reliance on the requested Order. ''Potential Co-Investment Transaction'' means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more other Regulated Funds and/or one or more Affiliated Funds without obtaining and relying on the Order.[8]

5. Applicants state that any of the Regulated Funds may, from time to time, form one or more Wholly-Owned Investment Subs.[9] Such a subsidiary would be prohibited from investing in a Co-Investment Transaction with any other Regulated Fund or Affiliated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d–1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of its parent Regulated Fund and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the Order, as though the parent Regulated Fund were participating directly. Applicants represent that this treatment is justified because a Wholly-Owned Investment Sub would have no purpose other than serving as a holding vehicle for the Regulated Fund's investments and, therefore, no conflicts of interest could arise between the Regulated Fund and the Wholly-Owned Investment Sub. The Regulated Fund's Board would make all relevant determinations under the conditions with regard to a Wholly-Owned Investment Sub's participation in a Co-Investment Transaction, and the Regulated Fund's Board would be informed of, and take into consideration, any proposed use of a Wholly-Owned Investment Sub in the Regulated Fund's place. If the Regulated Fund proposes to participate in the same Co-Investment Transaction with any of its Wholly-Owned Investment Subs, the Board will also be informed of, and take into consideration, the relative participation of the Regulated Fund and the Wholly-Owned Investment Sub.

6. Great Elm Adviser expects that any portfolio company that is an appropriate investment for a Regulated Fund should also be an appropriate investment for one or more other Regulated Funds and/or one or more Affiliated Funds, with certain exceptions based on available capital or diversification.[10] When considering Potential Co-Investment Transactions for any Regulated Fund, the applicable Adviser will consider only the Objectives and Strategies, Board-Established Criteria,[11] investment policies, investment positions, capital available for investment, and other pertinent factors applicable to that Regulated Fund. Applicants believe that the use of Board-Established Criteria for each of the Regulated Funds is appropriate based on the potential size and scope of Great Elm Adviser's advisory business. Applicants argue that in addition to the other protections offered by the conditions, using Board-Established Criteria in the allocation of Potential Co-Investment Transactions

[5] The term ''Non-Interested Directors'' means, with respect to any Board, the directors who are not ''interested persons'' within the meaning of section 2(a)(19) of the Act.

[6] ''Regulated Fund'' refers to GECC and any Future Regulated Fund. ''Future Regulated Fund'' means any closed-end management investment company (a) that is registered under the Act or has elected to be regulated as a BDC under the Act, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the Co-Investment Program. The term ''Adviser'' means (a) Great Elm Adviser and (b) any future investment adviser that (i) controls, is controlled by or is under common control with Great Elm Adviser, (ii) (A) is registered as an investment adviser under the Advisers Act or (B) is a relying adviser of an investment adviser that is registered under the Advisers Act and that controls, is controlled by, or is under common control with, Great Elm Adviser, and (iii) is not a Regulated Fund or a subsidiary of a Regulated Fund.

[7] An ''Affiliated Fund'' means (a) the Existing Affiliated Fund and (b) any Future Affiliated Fund. ''Future Affiliated Fund'' means any entity (a) whose investment adviser is an Adviser, (b) that would be an investment company but for section 3(c)(1), 3(c)(5)(C) or 3(c)(7) of the Act, and (c) that intends to participate in the Co-Investment Program.

[8] All existing entities that currently intend to rely upon the requested Order have been named as applicants. Any other existing or future entity that subsequently relies on the Order will comply with the terms and conditions of the application.

[9] The term ''Wholly-Owned Investment Sub'' means an entity (a) whose sole business purpose is to hold one or more investments on behalf of a Regulated Fund (and, in the case of an SBIC Subsidiary (as defined below), maintain a license under the Small Business Investment Act of 1958, as amended (the ''SBA Act'') and issue debentures guaranteed by the Small Business Administration (the ''SBA''); (b) that is wholly-owned by the Regulated Fund (with the Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (c) with respect to which the Regulated Fund's Board has the sole authority to make all determinations with respect to the entity's participation under the conditions of the application; and (d) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. All subsidiaries of the Regulated Fund participating in the Co-Investment Transactions will be Wholly-Owned Investment Subs. The term ''SBIC Subsidiary'' means a Wholly-Owned Investment Sub that is licensed by the SBA to operate under the SBA Act as a small business investment company (an ''SBIC'').

[10] The Regulated Funds, however, will not be obligated to invest, or co-invest, when investment opportunities are referred to them.

[11] The term ''Board-Established Criteria'' means criteria that the Board of the applicable Regulated Fund may establish from time to time to describe the characteristics of Potential Co-Investment Transactions which would be within the Regulated Fund's then-current Objectives and Strategies that the applicable Adviser should consider as appropriate for the Regulated Fund. If no Board-Established Criteria are in effect for a Regulated Fund, then such Adviser will consider all Potential Co-Investment Transactions that fall within the then-current Objectives and Strategies for that Regulated Fund. Board-Established Criteria will be objective and testable, meaning that they will be based on observable information, such as industry/sector of the issuer, minimum EBITDA of the issuer, asset class of the investment opportunity or required commitment size, and not on characteristics that involve discretionary assessment. The Adviser to a Regulated Fund may from time to time recommend criteria for the applicable Board's consideration, but Board-Established Criteria will only become effective if approved by a majority of the Non-Interested Directors. The Non-Interested Directors of a Regulated Fund may at any time rescind, suspend or qualify its approval of any Board-Established Criteria, though applicants anticipate that, under normal circumstances, the Board would not modify these criteria more often than quarterly.

will further reduce the risk of subjectivity in the Adviser's determination of whether an investment opportunity is appropriate for a Regulated Fund. In connection with the Board's annual review of the continued appropriateness of any Board-Established Criteria under condition 9, the Regulated Fund's Adviser will provide information regarding any Co-Investment Transaction (including, but not limited to, Follow-On Investments) effected by the Regulated Fund that did not fit within the then-current Board-Established Criteria.

7. Other than pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, and after making the determinations required in conditions 1 and 2(a), for each Regulated Fund, the applicable Adviser will present each Potential Co-Investment Transaction and the proposed allocation to the directors of the Board eligible to vote under section 57(o) of the Act (''Eligible Directors''), and the ''required majority,'' as defined in section 57(o) of the Act (''Required Majority'') [12] will approve each Co-Investment Transaction prior to any investment by the participating Regulated Fund.

8. With respect to the pro rata dispositions and Follow-On Investments provided in conditions 7 and 8, a Regulated Fund may participate in a pro rata disposition or Follow-On Investment without obtaining prior approval of the Required Majority if, among other things: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition or Follow-On Investment, as the case may be; and (ii) the Board of the Regulated Fund has approved that Regulated Fund's participation in pro rata dispositions and Follow-On Investments as being in the best interests of the Regulated Fund. If the Board does not so approve, any such disposition or Follow-On Investment will be submitted to the Regulated Fund's Eligible Directors. The Board of any Regulated Fund may at any time rescind, suspend or qualify its approval of pro rata dispositions and Follow-On Investments with the result that all dispositions and/or Follow-On Investments must be submitted to the Eligible Directors.

[12] In the case of a Regulated Fund that is a registered fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

9. No Non-Interested Director of a Regulated Fund will have a direct or indirect financial interest in any Co-Investment Transaction (other than indirectly through share ownership in one of the Regulated Funds), including any interest in any company whose securities would be acquired in a Co-Investment Transaction.

10. Applicants also represent that if the Advisers, the principal owners of any of the Advisers (the ''Principals''), or any person controlling, controlled by, or under common control with the Advisers or the Principals, and the Affiliated Funds (collectively, the ''Holders'') own in the aggregate more than 25% of the outstanding voting shares of a Regulated Fund (the ''Shares''), then the Holders will vote such Shares as required under condition 14. Applicants believe this condition will ensure that the Non-Interested Directors will act independently in evaluating the Co-Investment Program, because the ability of the Advisers or the Principals to influence the Non-Interested Directors by a suggestion, explicit or implied, that the Non-Interested Directors can be removed will be limited significantly. Applicants represent that the Non-Interested Directors will evaluate and approve any such independent third party, taking into account its qualifications, reputation for independence, cost to the shareholders, and other factors that they deem relevant.

Applicants' Legal Analysis

1. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in joint transactions with the BDC or a company controlled by a BDC in contravention of rules as prescribed by the Commission. Under section 57(b)(2) of the Act, any person who is directly or indirectly controlling, controlled by, or under common control with a BDC is subject to section 57(a)(4). Applicants submit that each of the Regulated Funds and Affiliated Funds could be deemed to be a person related to each Regulated Fund in a manner described by section 57(b) by virtue of being under common control. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission's rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Section 17(d) of the Act and rule 17d–1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company unless the Commission has granted an order permitting such transactions. In passing upon applications under rule 17d–1, the Commission considers whether the company's participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

3. Applicants state that in the absence of the requested relief, the Regulated Funds would be, in many circumstances, limited in their ability to participate in attractive and appropriate investment opportunities. Applicants believe that the proposed terms and conditions will ensure that the Co-Investment Transactions are consistent with the protection of each Regulated Fund's shareholders and with the purposes intended by the policies and provisions of the Act. Applicants state that the Regulated Funds' participation in the Co-Investment Transactions will be consistent with the provisions, policies, and purposes of the Act and on a basis that is not different from, or less advantageous than, that of other participants.

Applicants' Conditions

Applicants agree that the Order will be subject to the following conditions:

1. (a) Each Adviser will establish, maintain and implement policies and procedures reasonably designed to ensure that it identifies for each Regulated Fund all Potential Co-Investment Transactions that (i) the Adviser considers for any other Regulated Fund or Affiliated Fund and (ii) fall within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria.

(b) When an Adviser identifies a Potential Co-Investment Transaction for a Regulated Fund under condition 1(a), the Adviser will make an independent determination of the appropriateness of the investment for the Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. (a) If an Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, the Adviser will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by an Adviser to be invested by the applicable Regulated Fund in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Funds, collectively, in the same transaction, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on each participant's capital available for investment in the asset class being allocated, up to the amount proposed to be invested by each. Each Adviser will provide the Eligible Directors of each participating Regulated Fund with information concerning each participating party's available capital to assist the Eligible Directors with their review of the applicable Regulated Fund's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1(b) and 2(a), the applicable Adviser will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and each participating Affiliated Fund) to the Eligible Directors of its participating Regulated Fund(s) for their consideration. A Regulated Fund will enter into a Co-Investment Transaction with one or more other Regulated Funds or Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its equity holders and do not involve overreaching in respect of the Regulated Fund or its equity holders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the Regulated Fund's equity holders; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Fund(s) or any Affiliated Fund(s) would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis different from or less advantageous than that of any other Regulated Funds or any Affiliated Funds; provided that, if any other Regulated Fund or any Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition 2(c)(iii), if:

(A) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any; and

(B) the Adviser agrees to, and does, provide periodic reports to the Board of the Regulated Fund with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that any Regulated Fund or any Affiliated Fund or any affiliated person of any Regulated Fund or any Affiliated Fund receives in connection with the right of a Regulated Fund or an Affiliated Fund to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Affiliated Funds (who may each, in turn, share its portion with its affiliated persons) and the participating Regulated Funds in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Regulated Fund will not benefit any Adviser, the other Regulated Funds, the Affiliated Funds, or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 13, (B) to the extent permitted by sections 17(e) or 57(k) of the Act, as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The applicable Adviser will present to the Board of each Regulated Fund, on a quarterly basis, a record of all investments in Potential Co-Investment Transactions made by any other Regulated Fund or Affiliated Fund during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria that were not made available to the Regulated Fund, and an explanation of why the investment opportunities were not offered to the Regulated Fund. All information presented to the Board pursuant to this condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

5. Except for Follow-On Investments made in accordance with condition 8,[13] a Regulated Fund will not invest in reliance on the Order in any issuer in which another Regulated Fund, Affiliated Fund, or any affiliated person of another Regulated Fund or Affiliated Fund is an existing investor. The applicable Adviser will maintain books and records that demonstrate compliance with this condition for such Regulated Fund.

6. A Regulated Fund will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for each participating Regulated Fund and Affiliated Fund. The grant to another Regulated Fund or an Affiliated Fund, but not the Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B), and (C) are met.

7. (a) If any Regulated Fund or Affiliated Fund elects to sell, exchange or otherwise dispose of an interest in a security that was acquired in a Co-Investment Transaction, the applicable Advisers will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by each Regulated Fund in the disposition.

(b) Each Regulated Fund will have the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the participating Regulated Funds and Affiliated Funds.

(c) A Regulated Fund may participate in such disposition without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated

[13] This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition; (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such dispositions on a pro rata basis (as described in greater detail in the application); and (iii) the Board of the Regulated Fund is provided on a quarterly basis with a list of all dispositions made in accordance with this condition. In all other cases, the Adviser will provide its written recommendation as to such Regulated Fund's participation to such Regulated Fund's Eligible Directors, and such Regulated Fund will participate in such disposition solely to the extent that a Required Majority determines that it is in such Regulated Fund's best interests.

(d) Each Regulated Fund and each Affiliated Fund will bear its own expenses in connection with any such disposition.

8. (a) If a Regulated Fund or an Affiliated Fund desires to make a Follow-On Investment in a portfolio company whose securities were acquired in a Co-Investment Transaction, the applicable Advisers will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by each Regulated Fund.

(b) A Regulated Fund may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer immediately preceding the Follow-On Investment; and (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application). In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(c) If, with respect to any Follow-On Investment:

(i) The amount of a Follow-On Investment is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the applicable Advisers to be invested by each Regulated Fund in the Follow-On Investment, together with the amount proposed to be invested by the participating Affiliated Funds in the same transaction, exceeds the amount of the opportunity; then the amount invested by each such party will be allocated among them pro rata based on each party's capital available for investment in the asset class being allocated, up to the amount proposed to be invested by each.

(d) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in the application.

9. The Non-Interested Directors of each Regulated Fund will be provided quarterly for review all information concerning Potential Co-Investment Transactions that fell within the Regulated Fund's then-current Objectives and Strategies and Board-Established Criteria, including investments in Potential Co-Investment Transactions made by other Regulated Funds and Affiliated Funds, that the Regulated Fund considered but declined to participate in, and concerning Co-Investment Transactions in which the Regulated Fund participated, so that the Non-Interested Directors may determine whether all Potential Co-Investment Transactions and Co-Investment Transactions during the preceding quarter, including those Potential Co-Investment Transactions which the Regulated Fund considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Directors will consider at least annually (a) the continued appropriateness for the Regulated Fund of participating in new and existing Co-Investment Transactions and (b) the continued appropriateness of any Board-Established Criteria.

10. Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these conditions were approved by the Required Majority under section 57(f).

11. No Non-Interested Director of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an ''affiliated person'' (as defined in the Act), of any Affiliated Fund.

12. The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective investment advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Affiliated Funds and the Regulated Funds in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

13. Any transaction fee [14] (including break-up or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k) of the Act, as applicable) received in connection with a Co-Investment Transaction will be distributed to the participating Regulated Funds and Affiliated Funds on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1) of the Act, and the account will earn a competitive rate of interest that will also be divided pro rata among the participating Regulated Funds and Affiliated Funds based on the amounts they invest in such Co-Investment Transaction. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Regulated Funds or Affiliated Funds will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) in the case of the Regulated Funds and Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in condition 2(c)(iii)(C), (b) brokerage or underwriting compensation permitted by section 17(e) or 57(k) of the Act or (c) in the case of an Adviser, investment advisory fees paid in accordance with the investment advisory agreement between the Adviser and the Regulated Fund or Affiliated Fund).

14. If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will

[14] Applicants are not requesting and the staff of the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) all other matters under either the Act or applicable State law affecting the Board's composition, size or manner of election.

15. Each Regulated Fund's chief compliance officer, as defined in rule 38a–1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and conditions of the application and the procedures established to achieve such compliance.

For the Commission, by the Division of Investment Management, under delegated authority.

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88637; File No. SR–NSCC–2020–008]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change To Modify the Clearing Agency Model Risk Management Framework

April 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 10, 2020, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

(a) The proposed rule change of NSCC would amend the Clearing Agency Model Risk Management Framework (''Framework'') of NSCC and its affiliates The Depository Trust Company (''DTC'') and Fixed Income Clearing Corporation (''FICC,'' and FICC together with NSCC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[3] Specifically, the proposed rule change would amend the Framework to (i) change the governance structure for approval of a model [4] validation (''Model Validation''), (ii) incorporate a model risk tolerance statement (''Model Risk Tolerance Statement'') and related provisions, (iii) clarify the definition of Model Owner (as defined below), (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (''DTC Rules''), the Rulebook of the Government Securities Division (''GSD'') of Fixed Income Clearing Corporation (such Rulebook hereinafter referred to as ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division (''MBSD'') of Fixed Income Clearing Corporation (''such Clearing Rules hereinafter referred to as ''MBSD Rules''), or the Rules & Procedures of NSCC (''NSCC Rules''), as the Framework would be a standalone document.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) change the governance structure for approval of a Model Validation, (ii) incorporate the Model Risk Tolerance Statement with respect to related forward-looking provisions associated with maintaining multiple model risk-related tolerance statements, (iii) clarify the definition of Model Owner, (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the DTC Rules, GSD Rules, MBSD Rules, or NSCC Rules, as the Framework would be a standalone document.

Background

The Framework is maintained by the Clearing Agencies for compliance with Rule 17Ad–22 (e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii) under the Act,[6] and sets forth the model risk management practices

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Framework sets forth the model risk management practices adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. *See* Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008; SR–FICC–2017–014; SR–NSCC–2017–008) (''2017 Notice''). The Framework is managed by the Clearing Agencies' risk management areas generally responsible for model validation and control matters, DTCC Model Validation and Control (''MVC''), on behalf of each Clearing Agency, with review and oversight by senior management and the Risk Committee of the Board of Directors of each of DTC, FICC, and NSCC (collectively, ''Boards''). *See Id.*

[4] The Clearing Agencies have adopted the following definition for the term ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: An information input component, which delivers assumptions and data to the model; a processing component, which transforms inputs into estimates; and a reporting component, which translates the estimates into useful business information. The definition of ''model'' also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* Supervisory Guidance on Model Risk Management, SR Letter 11–7, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, at 3.

[5] Capitalized terms not defined herein are defined in the DTC Rules, NSCC Rules, GSD Rules or MBSD Rules, as applicable, *available at http://dtcc.com/legal/rules-and-procedures.*

[6] 17 CFR 240.17Ad–22 (e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii). Each of DTC, NSCC and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with subsection (e) of Rule 17Ad–22. References to Rule 17Ad–22(e)(6) and its subparagraphs cited herein, and compliance therewith, apply to the CCPs only and do not apply to DTC.

adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is managed by MVC, on behalf of each Clearing Agency, with review and oversight by senior management of each Clearing Agency and the Boards.[7]

Pursuant to the Framework, a model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' is included and tracked within a model inventory (''Model Inventory'') maintained by MVC.[8]

As Model Validation and the process for approval of Model Validations is a key concept that flows through the Framework, NSCC is providing the following background regarding Model Validation to supplement the proposed rule changes discussed further below.

Model Validation

Pursuant to Section 3.3 (Full Model Validation) of the Framework, each new model undergoes a Model Validation (unless provisionally approved, as discussed below) pursuant to which MVC verifies that the model is performing as expected in accordance with its design objectives and business purpose. The Model Validation standards, referred to in the Framework as the full Model Validation standards for any new model include, but are not be limited to, the following core Model Validation activities, as listed in the Framework:

- Evaluation of the model development documentation and testing;
- evaluation of model theory and assumptions, and identification of potential limitations;
- evaluation of data inputs and parameters;
- review of numerical implementation including replication for certain key model components, which would vary from model to model;
- independent testing: Sensitivity analysis, stress testing, and benchmarking, as appropriate; and
- evaluation of model outputs, model performance, and back testing.

Pursuant to the Framework, Full Model Validation is applied under the following circumstances: (i) For all new models prior to their use in production; (ii) during periodic Model Validations (as described below); and (iii) when model changes are made that require independent Model Validation (as further described below).

Pursuant to Section 3.4 (Periodic Model Validation) of the Framework, models approved for use in production are subject to what is currently referred to in the Framework as periodic Model Validations for purposes of confirming that the models continue to operate as intended, identifying any deficiencies that would call into question the continuing validity of any such model's original approval and evaluating whether the model and its prior validation remain valid within the dynamics of current market conditions.

In this regard, the Framework describes that MVC performs a Model Validation for each model approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[9] liquidity risk model,[10] and in the case of FICC and NSCC, as central counterparties, on their margin systems and related models.[11]

Periodic Model Validations and a full Model Validation follow identical standards. The Framework states that in certain cases, MVC may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a model warrants extra validation.

Pursuant to the Framework all findings that result from a new Model Validation, a change Model Validation, a periodic Model Validation, or in connection with implementation of a new model or model change, are centrally tracked by MVC.

Proposed Rule Changes

Section 3.1 Model Inventory

Section 3.1 of the Framework currently explains how any model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' would be subject to tracking within the Model Inventory. MVC is charged with responsibility for adding models to the Model Inventory and for tracking models listed in the Model Inventory. Section 3.1 also describes how a Model Inventory survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current. During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MVC to review and assess whether such proposed model will be added to the Model Inventory.

Proposed Change To Enhance Flow and Readability of Text

Pursuant to the proposed rule change, NSCC would remove the use of the modifier ''Clearing Agency'' with respect to references to models in this section and throughout the Framework. The Framework relates solely to models of the Clearing Agencies and the use of this modifier is redundant. This change would enhance the flow and readability of the text by eliminating a redundancy.

Model Owner

Also, the proposed rule change would move the first reference to the defined term ''Model Owner'' from the last paragraph of the section to the second paragraph of the section and clarify the meaning of the term. This reference would appear in a new sentence that would describe that a Model Owner is the person designated by the applicable business area or support function to be responsible for a particular model, and that the Model Owner is recorded as the Model Owner for such model by MVC in the Model Inventory. The Framework currently describes the Model Owner as responsible for the development or operation of the model being validated by MVC, without noting that the Model Owner is an individual designated by the applicable business unit or support function. In this regard, the proposed change would provide clarification that an individual is designated as the Model Owner by the applicable business area or support function.

The proposed rule change would also change the Clearing Agency title of the individual that is the head of MVC that is referred to in a footnote in this section from being an Executive Director to Managing Director of each Clearing Agency to reflect that a more senior officer of the Clearing Agencies would be responsible for supervising the MVC.[12] The footnote also states that the head of MVC reports to the Group Chief

[7] The parent company of the Clearing Agencies is The Depository Trust & Clearing Corporation (''DTCC''). DTCC operates on a shared services model with respect to the Clearing Agencies. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a Clearing Agency.

[8] *See* 2017 Notice, *supra* note 3.

[9] *See* Rule 17Ad–22(e)(4)(vii). *See supra* note 6.

[10] *See* Rule 17Ad–22(e)(7)(vii). *See supra* note 6.

[11] *See* Rule 17Ad–22(e)(6)(vi) and (vii). *See supra* note 6.

[12] A Managing Director is senior to an Executive Director.

Risk Officer[13] rather than to any Model Owner.[14] This statement would be amended to clarify the independence of the MVC extends so that it is independent from anyone who develops and operates a model and not only a Model Owner. Also relating to the status of the head of MVC within the governance structure of the Clearing Agencies, this footnote would note that the head of MVC is a member of the Management Risk Committee (''MRC'').

Replacement of Term ''Vendor'' With ''externally purchased''

Section 3.1 currently contains a paragraph which describes that all models, whether internally developed or purchased from a ''vendor,'' are subject to Model Validation. Pursuant to the proposed rule change, NSCC would revise the text of this paragraph to replace the term ''vendor'' with ''externally purchased.'' NSCC believes use of the term ''externally purchased'', rather than vendor, would provide clarity with respect to sections of the Framework that apply to models developed internally versus externally.

Section 3.2 Model Materiality and Complexity

Section 3.2 of the Framework outlines that MVC assigns a materiality rating and a complexity rating to each model after it is added to the Model Inventory and describes that the applicable rating impacts the model's validation in terms of prioritization and approval authority.

As more fully described below regarding Section 3.6 of the Framework, the proposed rule change would provide for the delegation of approval authority for all Model Validations from the Clearing Agencies' management level committee responsible for model risk management matters to MVC, and the authority to approve model validations would vest solely in MVC.[15]

In this regard, a materiality rating and complexity rating would no longer be determinative of approval authority and the text that describes approval authority as impacted by materiality and complexity ratings would be deleted.

As a related change in the model governance structure, the forum currently referred to as the Model Risk Governance Committee would no longer maintain oversight authority in the model validation process and the text in this section would reflect that it is the forum for review of Model Risk matters rather than the formal forum for addressing Model Risk matters. The Model Risk Governance Committee's name would be revised in this section and throughout to refer to it instead as the Model Risk Governance Council (''MRGC'') to reflect its proposed role as an advisory body rather than being part of the formal model governance process. In this regard, the text of Section 3.2 would be revised to reflect that the MRGC is a forum for review of, rather than addressing, Model Risk matters and a footnote would be added to state that MRGC is an advisory body that has no decision-making authority but would discuss and/or review certain model risk related matters which could result in advice and/or recommendation, which is generally directed to the interested party of a given model that brings the matter, as applicable.

The proposed change to shift responsibility for Model Risk matters, including approval of Model Validations, to MVC would ensure that MVC has sole responsibility for approving Model Validations, as MVC is best suited within the Clearing Agencies to manage the quantitative and technical expertise to carry out the related functions.

Section 3.5—Model Change Management

Section 3.5 (Model Change Management) currently states that an active model may require changes in either structure or technique. Details for any model change request are provided to MVC for review and a determination of whether full Model Validation is required. This section also includes text that states to the extent that a vendor's version change may impact any existing model used in production, an impact study of the version change along with any other analysis/benchmarking shall be conducted as appropriate in MVC's reasonable business discretion.

The process described in this section will not be amended pursuant to the proposed rule change, however, to remain consistent with the use of terminology as described with respect to Section 3.1 above, references to ''vendor'' models in this section would be revised to reflect that models not developed by the Clearing Agencies would instead be referred to as externally purchased.

Section 3.6—Model Approval and Control

Section 3.6 (Model Approval and Control) currently provides that all new models, and all material changes to existing models, undergo Model Validation by MVC and must be approved prior to business use. Currently, in cases where such model's materiality is ''Medium'' or ''High,'' such Model Validation is reviewed by the MRGC and recommended by the MRGC to MRC, for approval.

As stated above, the proposed rule change would redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight.

With respect to the first line, the proposed rule change would remove a reference to the Financial Engineering Unit (''FEU'') within Quantitative Risk Management (''QRM''). QRM is a risk management function within the Group Chief Risk Office, and a representative of QRM is the Model Owner for all margin Models used by the CCPs under the Standards for Covered Clearing Agencies (''Standards'') under the Securities Exchange Act of 1934. Because the Model Owner resides in QRM, QRM is responsible for developing, testing, and signing-off on new models and enhancements to existing models before submitting any such model to MVC for Model Validation and approval. Due to an organizational restructuring, FEU was eliminated, and pursuant to the proposed rule change, the responsibilities of FEU described above would vest in the Model Owners, who as described with respect to the proposed changes to Section 3.1 above, would have responsibility for the models.

With respect to the second line, the proposed rule change would revise this section to remove the requirement that MRC approve any Model Validation. In this regard, MVC would have the sole and exclusive authority to approve a model. As stated above, the Clearing Agencies' believe that the MVC is best suited to address Model Validation issues based on its quantitative and technical expertise and knowledge, and the section would be revised accordingly to reflect MVC's proposed role in this regard. As such, the proposed rule change would remove any text that indicates that MRC approval is required for any Model Validation to be complete and/or for a model to remain in production.

[13] The Clearing Agencies' Model Risk management standards and practices are subject to the oversight and direction of the Group Chief Risk Officer, who is the head of the Group Chief Risk Office.

[14] The purpose of the footnote is to make clear that MVC management has an independent reporting line to the Group Chief Risk Office, without potential conflict of reporting to any person that could be a Model Owner.

[15] Currently, Model Validations that have a materiality rating of 'Medium' or 'High,' must be approved by the MRC, after the model has been reviewed and recommended to the MRC for approval by the MRGC. Additionally, all periodic Model Validations must currently be approved by the MRC to be deemed complete through review and recommendation by the MRGC.

Also, consistent with the change in the role of MRGC from one of oversight to instead acting in an advisory capacity, as described above, the proposed rule change would also remove text indicating that MRGC would review and recommend Model Validations to MRC or have any role in provisional approvals [16] of models.

Section 3.8—Model Performance Monitoring

Pursuant to the Framework, MVC is currently responsible for model performance monitoring and for each Clearing Agency's backtesting process, which are integral parts of each Clearing Agency's model risk management framework. In this regard, Section 3.8 (Model Performance Monitoring) of the Framework states that model performance monitoring is the process of (i) evaluating an active model's ongoing performance based on theoretical tests, (ii) monitoring the model's parameters through the use of threshold indicators, and/or (iii) backtesting using actual historical data/realizations to test a Value-at-Risk (''VaR'') model's predictive power.

The proposed rule change would eliminate references to ''theoretical tests'' and ''threshold indicators'' and ''historical data/realizations'' to represent a real-world depiction of the model performance monitoring process. These changes are being proposed because the process of model performance monitoring does not always take into account theoretical tests, threshold indicators, and/or historical data/realizations, but ''could'' take some or all of these into account and appropriate under the circumstances. Therefore, the elimination of the ties to these tests, thresholds and use of historical data/realizations are a more accurate representation of the model performance monitoring process.

In addition, Section 3.8 would be revised to reflect changes to the roles of Model Owners and the MVC consistent with the roles of the first and second lines described above, and add text stating that Model Owners are responsible for the design and execution of model performance monitoring and preparation of model performance monitoring reports. The proposed text would also state that MVC is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying Model issues and/or limitations.[17]

One paragraph within Section 3.8 contains a statement that MVC is responsible for model performance monitoring, including review of risk-based models used to calculate margin requirements and relevant parameters/threshold indicators, sensitivity analysis, and model backtesting results, and preparation of related reports. It also states that review of these model performance measures is subject to review by MRGC. To remain consistent with the change in the role of MRGC and the related consolidation of primary responsibility for oversight in the model governance process in MVC, as described above, this paragraph would be deleted.

Also, consistent with the shift of the responsibility in this regard to Model Owners, Section 3.8 would be clarified to indicate that QRM, because the Model Owner for all margin models used by the CCPs under the Standards would reside in QRM, would be responsible for model performance monitoring the CCP's margin models

Section 3.9—Backtesting

Section 3.9 states that MVC is responsible for each Clearing Agency's VaR backtesting processes for the central counterparties, including for model backtesting and Clearing Fund Requirement (''CFR'') backtesting. Consistent with the changes described above, this section would be revised to state that this backtesting function for models and CFR would reside with QRM, as it is the owner of margin models and would be responsible for performance monitoring functions with respect to margin models.

Section 4.1—Board of Directors and Senior Management Reporting

Section 4.1 describes MRGC as the primary forum for MVC's regular reporting of Model Validation activities and material Model Risks identified through regular Model performance monitoring. Reports and recommendations with respect to Model Risk management are made to the MRC as described in *Section 3.*

Periodic reporting to the Risk Committee of the Clearing Agencies' Boards (''BRC'') regarding Model Risk matters may include:

- Updates of Model Validation findings and the status of annual validations.
- Updates on significant Model Risk matters, and on compliance matters with respect to Model Risk policies and procedures (including this Framework).
- Escalation of Model Risk matters as set forth in the Market Risk Tolerance Statement, and subsequent, regular updates with respect thereto.

The proposed rule change would revise Section 4.1 to reflect the changes to the roles of MVC and MRGC as described above. In this regard, the proposed rule change would delete the description of MRGC's role as it would no longer have oversight of Model Validation and model performance monitoring and would add MRC as a recipient of periodic reporting. The proposed rule change would also generalize the statement relating to escalation of matters as set forth in the Market Risk Tolerance Statement to instead refer to ''the Risk Tolerance Statements'' to reflect the addition of a reference to the Model Risk Tolerance Statement as a supporting document for the Framework, as more fully described below.

Section 4.2—Escalation

Section 4.2 describes, among other things, how on at least a monthly basis, the key metrics identified in Section 3.9 (Backtesting) are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and MVC and reported to MRC. Given MVC's reduced role with respect to backtesting in this regard, the proposed rule change would eliminate the provision that MVC would review the metrics.[18]

The proposed rule change would also revise text for clarity and readability with respect to statements on the review of the Market Risk Tolerance Statement, to reference ''Risk Tolerance Statements'' more generally to reflect the changes described herein. Also, the proposed rule change would remove MRGC's role in review and approval of changes to backtesting methodology and instead vest that responsibility with MVC, to reflect the change in oversight of Model Validation from MRGC to MVC.

Also, to enhance the readability and flow of the text in this section, the proposed rule change would move text

[16] In this regard, Section 3.6 that states that models may be provisionally approved by MVC for a limited period, not to exceed six months unless also approved by the MRGC, would be revised to delete the reference to MRGC's role. Consistent with the changes relating to the second line as described above, MVC would assume full responsibility for provisional approvals and, and consistent with text in Section 3.6, would continue to track all provisional approvals to confirm provisional periods and control measures are met.

[17] The organizational standards apply to DTCC's subsidiaries, as applicable.

[18] Text would be added to clarify that the risk metrics are reported to MRC by the group within Group Chief Risk Office responsible for risk reporting. Currently, this function is known as Risk Reporting.

describing that (i) the review of the Risk Tolerance Statements by the Managing Director of the Market and Liquidity Risk Management unit (''MDMLRM'') within the Group Chief Risk Office will occur on an at least annual basis, and (ii) the BRC's review and approval of the Risk Tolerance Statements will occur on an at least annual basis, to the end of Section 4.2.[19] The proposed change would also replace the reference to specific title of the MDMLRM to instead refer to the owner of the Risk Tolerance Statements, to provide for more generic terminology that would not require formal amendment in the Framework if the title of the MDMLRM were to change.

Other Changes

The Framework inconsistently uses the term ''model'' without and with initial capitalization, but currently refers throughout to the risks relating to models referred to in the Framework as a defined term using initial capitalization—''Model Risk.'' To remain consistent with the usage of ''model'' throughout the Framework, NSCC would conform all references to the term ''model'', so they appear without initial capitalization and change references to Model Risk throughout the Framework to eliminate the initial capitalization of the term and refer to it as ''model risk.''

The Executive Summary of the Framework includes a description of internal DTCC policies and procedures that support the Framework, including the (a) DTCC Model Risk Management Policy, (b) DTCC Model Validation Procedures, (c) DTCC Model Risk Performance Monitoring Procedures, (d) the DTCC Backtesting Procedures and (e) Market Risk Tolerance Statement (''Related Procedures''). In addition to the policies and procedures described in the Executive Summary, the proposed rule change would list in the Executive Summary as a supporting policy, the Model Risk Tolerance Statement. The Model Risk Tolerance Statement articulates, among other things, risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance. The conclusion, based on risk tolerance levels, focuses on model remediation.

Since the risk tolerance levels in both the Market Risk Tolerance Statement[20] and the Model Risk Tolerance Statement consider model remediation as the basis of risk control, both are applicable to the Framework. In this regard, the proposed rule change would add a footnote after the listing of the Model Risk Tolerance Statement and the existing reference to the Market Risk Tolerance Statement to describe that with respect to the key risks[21] of model risk and market risk, each risk tolerance statement documents the overall risk reduction or mitigation objectives as it relates to model risk and market risk activities and documents the risk controls and other measures used to manage such activities, including escalation requirements in the event of risk metric breaches. The footnote would also state that the Risk Tolerance Statements are reviewed, revised, retired, and/or replaced, as the case may be, and approved by the BRC (as defined herein) annually, based upon the circumstances, and the reasonable best judgement of management, then existing relating to model risk management matters. Consistent with proposed terminology described above with respect to Sections 4.1 and 4.2, the Model Risk Tolerance Statement and the Market Risk Tolerance Statement would be referred to collectively in the Executive Summary as the ''Risk Tolerance Statements.''

The Executive Summary also indicates that the Related Procedures may be updated or amended. The Clearing Agencies regularly review their internal policies and procedures, and in addition to updating or amending them as an administrative matter as they deem appropriate, may also retire or replace internal policies and procedures as they deem appropriate. In this regard, the proposed rule change would also include text to the effect that each of the Related Procedures and the Model Risk Tolerance Statement may retired or replaced (in addition to updated or amended).

Effective Date

The proposed rule change would become effective upon approval by the Commission.

2. Statutory Basis

The Clearing Agencies believe that the Framework is consistent with Section 17A(b)(3)(F) of the Act,[22] as well as Rule 17Ad–22 (e)(4)(vii), and (e)(7)(vii) thereunder,[23] for the reasons described below.

Section 17A(b)(3)(F) of the Act[24] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the Framework describes the process by which the Clearing Agencies identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The quantitative models covered by the Framework are applied by the Clearing Agencies, as applicable, to evaluate and address their respective risk exposures associated with their settlement activity and facilitate their ability to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. In this regard, the proposed changes to the Framework support their ability to develop models that are applied to evaluate and address risk exposure and facilitate the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they are responsible by (i) changing the governance structure for approval of a Model Validation to transfer the responsibility for approval of model validations to the MVC, which is composed of individuals with a higher level of expertise relating to model validations than members of the MRC, which is currently responsible for such approvals, thereby enhancing the ability of the group conducting Model Validations to evaluate risk exposures relating to models, (ii) incorporating the Model Risk Tolerance Statement into the Framework which describes risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance, and therefore including a cross-reference to a document which describes an important gauge with respect to the level of risk that may be tolerated as part of managing the risk presented to the Clearing Agencies relating to models, (iii) clarifying the definition of Model Owner, therefore

[19] The Risk Tolerance Statements are also reviewed on an at least annual basis by Operational Risk Management, which, among other things, is the business line responsible for enabling the identification of the Clearing Agencies' plausible sources of operational risk in order to mitigate the impact of a potential event related to those sources using tailored risk profiles and monitoring risk profiles in accordance with the relevant Risk Tolerance Statements.

[20] The Market Risk Tolerance Statement articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves. The conclusion, based on tolerance levels, focuses on model enhancement or model remediation, as applicable.

[21] DTCC has identified a set of key risks to better guide the content, measurement, frequency, and focus of our discussion and management of risk generally across the Organization.

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] *Supra* note 6.

[24] 15 U.S.C. 78q–1(b)(3)(F).

defining the first line responsible for evaluating risk exposure, (iv) reflecting changes in the role of the Model Risk Governance Committee and a change its name, which relates to the change in governance structure that is designed to enhance the independence in its new role of responsibility for approval of Model Validations which would support the Clearing Agencies' ability to evaluate risk exposure, (v) redefining the first and second line responsibilities and incentives relating to model performance monitoring and oversight, therefore enhancing the process by which risk relating to models is evaluated, and (vi) making other technical and clarifying changes to the text, as described above, to improve the text in defining roles and responsibilities for the processes established by the Clearing Agencies to monitor risk. Therefore, NSCC believes the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act,[25] because it would facilitate the ability of the Clearing Agencies to continue to develop models that are applied to evaluate and address risk exposure and allow them to maintain a Framework that facilitates the ability of the Clearing Agencies to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, as described above.

Rule 17Ad–22(e)(4)(vii) [26] and (e)(7)(vii) [27] under the Act requires, *inter alia,* that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to perform Model Validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the clearing agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[28] As discussed above, the proposed rule change would amend the Framework to provide for enhanced clarity in the text and enhanced efficiency with respect to the approval process for Model Validations at least annually. In this regard, and as noted above, pursuant to the Framework, Model Validations are performed not less than annually on its credit risk models and liquidity risk models. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rule 17Ad–22(e)(4)(vii) [29] and (e)(7)(vii) [30] under the Act.

(B) Clearing Agency's Statement on Burden on Competition

None of the Clearing Agencies believe that the Framework would have any impact, or impose any burden, on competition because the proposed rule change reflects clarifying changes and provides for a more efficient internal governance process and would not effectuate any changes to the Clearing Agencies' model risk management tools as they currently apply to their respective Members or Participants.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not solicited or received any written comments relating to this proposal. The Clearing Agencies will notify the Commission of any written comments received by the Clearing Agencies.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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.* Please include File Number SR–NSCC–2020–008 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–NSCC–2020–008. 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 website (*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 website 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 NSCC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NSCC–2020–008 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08378 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[25] *Id.*

[26] 17 CFR 240.17Ad–22(e)(4) (in particular, 17 CFR 240.17Ad–22(e)(4)(vii)). *See supra* note 6.

[27] 17 CFR 240.17Ad–22(e)(7) (in particular, 17 CFR 240.17Ad–22(e)(7)(vii)). *See supra* note 6.

[28] 17 CFR 240.17Ad–22(e)(3). *See supra* note 6.

[29] *Supra* note 6.

[30] *Supra* note 6.

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88636; File No. SR–FICC–2020–004]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing of Proposed Rule Change To Modify the Clearing Agency Model Risk Management Framework

April 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 10, 2020, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the clearing agency. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

(a) The proposed rule change of FICC would amend the Clearing Agency Model Risk Management Framework (''Framework'') of FICC and its affiliates The Depository Trust Company (''DTC'') and National Securities Clearing Corporation (''NSCC,'' and NSCC together with FICC, the ''CCPs,'' and the CCPs together with DTC, the ''Clearing Agencies'').[3] Specifically, the proposed rule change would amend the Framework to (i) change the governance structure for approval of a model [4] validation (''Model Validation''), (ii) incorporate a model risk tolerance statement (''Model Risk Tolerance Statement'') and related provisions, (iii) clarify the definition of Model Owner (as defined below), (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the Rules, By-Laws and Organization Certificate of DTC (''DTC Rules''), the Rulebook of the Government Securities Division (''GSD'') of Fixed Income Clearing Corporation (such Rulebook hereinafter referred to as ''GSD Rules''), the Clearing Rules of the Mortgage-Backed Securities Division (''MBSD'') of Fixed Income Clearing Corporation (''such Clearing Rules hereinafter referred to as ''MBSD Rules''), or the Rules & Procedures of NSCC (''NSCC Rules''), as the Framework would be a standalone document.[5]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the clearing agency 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 clearing agency has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change would amend the Framework to (i) change the governance structure for approval of a Model Validation, (ii) incorporate the Model Risk Tolerance Statement with respect to related forward-looking provisions associated with maintaining multiple model risk-related tolerance statements, (iii) clarify the definition of Model Owner, (iv) reflect changes in the role of the Model Risk Governance Committee and a change of its name, (v) redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight and (vi) make other technical and clarifying changes to the text, as more fully described below.

Although the Clearing Agencies consider the Framework to be a rule, the proposed rule change does not require any changes to the DTC Rules, GSD Rules, MBSD Rules, or NSCC Rules, as the Framework would be a standalone document.

Background

The Framework is maintained by the Clearing Agencies for compliance with Rule 17Ad–22(e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii) under the Act,[6] and sets forth the model risk management practices adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. The Framework is managed by MVC, on behalf of each Clearing Agency, with review and oversight by senior management of each Clearing Agency and the Boards.[7]

Pursuant to the Framework, a model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' is

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Framework sets forth the model risk management practices adopted by the Clearing Agencies, which have been designed to assist the Clearing Agencies in identifying, measuring, monitoring, and managing the risks associated with the design, development, implementation, use, and validation of quantitative models. *See* Securities Exchange Act Release No. 81485 (August 25, 2017), 82 FR 41433 (August 31, 2017) (File Nos. SR–DTC–2017–008; SR–FICC–2017–014; SR–NSCC–2017–008) (''2017 Notice''). The Framework is managed by the Clearing Agencies' risk management areas generally responsible for model validation and control matters, DTCC Model Validation and Control (''MVC''), on behalf of each Clearing Agency, with review and oversight by senior management and the Risk Committee of the Board of Directors of each of DTC, FICC, and NSCC (collectively, ''Boards''). *See Id.*

[4] The Clearing Agencies have adopted the following definition for the term ''model'': ''[M]odel'' refers to a quantitative method, system, or approach that applies statistical, economic, financial, or mathematical theories, techniques, and assumptions to process input data into quantitative estimates. A ''model'' consists of three components: An information input component, which delivers assumptions and data to the model; a processing component, which transforms inputs into estimates; and a reporting component, which translates the estimates into useful business information. The definition of ''model'' also covers quantitative approaches whose inputs are partially or wholly qualitative or based on expert judgment, provided that the output is quantitative in nature. *See* Supervisory Guidance on Model Risk Management, SR Letter 11–7, dated April 4, 2011, issued by the Board of Governors of the Federal Reserve System and the Office of the Comptroller of the Currency, at 3.

[5] Capitalized terms not defined herein are defined in the DTC Rules, NSCC Rules, GSD Rules or MBSD Rules, as applicable, *available at http://dtcc.com/legal/rules-and-procedures.*

[6] 17 CFR 240.17Ad–22(e)(4)(i), (e)(4)(vii), (e)(6)(iii), (e)(6)(vi), (e)(6)(vii), and (e)(7)(vii). Each of DTC, NSCC, and FICC is a ''covered clearing agency'' as defined in Rule 17Ad–22(a)(5) and must comply with subsection (e) of Rule 17Ad–22. References to Rule 17Ad–22(e)(6) and its subparagraphs cited herein, and compliance therewith, apply to the CCPs only and do not apply to DTC.

[7] The parent company of the Clearing Agencies is The Depository Trust & Clearing Corporation (''DTCC''). DTCC operates on a shared services model with respect to the Clearing Agencies. Most corporate functions are established and managed on an enterprise-wide basis pursuant to intercompany agreements under which it is generally DTCC that provides a relevant service to a Clearing Agency.

included and tracked within a model inventory (''Model Inventory'') maintained by MVC.[8]

As Model Validation and the process for approval of Model Validations is a key concept that flows through the Framework, FICC is providing the following background regarding Model Validation to supplement the proposed rule changes discussed further below.

Model Validation

Pursuant to Section 3.3 (Full Model Validation) of the Framework, each new model undergoes a Model Validation (unless provisionally approved, as discussed below) pursuant to which MVC verifies that the model is performing as expected in accordance with its design objectives and business purpose. The Model Validation standards, referred to in the Framework as the full Model Validation standards for any new model include, but are not be limited to, the following core Model Validation activities, as listed in the Framework:

- Evaluation of the model development documentation and testing;
- evaluation of model theory and assumptions, and identification of potential limitations;
- evaluation of data inputs and parameters;
- review of numerical implementation including replication for certain key model components, which would vary from model to model;
- independent testing: Sensitivity analysis, stress testing, and benchmarking, as appropriate; and
- evaluation of model outputs, model performance, and back testing.

Pursuant to the Framework, Full Model Validation is applied under the following circumstances: (i) For all new models prior to their use in production; (ii) during periodic Model Validations (as described below); and (iii) when model changes are made that require independent Model Validation (as further described below).

Pursuant to Section 3.4 (Periodic Model Validation) of the Framework, models approved for use in production are subject to what is currently referred to in the Framework as periodic Model Validations for purposes of confirming that the models continue to operate as intended, identifying any deficiencies that would call into question the continuing validity of any such model's original approval and evaluating whether the model and its prior validation remain valid within the dynamics of current market conditions.

In this regard, the Framework describes that MVC performs a Model Validation for each model approved for use in production not less than annually (or more frequently as may be contemplated by such Clearing Agency's established risk management framework), including each credit risk model,[9] liquidity risk model,[10] and in the case of FICC and NSCC, as central counterparties, on their margin systems and related models.[11]

Periodic Model Validations and a full Model Validation follow identical standards. The Framework states that in certain cases, MVC may determine extra Model Validation activities are warranted based on previous Model Validation work and findings, changes in market conditions, or because performance monitoring of a model warrants extra validation.

Pursuant to the Framework all findings that result from a new Model Validation, a change Model Validation, a periodic Model Validation, or in connection with implementation of a new model or model change, are centrally tracked by MVC.

Proposed Rule Changes

Section 3.1 Model Inventory

Section 3.1 of the Framework currently explains how any model developed for use by any of the Clearing Agencies and meeting the above definition for the term ''model'' would be subject to tracking within the Model Inventory. MVC is charged with responsibility for adding models to the Model Inventory and for tracking models listed in the Model Inventory. Section 3.1 also describes how a Model Inventory survey is conducted at least annually across the Clearing Agencies to confirm the Model Inventory is current. During the Annual Model Inventory Survey, any business area or support function intending to have a model developed for Clearing Agency use will submit materials relevant to such proposed model for MVC to review and assess whether such proposed model will be added to the Model Inventory.

Proposed Change To Enhance Flow and Readability of Text

Pursuant to the proposed rule change, FICC would remove the use of the modifier ''Clearing Agency'' with respect to references to models in this section and throughout the Framework. The Framework relates solely to models of the Clearing Agencies and the use of this modifier is redundant. This change would enhance the flow and readability of the text by eliminating a redundancy.

Model Owner

Also, the proposed rule change would move the first reference to the defined term ''Model Owner'' from the last paragraph of the section to the second paragraph of the section and clarify the meaning of the term. This reference would appear in a new sentence that would describe that a Model Owner is the person designated by the applicable business area or support function to be responsible for a particular model, and that the Model Owner is recorded as the Model Owner for such model by MVC in the Model Inventory. The Framework currently describes the Model Owner as responsible for the development or operation of the model being validated by MVC, without noting that the Model Owner is an individual designated by the applicable business unit or support function. In this regard, the proposed change would provide clarification that an individual is designated as the Model Owner by the applicable business area or support function.

The proposed rule change would also change the Clearing Agency title of the individual that is the head of MVC that is referred to in a footnote in this section from being an Executive Director to Managing Director of each Clearing Agency to reflect that a more senior officer of the Clearing Agencies would be responsible for supervising the MVC.[12] The footnote also states that the head of MVC reports to the Group Chief Risk Officer[13] rather than to any Model Owner.[14] This statement would be amended to clarify the independence of the MVC extends so that it is independent from anyone who develops and operates a model and not only a Model Owner. Also relating to the status of the head of MVC within the governance structure of the Clearing Agencies, this footnote would note that the head of MVC is a member of the Management Risk Committee (''MRC'').

Replacement of Term ''Vendor'' With ''externally purchased''

Section 3.1 currently contains a paragraph which describes that all

[8] *See* 2017 Notice, *supra* note 3.

[9] *See* Rule 17Ad–22(e)(4)(vii). *See supra* note 6.

[10] *See* Rule 17Ad–22(e)(7)(vii). *See supra* note 6.

[11] *See* Rule 17Ad–22(e)(6)(vi) and (vii). *See supra* note 6.

[12] A Managing Director is senior to an Executive Director.

[13] The Clearing Agencies' Model Risk management standards and practices are subject to the oversight and direction of the Group Chief Risk Officer, who is the head of the Group Chief Risk Office.

[14] The purpose of the footnote is to make clear that MVC management has an independent reporting line to the Group Chief Risk Office, without potential conflict of reporting to any person that could be a Model Owner.

models, whether internally developed or purchased from a ''vendor,'' are subject to Model Validation. Pursuant to the proposed rule change, FICC would revise the text of this paragraph to replace the term ''vendor'' with ''externally purchased.'' FICC believes use of the term ''externally purchased'', rather than vendor, would provide clarity with respect to sections of the Framework that apply to models developed internally versus externally.

Section 3.2 Model Materiality and Complexity

Section 3.2 of the Framework outlines that MVC assigns a materiality rating and a complexity rating to each model after it is added to the Model Inventory and describes that the applicable rating impacts the model's validation in terms of prioritization and approval authority.

As more fully described below regarding Section 3.6 of the Framework, the proposed rule change would provide for the delegation of approval authority for all Model Validations from the Clearing Agencies' management level committee responsible for model risk management matters to MVC, and the authority to approve model validations would vest solely in MVC.[15]

In this regard, a materiality rating and complexity rating would no longer be determinative of approval authority and the text that describes approval authority as impacted by materiality and complexity ratings would be deleted.

As a related change in the model governance structure, the forum currently referred to as the Model Risk Governance Committee would no longer maintain oversight authority in the model validation process and the text in this section would reflect that it is the forum for review of Model Risk matters rather than the formal forum for addressing Model Risk matters. The Model Risk Governance Committee's name would be revised in this section and throughout to refer to it instead as the Model Risk Governance Council (''MRGC'') to reflect its proposed role as an advisory body rather than being part of the formal model governance process. In this regard, the text of Section 3.2 would be revised to reflect that the MRGC is a forum for review of, rather than addressing, Model Risk matters and a footnote would be added to state that MRGC is an advisory body that has no decision-making authority but would discuss and/or review certain model risk related matters which could result in advice and/or recommendation, which is generally directed to the interested party of a given model that brings the matter, as applicable.

The proposed change to shift responsibility for Model Risk matters, including approval of Model Validations, to MVC would ensure that MVC has sole responsibility for approving Model Validations, as MVC is best suited within the Clearing Agencies to manage the quantitative and technical expertise to carry out the related functions.

Section 3.5—Model Change Management

Section 3.5 (Model Change Management) currently states that an active model may require changes in either structure or technique. Details for any model change request are provided to MVC for review and a determination of whether full Model Validation is required. This section also includes text that states to the extent that a vendor's version change may impact any existing model used in production, an impact study of the version change along with any other analysis/benchmarking shall be conducted as appropriate in MVC's reasonable business discretion.

The process described in this section will not be amended pursuant to the proposed rule change, however, to remain consistent with the use of terminology as described with respect to Section 3.1 above, references to ''vendor'' models in this section would be revised to reflect that models not developed by the Clearing Agencies would instead be referred to as externally purchased.

Section 3.6—Model Approval and Control

Section 3.6 (Model Approval and Control) currently provides that all new models, and all material changes to existing models, undergo Model Validation by MVC and must be approved prior to business use. Currently, in cases where such model's materiality is ''Medium'' or ''High,'' such Model Validation is reviewed by the MRGC and recommended by the MRGC to MRC, for approval.

As stated above, the proposed rule change would redefine the first and second line responsibilities and incentives relating to model performance monitoring and oversight.

With respect to the first line, the proposed rule change would remove a reference to the Financial Engineering Unit (''FEU'') within Quantitative Risk Management (''QRM''). QRM is a risk management function within the Group Chief Risk Office, and a representative of QRM is the Model Owner for all margin Models used by the CCPs under the Standards for Covered Clearing Agencies (''Standards'') under the Securities Exchange Act of 1934. Because the Model Owner resides in QRM, QRM is responsible for developing, testing, and signing-off on new models and enhancements to existing models before submitting any such model to MVC for Model Validation and approval. Due to an organizational restructuring, FEU was eliminated, and pursuant to the proposed rule change, the responsibilities of FEU described above would vest in the Model Owners, who as described with respect to the proposed changes to Section 3.1 above, would have responsibility for the models.

With respect to the second line, the proposed rule change would revise this section to remove the requirement that MRC approve any Model Validation. In this regard, MVC would have the sole and exclusive authority to approve a model. As stated above, the Clearing Agencies' believe that the MVC is best suited to address Model Validation issues based on its quantitative and technical expertise and knowledge, and the section would be revised accordingly to reflect MVC's proposed role in this regard. As such, the proposed rule change would remove any text that indicates that MRC approval is required for any Model Validation to be complete and/or for a model to remain in production.

Also, consistent with the change in the role of MRGC from one of oversight to instead acting in an advisory capacity, as described above, the proposed rule change would also remove text indicating that MRGC would review and recommend Model Validations to MRC or have any role in provisional approvals[16] of models.

Section 3.8—Model Performance Monitoring

Pursuant to the Framework, MVC is currently responsible for model performance monitoring and for each Clearing Agency's backtesting process,

[15] Currently, Model Validations that have a materiality rating of 'Medium' or 'High,' must be approved by the MRC, after the model has been reviewed and recommended to the MRC for approval by the MRGC. Additionally, all periodic Model Validations must currently be approved by the MRC to be deemed complete through review and recommendation by the MRGC.

[16] In this regard, Section 3.6 that states that models may be provisionally approved by MVC for a limited period, not to exceed six months unless also approved by the MRGC, would be revised to delete the reference to MRGC's role. Consistent with the changes relating to the second line as described above, MVC would assume full responsibility for provisional approvals and, and consistent with text in Section 3.6, would continue to track all provisional approvals to confirm provisional periods and control measures are met.

which are integral parts of each Clearing Agency's model risk management framework. In this regard, Section 3.8 (Model Performance Monitoring) of the Framework states that model performance monitoring is the process of (i) evaluating an active model's ongoing performance based on theoretical tests, (ii) monitoring the model's parameters through the use of threshold indicators, and/or (iii) backtesting using actual historical data/realizations to test a Value-at-Risk (''VaR'') model's predictive power.

The proposed rule change would eliminate references to ''theoretical tests'' and ''threshold indicators'' and ''historical data/realizations'' to represent a real-world depiction of the model performance monitoring process. These changes are being proposed because the process of model performance monitoring does not always take into account theoretical tests, threshold indicators, and/or historical data/realizations, but ''could'' take some or all of these into account and appropriate under the circumstances. Therefore, the elimination of the ties to these tests, thresholds and use of historical data/realizations are a more accurate representation of the model performance monitoring process.

In addition, Section 3.8 would be revised to reflect changes to the roles of Model Owners and the MVC consistent with the roles of the first and second lines described above, and add text stating that Model Owners are responsible for the design and execution of model performance monitoring and preparation of model performance monitoring reports. The proposed text would also state that MVC is responsible for providing oversight of model performance monitoring activities by setting organizational standards and providing critical analysis for identifying Model issues and/or limitations.[17]

One paragraph within Section 3.8 contains a statement that MVC is responsible for model performance monitoring, including review of risk-based models used to calculate margin requirements and relevant parameters/threshold indicators, sensitivity analysis, and model backtesting results, and preparation of related reports. It also states that review of these model performance measures is subject to review by MRGC. To remain consistent with the change in the role of MRGC and the related consolidation of primary responsibility for oversight in the model governance process in MVC, as described above, this paragraph would be deleted.

Also, consistent with the shift of the responsibility in this regard to Model Owners, Section 3.8 would be clarified to indicate that QRM, because the Model Owner for all margin models used by the CCPs under the Standards would reside in QRM, would be responsible for model performance monitoring the CCP's margin models.

Section 3.9—Backtesting

Section 3.9 states that MVC is responsible for each Clearing Agency's VaR backtesting processes for the central counterparties, including for model backtesting and Clearing Fund Requirement (''CFR'') backtesting. Consistent with the changes described above, this section would be revised to state that this backtesting function for models and CFR would reside with QRM, as it is the owner of margin models and would be responsible for performance monitoring functions with respect to margin models.

Section 4.1—Board of Directors and Senior Management Reporting

Section 4.1 describes MRGC as the primary forum for MVC's regular reporting of Model Validation activities and material Model Risks identified through regular Model performance monitoring. Reports and recommendations with respect to Model Risk management are made to the MRC as described in *Section 3.*

Periodic reporting to the Risk Committee of the Clearing Agencies' Boards (''BRC'') regarding Model Risk matters may include:

- Updates of Model Validation findings and the status of annual validations.
- Updates on significant Model Risk matters, and on compliance matters with respect to Model Risk policies and procedures (including this Framework).
- Escalation of Model Risk matters as set forth in the Market Risk Tolerance Statement, and subsequent, regular updates with respect thereto.

The proposed rule change would revise Section 4.1 to reflect the changes to the roles of MVC and MRGC as described above. In this regard, the proposed rule change would delete the description of MRGC's role as it would no longer have oversight of Model Validation and model performance monitoring and would add MRC as a recipient of periodic reporting. The proposed rule change would also generalize the statement relating to escalation of matters as set forth in the Market Risk Tolerance Statement to instead refer to ''the Risk Tolerance Statements'' to reflect the addition of a reference to the Model Risk Tolerance Statement as a supporting document for the Framework, as more fully described below.

Section 4.2—Escalation

Section 4.2 describes, among other things, how on at least a monthly basis, the key metrics identified in Section 3.9 (Backtesting) are reviewed by the Market and Liquidity Risk Management unit within the Group Chief Risk Office and MVC and reported to MRC. Given MVC's reduced role with respect to backtesting in this regard, the proposed rule change would eliminate the provision that MVC would review the metrics.[18]

The proposed rule change would also revise text for clarity and readability with respect to statements on the review of the Market Risk Tolerance Statement, to reference ''Risk Tolerance Statements'' more generally to reflect the changes described herein. Also, the proposed rule change would remove MRGC's role in review and approval of changes to backtesting methodology and instead vest that responsibility with MVC, to reflect the change in oversight of Model Validation from MRGC to MVC.

Also, to enhance the readability and flow of the text in this section, the proposed rule change would move text describing that (i) the review of the Risk Tolerance Statements by the Managing Director of the Market and Liquidity Risk Management unit (''MDMLRM'') within the Group Chief Risk Office will occur on an at least annual basis, and (ii) the BRC's review and approval of the Risk Tolerance Statements will occur on an at least annual basis, to the end of Section 4.2.[19] The proposed change would also replace the reference to specific title of the MDMLRM to instead refer to the owner of the Risk Tolerance Statements, to provide for more generic terminology that would not require formal amendment in the Framework if the title of the MDMLRM were to change.

[17] The organizational standards apply to DTCC's subsidiaries, as applicable.

[18] Text would be added to clarify that the risk metrics are reported to MRC by the group within Group Chief Risk Office responsible for risk reporting. Currently, this function is known as Risk Reporting.

[19] The Risk Tolerance Statements are also reviewed on an at least annual basis by Operational Risk Management, which, among other things, is the business line responsible for enabling the identification of the Clearing Agencies' plausible sources of operational risk in order to mitigate the impact of a potential event related to those sources using tailored risk profiles and monitoring risk profiles in accordance with the relevant Risk Tolerance Statements.

Other Changes

The Framework inconsistently uses the term ''model'' without and with initial capitalization, but currently refers throughout to the risks relating to models referred to in the Framework as a defined term using initial capitalization—''Model Risk.'' To remain consistent with the usage of ''model'' throughout the Framework, FICC would conform all references to the term ''model'', so they appear without initial capitalization and change references to Model Risk throughout the Framework to eliminate the initial capitalization of the term and refer to it as ''model risk.''

The Executive Summary of the Framework includes a description of internal DTCC policies and procedures that support the Framework, including the (a) DTCC Model Risk Management Policy, (b) DTCC Model Validation Procedures, (c) DTCC Model Risk Performance Monitoring Procedures, (d) the DTCC Backtesting Procedures and (e) Market Risk Tolerance Statement (''Related Procedures''). In addition to the policies and procedures described in the Executive Summary, the proposed rule change would list in the Executive Summary as a supporting policy, the Model Risk Tolerance Statement. The Model Risk Tolerance Statement articulates, among other things, risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance. The conclusion, based on risk tolerance levels, focuses on model remediation.

Since the risk tolerance levels in both the Market Risk Tolerance Statement [20] and the Model Risk Tolerance Statement consider model remediation as the basis of risk control, both are applicable to the Framework. In this regard, the proposed rule change would add a footnote after the listing of the Model Risk Tolerance Statement and the existing reference to the Market Risk Tolerance Statement to describe that with respect to the key risks [21] of model risk and market risk, each risk tolerance statement documents the overall risk reduction or mitigation objectives as it relates to model risk and market risk activities and documents the risk controls and other measures used to manage such activities, including escalation requirements in the event of risk metric breaches. The footnote would also state that the Risk Tolerance Statements are reviewed, revised, retired, and/or replaced, as the case may be, and approved by the BRC (as defined herein) annually, based upon the circumstances, and the reasonable best judgement of management, then existing relating to model risk management matters. Consistent with proposed terminology described above with respect to Sections 4.1 and 4.2, the Model Risk Tolerance Statement and the Market Risk Tolerance Statement would be referred to collectively in the Executive Summary as the ''Risk Tolerance Statements.''

The Executive Summary also indicates that the Related Procedures may be updated or amended. The Clearing Agencies regularly review their internal policies and procedures, and in addition to updating or amending them as an administrative matter as they deem appropriate, may also retire or replace internal policies and procedures as they deem appropriate. In this regard, the proposed rule change would also include text to the effect that each of the Related Procedures and the Model Risk Tolerance Statement may retired or replaced (in addition to updated or amended).

Effective Date

The proposed rule change would become effective upon approval by the Commission.

2. Statutory Basis

The Clearing Agencies believe that the Framework is consistent with Section 17A(b)(3)(F) of the Act,[22] as well as Rule 17Ad–22 (e)(4)(vii), and (e)(7)(vii) thereunder,[23] for the reasons described below.

Section 17A(b)(3)(F) of the Act [24] requires, *inter alia,* that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. As described above, the Framework describes the process by which the Clearing Agencies identify, measure, monitor, and manage the risks associated with the design, development, implementation, use, and validation of quantitative models. The quantitative models covered by the Framework are applied by the Clearing Agencies, as applicable, to evaluate and address their respective risk exposures associated with their settlement activity and facilitate their ability to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible. In this regard, the proposed changes to the Framework support their ability to develop models that are applied to evaluate and address risk exposure and facilitate the safeguarding of securities and funds which are in the custody or control of the Clearing Agencies or for which they are responsible by (i) changing the governance structure for approval of a Model Validation to transfer the responsibility for approval of model validations to the MVC, which is composed of individuals with a higher level of expertise relating to model validations than members of the MRC, which is currently responsible for such approvals, thereby enhancing the ability of the group conducting Model Validations to evaluate risk exposures relating to models, (ii) incorporating the Model Risk Tolerance Statement into the Framework which describes risk tolerance levels covering model design and implementation, including consideration of a model's intended purpose and/or its adequacy of performance, and therefore including a cross-reference to a document which describes an important gauge with respect to the level of risk that may be tolerated as part of managing the risk presented to the Clearing Agencies relating to models, (iii) clarifying the definition of Model Owner, therefore defining the first line responsible for evaluating risk exposure, (iv) reflecting changes in the role of the Model Risk Governance Committee and a change its name, which relates to the change in governance structure that is designed to enhance the independence in its new role of responsibility for approval of Model Validations which would support the Clearing Agencies' ability to evaluate risk exposure, (v) redefining the first and second line responsibilities and incentives relating to model performance monitoring and oversight, therefore enhancing the process by which risk relating to models is evaluated, and (vi) making other technical and clarifying changes to the text, as described above, to improve the text in defining roles and responsibilities for the processes established by the Clearing Agencies to monitor risk. Therefore, FICC believes the proposed rule change is consistent with the requirements of Section 17A(b)(3)(F) of the Act,[25] because it

[20] The Market Risk Tolerance Statement articulates, among other things, risk tolerance levels covering margin backtests covering backtest coverage and stress tests covering exposure to extreme market moves. The conclusion, based on tolerance levels, focuses on model enhancement or model remediation, as applicable.

[21] DTCC has identified a set of key risks to better guide the content, measurement, frequency, and focus of our discussion and management of risk generally across the Organization.

[22] 15 U.S.C. 78q–1(b)(3)(F).

[23] *Supra* note 6.

[24] 15 U.S.C. 78q–1(b)(3)(F).

[25] *Id.*

would facilitate the ability of the Clearing Agencies to continue to develop models that are applied to evaluate and address risk exposure and allow them to maintain a Framework that facilitates the ability of the Clearing Agencies to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, as described above.

Rule 17Ad–22(e)(4)(vii) [26] and (e)(7)(vii) [27] under the Act requires, *inter alia,* that a covered clearing agency establish, implement, maintain and enforce written policies and procedures reasonably designed to perform Model Validations on its credit risk models and liquidity risk models not less than annually or more frequently as may be contemplated by the clearing agency's risk management framework established pursuant to Rule 17Ad–22(e)(3).[28] As discussed above, the proposed rule change would amend the Framework to provide for enhanced clarity in the text and enhanced efficiency with respect to the approval process for Model Validations at least annually. In this regard, and as noted above, pursuant to the Framework, Model Validations are performed not less than annually on its credit risk models and liquidity risk models. Therefore, the Clearing Agencies believe that the proposed changes to the Framework are consistent with Rule 17Ad–22(e)(4)(vii) [29] and (e)(7)(vii) [30] under the Act.

(B) Clearing Agency's Statement on Burden on Competition

None of the Clearing Agencies believe that the Framework would have any impact, or impose any burden, on competition because the proposed rule change reflects clarifying changes and provides for a more efficient internal governance process and would not effectuate any changes to the Clearing Agencies' model risk management tools as they currently apply to their respective Members or Participants.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Clearing Agencies have not solicited or received any written comments relating to this proposal. The Clearing Agencies will notify the Commission of any written comments received by the Clearing Agencies.

III. Date of Effectiveness of the Proposed Rule Change, and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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.* Please include File Number SR–FICC–2020–004 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

All submissions should refer to File Number SR–FICC–2020–004. 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 website (*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 website 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 FICC and on DTCC's website (*http://dtcc.com/legal/sec-rule-filings.aspx*). All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FICC–2020–004 and should be submitted on or before May 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[31]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08377 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[26] 17 CFR 240.17Ad–22(e)(4) (in particular, 17 CFR 240.17Ad–22(e)(4)(vii)). *See supra* note 6.

[27] 17 CFR 240.17Ad–22(e)(7) (in particular, 17 CFR 240.17Ad–22(e)(7)(vii)). *See supra* note 6.

[28] 17 CFR 240.17Ad–22(e)(3). *See supra* note 6.

[29] *Supra* note 6.

[30] *Supra* note 6.

[31] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88642; File No. SR–CboeEDGA–2019–015]

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Withdrawal of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

April 15, 2020.

On October 1, 2019, Cboe EDGA Exchange, Inc. (''Exchange'' or ''EDGA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the EDGA fee schedule to introduce a Small Retail Broker Distribution Program. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the **Federal Register** on October 17, 2019.[4] The Commission received no comment letters regarding the proposed rule change. On December 10, 2019, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Act [5] and simultaneously instituting proceedings

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).

[4] *See* Securities Exchange Act Release No. 87294 (October 11, 2019), 84 FR 55638 (October 17, 2019).

[5] 15 U.S.C. 78s(b)(3)(C).

under Section 19(b)(2)(B) of the Act[6] to determine whether to approve or disapprove the proposed rule change (''OIP'').[7] The Commission received no comment letters in response to the OIP.

On April 9, 2020, the Exchange withdrew the proposed rule change (SR–CboeEDGA–2019–015).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[8]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2020–08372 Filed 4–20–20; 8:45 am]

BILLING CODE 8011–01–P

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 87709 (December 10, 2019), 84 FR 68523 (December 16, 2019).

[8] 17 CFR 200.30–3(a)(57) and (58).

SURFACE TRANSPORTATION BOARD

[Docket No. AB 1009 (Sub-No. 2X)]

Mission Mountain Railroad, L.L.C.—Discontinuance of Service Exemption—in Flathead County, Mont.

On April 1, 2020, Mission Mountain Railroad, L.L.C. (MMT), filed a petition under 49 U.S.C. 10502 for exemption from the prior approval requirements of 49 U.S.C. 10903 to discontinue its operations over approximately 13.33 miles of rail line, extending from milepost 1211.86 at the interchange with the BNSF Railway Company (BNSF) at Columbia Falls to milepost 1225.19 at Kalispell, all in Flathead County, Mont. (the Line). The Line traverses U.S. Postal Service Zip Codes 59901 and 59912.

According to MMT, it provides service on the Line pursuant to a lease agreement with BNSF, the owner of the Line. MMT explains that the lease agreement was due to terminate on March 31, 2020, and that MMT and BNSF have agreed that BNSF will assume direct operation of its line in place of MMT as of April 1, 2020. MMT states that the proposed discontinuance will allow MMT to formally end its common carrier obligations over the Line. In addition, MMT states that no customer on the Line will be left without common carrier service as a consequence of the proposed discontinuance.

MMT states that it believes the Line does not contain any federally granted rights-of-way. MMT also states that any documentation in its possession will be made available to those requesting it.

As a condition to this exemption, any employee adversely affected by the discontinuance of service shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979).

By issuance of this notice, the Board is instituting an exemption proceeding pursuant to 49 U.S.C. 10502(b). A final decision will be issued by July 20, 2020.

Because this is a discontinuance proceeding and not an abandonment proceeding, interim trail use/rail banking and public use conditions are not appropriate. Because there will be environmental review during any subsequent abandonment, this discontinuance does not require an environmental review. *See* 49 CFR 1105.6(c)(5), 1105.8(b).

Any offer of financial assistance (OFA) for subsidy under 49 CFR 1152.27(b)(2) will be due no later than 120 days after the filing of the petition for exemption, or 10 days after service of a decision granting the petition for exemption, whichever occurs sooner.[1] Persons interested in submitting an OFA must first file a formal expression of intent to file an offer by May 1, 2020, indicating the intent to file an OFA for subsidy and demonstrating that they are preliminarily financially responsible. *See* 49 CFR 1152.27(c)(1)(i).

All filings in response to this notice must refer to Docket No. AB 1009 (Sub-No. 2X) and must be filed with the Surface Transportation Board either via e-filing or in writing addressed to 395 E Street SW, Washington, DC 20423–0001. In addition, a copy of each pleading must be served on MMT's representative, Bradon J. Smith, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 800, Chicago, IL 60606–2832. Replies to this petition are due on or before May 11, 2020.

Persons seeking further information concerning discontinuance procedures may contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or refer to the full abandonment and discontinuance regulations at 49 CFR part 1152. Questions concerning environmental issues may be directed to the Board's Office of Environmental Analysis at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

Board decisions and notices are available at *www.stb.gov.*

Decided: April 15, 2020.

[1] The filing fee for OFAs can be found at 49 CFR 1002.2(f)(25).

By the Board, Scott M. Zimmerman, Acting Director, Office of Proceedings.

Aretha Laws-Byrum,

Clearance Clerk.

[FR Doc. 2020–08411 Filed 4–20–20; 8:45 am]

BILLING CODE 4915–01–P

TENNESSEE VALLEY AUTHORITY

Allen Fossil Plant Ash Impoundment Closure Environmental Impact Statement

AGENCY: Tennessee Valley Authority.

ACTION: Record of decision.

SUMMARY: This notice is provided in accordance with the Council on Environmental Quality's regulations and Tennessee Valley Authority's (TVA's) procedures for implementing the National Environmental Policy Act (NEPA). TVA has decided to adopt the Preferred Alternative identified in the Allen Fossil Plant (ALF) Ash Impoundment Closure Environmental Impact Statement. The Final Environmental Impact Statement (EIS) was made available to the public on March 6, 2020. A Notice of Availability of the Final EIS was published in the **Federal Register** on March 13, 2020. The Preferred Alternative is ''Closure of the Metal Cleaning Pond, Closure-by-Removal of the East Ash Pond Complex and the West Ash Pond; Disposal of CCR in an Offsite Landfill Location.'' This alternative would achieve the purpose and need of the project to support the implementation of TVA's goal to eliminate all wet Coal Combustion Residuals (CCR) storage at its coal plants; close CCR surface impoundments across the TVA system; comply with the U.S. Environmental Protection Agency's CCR Rule and other applicable federal and state statutes and regulations; and enhance future economic development in the greater Memphis area.

FOR FURTHER INFORMATION CONTACT: W. Douglas White, Tennessee Valley Authority, 400 West Summit Hill Drive, WT11B–K, Knoxville, Tennessee 37902; telephone (865) 638–2252, or by email *wdwhite0@tva.gov.* The Final EIS, this Record of Decision (ROD) and other project documents are available on TVA's website *https://www.tva.gov/nepa.*

SUPPLEMENTARY INFORMATION: TVA is a corporate agency of the United States that provides electricity for business customers and local power distributors serving more than 10 million people in an 80,000 square mile area comprised of most of Tennessee and parts of Virginia,

North Carolina, Georgia, Alabama, Mississippi, and Kentucky. TVA receives no taxpayer funding, deriving virtually all of its revenues from sales of electricity. In addition to operation of its power system, TVA provides flood control, navigation and land management for the Tennessee River system and assists local power companies and state and local governments with economic development and job creation.

ALF was constructed in the 1950s by the Memphis Light, Gas and Water Division (MLGW). TVA purchased the plant in 1984 and operated the plant until ALF's three coal-fired units were retired on March 31, 2018. While in operation, ALF consumed approximately 7,200 tons of coal a day and produced approximately 5,160 million kilowatt-hours of electricity a year. CCR produced by the collective units included approximately 85,000 dry tons of slag and fly ash annually. Unlike other TVA power plants, much of the land occupied by ALF is not owned by TVA, but by third parties, including the City of Memphis, Shelby County, and MLGW. ALF is also located in a heavily industrialized area, which means that redevelopment is of particular interest as the land holds significant economic potential for the non-TVA owners due to its location within the Frank C. Pidgeon Industrial Park as well as its access to the Port of Memphis via McKellar Lake.

TVA has prepared an EIS pursuant to NEPA to assess the environmental impacts of the proposed closures of the East Ash Pond Complex (including the Coal Yard Runoff Pond), the West Ash Pond and the Metal Cleaning Pond at ALF. TVA estimates that approximately 3,500,000 yd^3 of CCR is located within the project areas at ALF. TVA has also evaluated the location requirements and environmental impacts associated with the potential construction and utilization of an off-site proposed beneficial re-use processing facility that would be used to process CCR from ALF. TVA also considered potential impacts associated with the transport of borrow from previously permitted sites and the disposal of CCR at existing, off-site permitted landfills.

With a long-standing commitment to safe and reliable operations and to environmental stewardship, TVA began, in 2009, to convert from wet to dry management of CCR. On April 17, 2015, the U.S. Environmental Protection Agency (EPA) published the Final Disposal of Coal Combustion Residuals from Electric Utilities rule (CCR Rule) in the **Federal Register** (80 FR 21302). The CCR Rule establishes national criteria and schedules for the management and closure of CCR facilities.

In June of 2016, TVA issued a Final Programmatic Environmental Impact Statement (PEIS) that analyzed methods for closing impoundments that hold CCR materials at TVA fossil plants and identified specific screening and evaluation factors to help frame its evaluation of closures at additional facilities. The purpose of the PEIS was to support TVA's goal to eliminate all wet CCR storage at its coal plants by closing CCR surface impoundments across TVA's system and to assist TVA in complying with the EPA's CCR Rule.

The proposed action at ALF tiers from the PEIS. The purpose, therefore, is to eliminate all wet CCR storage at ALF; close its CCR surface impoundments; comply with the EPA's CCR Rule and other applicable federal and state statutes and regulations; and help make the property available by its non-TVA owners for future economic development projects in the greater Memphis area.

Alternatives Considered

TVA considered three alternatives in the Draft EIS and Final EIS. These alternatives are:

Alternative A—No Action Alternative. Under the No Action Alternative, TVA would not close the East Ash Pond Complex (which includes the Coal Yard Runoff Pond) or the Metal Cleaning Pond. The West Ash Pond would remain in its current closed state. No closure activities (*i.e.,* no excavation or transport activities) would occur. However, the No Action Alternative is inconsistent with TVA's plans to convert all of its wet CCR systems to dry systems and is inconsistent with the general intent of EPA's CCR Rule. In addition, under the No Action Alternative, the ALF closure area land would not be made available to its owners for future economic development projects in the greater Memphis area. Consequently, this alternative would not satisfy the project purpose and need and, therefore, is not considered viable or reasonable. It does, however, provide a benchmark for comparing the environmental impacts associated with implementation of Alternatives B and C.

Alternative B—Closure of the Metal Cleaning Pond, Closure-by-Removal of the East Ash Pond Complex and the West Ash Pond; Disposal of CCR in an Offsite Landfill Location. Under Alternative B, the primary actions include the closure of the East Ash Pond Complex, the West Ash Pond and the Metal Cleaning Pond via Closure-by-Removal. Closure-by-Removal involves excavation and relocation of the CCR from the ash impoundments in accordance with federal and state requirements. TVA would stabilize residual ponded areas and then remove CCR material, underlying impacted soil, and support structures within the impoundment footprint.

Closure of the surface impoundments at ALF would entail the addition of borrow material to achieve proposed finished grades and provide a suitable medium to support restoration of the former impoundments with approved, non-invasive seed mixes designed to quickly establish desirable vegetation. Closure-by-Removal of the surface impoundments is expected to require approximately 3 million yd^3 of suitable borrow material. No specific borrow site(s) has been identified at this time and ultimate site selection will be determined by the contractor. As part of the contracting process to obtain borrow, TVA will require that any borrow material be obtained from a previously developed and/or permitted borrow site. Accordingly, potential impacts associated with the transport of borrow material to ALF are based upon the ''bounding'' or worst case characteristics of this action that were developed in consideration of the use of a range of identified candidate sites in the vicinity of ALF.

Offsite transport of CCR is another component action to be undertaken in conjunction with this alternative. CCR removed from the ash impoundments would be transported offsite to an existing permitted landfill. Because the selection of a particular receiving landfill is dependent upon TVA's NEPA decision, contract arrangements and other factors, identification of a specific receiving landfill is premature. Actual landfill selection will be determined during the project implementation phase. Under this alternative, TVA will consider only previously developed and/or permitted landfills having sufficient excess capacity and the ability to construct dedicated cells to accommodate a monofill for CCR from a single generator. TVA would not own or operate the landfill to which CCR from ALF is transported. Therefore, TVA has conducted a bounding analysis of potential environmental effects associated with transport of CCR to an offsite landfill by either truck or rail. Transport of CCR by barge was also considered by TVA. ALF has a barge unloading facility available for use and with minor modification and repairs, the existing reclamation hoppers and associated conveyors from the coal yard to the transfer station could be re-configured for use. However, additional

infrastructure would also need to be constructed to support loading of CCR onto a barge. While such modifications could be accomplished, no suitable landfill was identified by TVA that is equipped to receive CCR from barges. Consequently, the transport of CCR by barge as a mode of transportation was eliminated from further consideration.

Alternative C—Closure of the Metal Cleaning Pond, Closure-by-Removal of the East Ash Pond Complex and West Ash Pond; Disposal of CCR in a Beneficial Re-Use Process & Offsite Landfill Location. Under Alternative C, TVA would close the surface impoundments in the same manner as Alternative B. However, instead of transporting all excavated CCR material to an offsite landfill, most CCR (ranging from approximately 75 to 95 percent) would be transported to a beneficial re-use facility (constructed and operated by others) to be processed for use in concrete and other building materials. Borrow material suitable for use as backfill within the ALF impoundments would also be required under this alternative similar to that described for Alternative B.

No specific provider of the beneficiation services or the specific site at which a beneficial re-use processing facility would be constructed has been developed at this time. However, because it is expected that the feasibility of such a facility is dependent upon the presence of available CCR at ALF, this facility is also evaluated as a component action in the EIS. Because no specific provider or site for the potential beneficial re-use processing facility has been identified, impacts of this option to process CCR from ALF are based on a bounding analysis of the characteristics of a representative beneficial re-use processing facility.

Environmentally Preferred Alternative

Alternative A—No Action would result in the lowest level of environmental impacts as the impacts associated with closure of the impoundments and disposal of CCR under Alternatives B and C would be avoided. However, Alternative A—No Action, does not meet the purpose and need for the project. The scope of Alternatives B and C is formed by the purpose and need of the proposed action. Under both of these alternatives, CCR would be removed from the impoundments and borrow material suitable for use as backfill would be transported onsite to support site restoration. Removal of CCR from the impoundments would result in predominantly minor impacts to the natural environment (surface water, floodplains, vegetation, wildlife, aquatic ecology and wetlands), that would be temporary and localized. Consultation with U.S. Fish and Wildlife Service (USFWS) under Section 7 of the Endangered Species Act (ESA) determined that project activities may affect, but are not likely to adversely affect, the interior least tern, Indiana bat, and northern long-eared bat. Closure of the impoundments by removal eliminates both CCR and water within the impoundments, thereby resulting in a long-term beneficial impact to groundwater. No federal post-closure care measures are required as the impoundments would be closed under the Closure-by-Removal option. State requirements for post-closure care would be implemented as needed. Remedial investigations and actions at ALF, including the Environmental Investigation Plan (EIP) that is being undertaken in accordance with an administrative order issued by the Tennessee Department of Environment and Conservation (TDEC) in 2015, and the current Interim Response Actions (IRAs) for groundwater that are part of a remedial investigation (RI) directed by TDEC that began in 2017, will continue. Any future long-term remedy would continue to be implemented and groundwater quality would be restored where contamination from arsenic or other constituents is present. There would be only minor short-term impacts to the natural environment associated with procurement and transport of borrow and transport of CCR to an offsite landfill.

Impacts to the human environment (air quality, climate change, visual resources, land use, socioeconomics, and public and worker safety) would be primarily related to closure activities and would be minor and short-term. Although the proposed closure of the impoundments under either alternative would have a minor impact on the regional transportation system, there could be moderate localized impacts to low volume roadways used jointly by trucks transporting CCR and borrow, sensitive noise receptors along the transport routes, and users of recreational facilities located adjacent to low volume roadway segments. In addition, there could be moderate to large impacts associated with borrow and CCR transport by truck, disproportionate to environmental justice populations. These impacts would be minimized with implementation of a traffic management plan that is designed to address congestion and avoidance of borrow sites accessed by low volume roadways serving residential areas. There would be no effect to solid and hazardous waste, although CCR previously managed in the impoundments at ALF would be disposed in an existing, permitted landfill. There would be no effect to cultural resources with adherence to the mitigation measures defined below.

Reasonably foreseeable future projects that are planned to occur on ALF include the deconstruction and demolition activities of the plant. Such actions could contribute to cumulative impacts on the local transportation network if these activities are concurrent with the proposed ash impoundment closure project. The number of trucks associated with the transport of debris from ALF deconstruction, added to the number of trucks required to remove CCR from impoundments at ALF and transport of borrow material for restoration activities could result in a very large number of trucks and other vehicles entering and exiting the facility on a daily basis. TVA would mitigate congestion in the vicinity of ALF with a traffic management plan. Possibilities include staging of trucks, temporary signals, spacing logistics, or timing truck traffic to occur during lighter traffic hours (such as not in the morning or afternoon commute hours). With implementation of these mitigation measures, cumulative impacts to transportation would be moderate and would only occur during the construction phases of these activities.

Impacts associated with Alternative C would be the same as for Alternative B, except most of the CCR removed from the impoundments would be transported to a beneficial re-use facility to be processed for use in concrete and other building materials. Therefore, implementation of this alternative would involve minor impacts associated with the construction and operation of the facility. In addition, this alternative would have a long-term moderate beneficial impact to solid waste as the majority of CCR would be beneficially re-used as compared to disposal in a landfill.

Decision

TVA has decided to implement the preferred alternative identified in the Final EIS: Alternative B—Closure of the Metal Cleaning Pond, Closure-by-Removal of the East Ash Pond Complex and the West Ash Pond; Disposal of CCR in an Offsite Landfill Location. This alternative would achieve the purpose and need of the project. Alternative C would also meet the purpose and need of the project and

would have similar impacts as Alternative B. However, construction of a new facility (by others) to process CCR from ALF would extend the duration of closure which would delay the future economic development of the site. This would result in greater direct and cumulative impacts associated with air emissions, noise emissions, impacts to transportation system, impacts to environmental justice communities, safety risks and disruptions to the public associated with the extended time frame for closure.

Public Involvement

On November 30, 2018, a Notice of Intent (NOI) to prepare an EIS to address the closure of the impoundments at ALF was published in the **Federal Register**. In addition to the NOI in the **Federal Register**, TVA published information about the review on TVA's project website, notified the media, and sent notices to numerous individuals, organizations, local and regional stakeholders, governments and interested parties.

A public information session was held on January 17, 2019, at the Mitchell Community Center in Memphis, TN, to provide additional information related to the proposed actions to the public. TVA's efforts to notify local residents of the January 2019 public information meeting included issuing an additional media advisory and notifying the 35 people who had attended a previous meeting related to activities underway at ALF. TVA also sent letters to all residents within a 5-mile radius of the plant and contacted three neighborhood associations surrounding the plant to inform them of the meeting. In addition, TVA distributed 540 flyers throughout the Memphis Public Library System. A total of 77 people attended the public meeting. Attendees included members of the general public, media representatives, and other special interest groups.

Public comments on the scope of the EIS were collected from November 30, 2018 through January 31, 2019, and at the public information session. TVA received 63 comment submissions from members of the pubic and federal agencies. Comments received that requested TVA extend the scoping period and hold a public meeting were addressed by TVA during the public scoping period. Comments received on the proposed alternatives generally expressed support for the complete removal of CCR and remediation of the site. Other commenters stressed the need to ensure the safe transport and disposal of CCR. Comments also included requests that the EIS include analysis of impacts to the following resources: Groundwater, surface water, the surrounding community, onsite workers, wildlife that frequent the impoundments and recreators who enjoy observing the wildlife that frequent the impoundments. Comments were received requesting the EIS provide more detail regarding the beneficiation process and its potential environmental impacts and that the EIS consider the cumulative impact of future economic development of the ALF site. TVA also received comments requesting the analysis of the operation of the Allen Combined Cycle Plant be included in the scope of the project. TVA considered these comments in the preparation of the Final EIS.

TVA released the Draft EIS for public review on October 4, 2019. A Notice of Availability (NOA) for the Draft EIS was published in the **Federal Register** on October 11, 2019. Publication of the NOA in the **Federal Register** opened the 45-day comment period, which ended on November 25, 2019. To solicit public input, the availability of the Draft EIS was announced in regional and local newspapers serving the Memphis area and on TVA's social media accounts. The availability of the Draft EIS was also announced in newspapers serving the communities in surrounding states where landfills capable of receiving CCR from ALF were identified in the Draft EIS. A news release was issued to the media and posted on TVA's website. The Draft EIS was posted on TVA's website, and hard copies were made available by request. Two public information sessions were held during the review period to allow the public the opportunity to learn more about the project. The first session was held on October 8, 2019, at the Mitchell Community Center in Memphis, TN. A second session was held on October 30, 2019, at the Benjamin L. Hooks Public Library in Memphis, TN. Public comments were accepted between October 4, 2019 and November 25, 2019, and at both public information sessions. TVA also conducted additional outreach activities through attendance at local community group events and meetings to provide information regarding activities at ALF.

TVA accepted comments submitted through mail, email, a comment form on TVA's public website, and at the public meetings. TVA received 28 comment submissions from members of the public, organizations and state and federal agencies. Comment submissions were carefully reviewed and compiled into 69 specific comments which received responses. Most of the comments received were related to the results of the landfill screening analysis which concluded that, among others, the Taylor County Landfill and the Arrowhead Landfill met the requirements to be considered in the bounding analysis for transportation of CCR to an offsite landfill for disposal. Other comments received were related to groundwater impacts and the ongoing investigations at ALF, sufficiency of the bounding analyses, consideration of impacts to communities requiring environmental justice considerations and the consideration of cumulative impacts. TVA provided responses to these comments, made appropriate minor revisions to the Draft EIS and issued this Final EIS.

TVA received an additional 54 comments after closure of the comment period, one of which was signed by 30 members of the public. These comments all expressed opposition to use of the Taylor County Landfill in Georgia for disposal of CCR from ALF. As these comments were sufficiently addressed by TVA in response to comments received while the comment period was open, TVA has not provided individual responses to these comments. However, the comments are retained as part of the project's Administrative Record.

The NOA for the Final EIS was published in the **Federal Register** on March 13, 2020. TVA received three comments during the mandatory 30-day waiting period after the Final EIS was released. One comment questioned the data and analysis regarding the health and safety of rail transport versus truck transport which TVA obtained from previous studies conducted by other entities and presented in the Draft and Final EIS. TVA has determined that no additional analysis is required. A second comment was from an advocacy group that expressed opposition to disposal of CCR from ALF at the Arrowhead Landfill. This concern was addressed in TVA's response to comments in the Final EIS. A third comment was received from a regulatory agency, noting their comments had been adequately resolved in the Final EIS.

Mitigation Measures

TVA will use appropriate best management practices (BMPs) during all phases of closure of the ash impoundments. Mitigation measures and actions taken to reduce adverse impacts associated with the proposed action, include:

- TVA would mitigate traffic impacts by developing a traffic management plan that considers alternate access locations to/from ALF (*i.e.,* Plant Road vs. Riverport Road to the west), staging

and management of truck ingress/egress, borrow site selection to optimize use of borrow sites that do not require truck use of common roadway segments, potential alternate routing during local rail operations on Rivergate Road, and installation of temporary signals at key intersections.

• To avoid potential for indirect impacts to the interior least tern, TVA would implement specific conservation measures identified as per consultation with USFWS under Section 7 of the ESA.

• Should the osprey nest located north of the East Ash Pond Complex on a mooring cell structure in McKellar Lake be active during ash impoundment closure, activities would be minimized within a 660-foot diameter buffer around the nest during the osprey nesting season. These avoidance measures would result in no adverse impacts to these birds.

• TVA may elect to remove the osprey nest during the non-nesting season in conjunction with other on-going site decommissioning activities unrelated to ash impoundment closure. As such, TVA would ensure nest removal would follow guidance from the U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services Program.

• TVA will require that CCR be disposed of in a previously developed and/or permitted site having sufficient permitted capacity.

• Borrow would be obtained from one or more previously developed and/or permitted commercial borrow site(s) within 30 miles of ALF. No specific site has been identified at this time and ultimate site selection would be determined by the contractor. However, TVA would perform all necessary due diligence and consultation as required under Section 106 of the National Historic Preservation Act (NHPA) related to any offsite work.

• TVA will continue to collect groundwater samples from existing monitoring wells and review the analytical results as a part of the 2015 TDEC administrative order process, the EPA's CCR Rule, and other regulatory requirements. TVA is also implementing the IRAs and corrective measures to control and begin treating impacted groundwater identified in some shallow aquifer monitoring wells around the East Ash Pond Complex.

• A TDEC Section 401 Water Quality Certification/TDEC Aquatic Resource Alteration Permit and U.S. Army Corps of Engineers 404 permit would be required for disturbance to wetlands and stream features, and the terms and conditions of these permits would include mitigation for unavoidable adverse impacts, as appropriate.

• A National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction Activities or an Individual Construction Storm Water permit may be required for the proposed project, and a Storm Water Pollution Prevention Plan (SWPPP) would be required to detail sediment and erosion control BMPs.

• Several actions associated with the proposed closures were addressed in TVA's programmatic consultation with the USFWS on routine actions and federally-listed bats in accordance with ESA Section 7(a)(2) which was completed in April 2018. For those activities with potential to affect Indiana bats and northern long-eared bat, TVA committed to implementing specific conservation measures. These activities and associated conservation measures would be implemented as part of the proposed project.

• To minimize adverse impacts on natural and beneficial floodplain values, BMPs would be used during construction activities. In addition, TVA would obtain documentation from permitted landfill(s) receiving ash that the ash would be disposed in an area outside the 100-year floodplain.

BMPs employed to minimize impacts include:

• Fugitive dust emissions from site preparation and construction would be controlled by wet suppression, installation of a truck washing station and other BMPs, as appropriate. In addition, the Clean Air Act Title V operating permit incorporates fugitive dust management conditions.

• Erosion and sedimentation control BMPs (*e.g.,* silt fences) would ensure that surface waters are protected from construction impacts.

• Consistent with E.O. 13112 as amended by E.O. 13751, disturbed areas would be revegetated with native or non-native, non-invasive plant species to avoid the introduction or spread of invasive species.

• BMPs as described in the project-specific SWPPP and the Tennessee Erosion and Sediment Control Handbook-4th Edition, 2012 would be used during construction activities to minimize impacts and restore areas disturbed during construction.

• TVA may decide to contract with outside vendors for construction and/or transportation services under Alternative B. It is TVA policy that all contractors have in place a site-specific health and safety plan prior to operation on TVA properties.

Dated: April 14, 2020.

Robert M. Deacy, Sr.,

Senior Vice President, Generation Construction, Projects & Services, Tennessee Valley Authority.

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OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Procedures for the Submission of Petitions by North American Producers of Passenger Vehicles or Light Trucks To Use the Alternative Staging Regime for the USMCA Rules of Origin for Automotive Goods

AGENCY: Office of the United States Trade Representative.

ACTION: Request for petitions.

SUMMARY: For a limited period, a North American producer of passenger vehicles and light trucks (vehicle producer) may request an alternative to the standard staging regime for the rules of origin for automotive goods under the United States-Mexico-Canada Agreement (USMCA or the Agreement) using the procedures and guidance for submitting petitions in this notice.

DATES: To be assured of consideration, a vehicle producer must submit a petition with a draft alternative staging plan no later than July 1, 2020. A vehicle producer must submit a petition with its final alternative staging plan no later than August 31, 2020.

ADDRESSES: Submit petitions by email to *USMCAAutosCommittee@ustr.eop.gov.* For alternatives to email submissions, please contact Kent Shigetomi, Director for Multilateral Non-Tariff Barriers at (202) 395–9459 in advance of the deadline and before submission.

FOR FURTHER INFORMATION CONTACT: Kent Shigetomi, Director for Multilateral Non-Tariff Barriers at (202) 395–9459.

SUPPLEMENTARY INFORMATION:

I. Introduction

A. Background

On June 12, 2017 (82 FR 23699), the President announced his intention to commence negotiations with Canada and Mexico to modernize the North American Free Trade Agreement (NAFTA). On November 30, 2018, the Governments of the United States, Mexico, and Canada (the Parties) signed the protocol replacing NAFTA with the USMCA. On December 10, 2019, the Parties signed the protocol of amendment to the USMCA.

The USMCA includes new rules of origin to claim preferential treatment for

automotive goods, including higher Regional Value Content (RVC) thresholds, mandatory requirements to produce core parts in the region, mandatory steel and aluminum purchasing requirements, and a Labor Value Content (LVC) requirement. The Agreement allows vehicle producers to request an alternative staging regime for these requirements that would permit a longer period of transition to help ensure that future production is able to meet the new rules. The standard staging regime is specified under the Automotive Appendix to Chapter 4 of the USMCA (Automotive Appendix), with the exception of Article 8, which specifies provisions relating to the alternative staging regime. You can find information about the estimated impact of the USMCA rules of origin on investment, production, and employment in the U.S. automotive sector on the Office of the United States Trade Representative (USTR) website: *https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/us-automotive-sector.*

B. Overview of the Alternative Staging Regime

The alternative staging regime differs from the standard staging regime by providing additional time and a different phase-in of the new requirements. It provides an alternative to certain rules of origin requirements for passenger vehicles and light trucks, but does not replace any other rules of origin or any provisions of general applicability for these goods to claim preferential treatment under the USMCA.

For instance, under an alternative staging regime, importers of certain passenger vehicles and light trucks will have an additional two years—five years instead of three—to meet the requirements, and the vehicles will have different RVC and LVC thresholds.

To qualify for an alternative staging regime, a vehicle producer must submit a petition with the information described in Section III, including a detailed and credible plan if the quantity of vehicles for which the producer requests an alternative staging regime exceeds a ten percent threshold. A plan could include commitments to make additional investments in the United States and North America, or additional purchases of U.S. and North American parts. You can find more information on the criteria for acceptance of a plan in Section IV. Because of the integrated nature of the North American auto industry and market, USTR will coordinate with the governments of Canada and Mexico throughout the alternative staging process.

C. Definition of Vehicle Producer, Passenger Vehicle, and Light Truck

A 'vehicle producer' is a producer of passenger vehicles or light trucks in the territory of the United States, Mexico, or Canada. The definitions of ''passenger vehicle'' and ''light truck'' are in Article 1 of the Automotive Appendix.

D. Timing of Petitions for the Alternative Staging Regime

A vehicle producer must submit a petition with a draft alternative staging plan by July 1, 2020. If USTR and the Interagency Committee on Trade in Automotive Goods (Committee) established in Executive Order 13908 of February 28, 2020 identify any deficiencies in a vehicle producer's draft alternative staging plan, the vehicle producer must submit a petition with a final draft alternative staging plan correcting those deficiencies no later than August 31, 2020. If USTR and the Committee do not identify any deficiencies in a vehicle producer's draft alternative staging plan, the vehicle producer must submit a petition with a final draft alternative staging plan with any modifications, or a statement requesting that its draft alternative staging plan be considered final, no later than August 31, 2020. If a producer has questions about the content of a petition, it should contact Kent Shigetomi, Director for Multilateral Non-Tariff Barriers at (202) 395–9459, as soon as possible and well in advance of the deadlines and before submission. USTR will not consider any petition submitted after the relevant dates, unless there is a good cause and the producer has made arrangements with USTR in advance of the deadline. For clarity, a vehicle producer is not required to submit a petition for an alternative staging regime if it intends to claim preferential treatment using the standard staging regime. However, if a vehicle producer is unsure about whether to request an alternative staging regime, it should do so under this notice. If USTR grants use of an alternative staging regime, a vehicle producer still can make claims for preferential tariff treatment under the standard staging regime if it determines it no longer requires use of the alternative staging regime.

The alternative staging regime is valid for five years after the entry into force of the Agreement unless the vehicle producer requests a longer period and it is accepted by USTR and the Committee. After expiration of the alternative staging period, all claims of preferential treatment for passenger vehicles and light trucks must meet the rules described under the standard USMCA rules in the Automotive Appendix.

II. Eligibility To Use the Alternative Staging Regime

A. Covered Vehicle Producer

A vehicle producer may submit a petition to use an alternative staging regime if the importer of the vehicles intends to make a claim of preferential treatment under the USMCA upon or after entry into force of the Agreement, and the producer has determined that it will be unable or unlikely to be able to meet the rules of origin under the standard staging regime or the standard USMCA rules of origin for automotive goods for such claims upon entry into force.

B. Ten Percent of Production

The quantity of passenger vehicles or light trucks eligible for an alternative staging regime is limited to 10 percent of a vehicle producer's total passenger vehicle or light truck production during the 12 month period prior to entry into force of the Agreement, or the average of such production during the complete 36 month period prior to entry into force of this Agreement, whichever is greater. A vehicle producer may request quantities above this limit if it provides a detailed and credible plan that ensures that these vehicles will meet all the requirements during the alternative staging regime period and the requirements under the Automotive Appendix after the expiration of the alternative staging period. Sections C and D below provide further information about these requirements, and Section III outlines the necessary components of a detailed and credible plan.

C. Requirements During the Alternative Staging Period

Under the alternative staging regime, eligible passenger vehicles or light trucks will be considered originating under the USMCA if they meet the following requirements:

a. An RVC threshold of no less than 62.5 percent, under the net cost method, for eligible passenger vehicles or light trucks.

b. An RVC threshold of no less than 62.5 percent, under the net cost method, or 72.5 percent under the transaction value method if the corresponding rule includes a transaction value method, for parts falling under Table A.1 of the Automotive Appendix, except for

batteries of subheading 8507.60, that are used in the production of such eligible passenger vehicles or light trucks.

c. At least 70 percent of a vehicle producer's purchases of steel and at least 70 percent of a vehicle producer's purchases of aluminum, by value, must be originating per the requirements outlined in Article 6 of the Automotive Appendix. If a vehicle producer demonstrates the existence of contracts, MOUs, or other similar types of business agreements or information to meet this requirement during the alternative staging period, that producer will be exempt from having to certify to this requirement during the alternative staging period. A vehicle producer should provide this information in the petition outlined in Section III.

d. An LVC threshold of at least 25 percent, consisting of at least 10 percentage points of high-wage material and manufacturing expenditures, no more than 10 percentage points of high-wage technology expenditures, and no more than 5 percentage points of high-wage assembly expenditures.

All methods and calculations for the requirements or thresholds described above should be made according to the applicable provisions in Chapter 4 of the Agreement. Notwithstanding these requirements or thresholds, all other product-specific rules of origin and all other applicable requirements of the Agreement will apply to such goods during the alternative staging regime period, with the exception of the core parts requirement described under Article 3.7 of the Automotive Appendix. Passenger vehicles and light trucks deemed eligible for an alternative staging regime will be exempt from the core parts requirement during the alternative staging period.

D. Requirements After the Alternative Staging Period

After the expiration of the applicable alternative staging period, all passenger vehicles or light trucks, or automotive parts for such vehicles, will be considered originating under USMCA if they satisfy the rules specified under the Automotive Appendix. These rules include:

a. An RVC threshold of no less than 75 percent, under the net cost formula.

b. An RVC threshold of no less than 75 percent, under the net cost formula, or 85 percent under the transaction value method if the corresponding rule includes a transaction value method, for parts classified in Table A.1 of the Automotive Appendix used in the production of such eligible passenger vehicles or light trucks.

c. Compliance with the core parts requirement specified under Article 3.7 of the Automotive Appendix.

d. At least 70 percent of a vehicle producer's purchases of steel and at least 70 percent of a vehicle producer's purchases of aluminum must be originating per the methodology described in Article 6 of the Automotive Appendix.

e. An LVC threshold of at least 40 percent for a passenger vehicle, consisting of at least 25 percentage points of high-wage material and manufacturing expenditures, no more than 10 percentage points of high-wage technology expenditures, and no more than 5 percentage points of high-wage assembly expenditures.

f. An LVC threshold of at least 45 percent for a light truck, consisting of at least 30 percentage points of high-wage material and manufacturing expenditures, no more than 10 percentage points of high-wage technology expenditures, and no more than 5 percentage points of high-wage assembly expenditures.

g. All other applicable requirements of Chapter 4.

E. Requirements for 403.6 Vehicles

Notwithstanding Section C above, a vehicle producer may request to continue using the regulations implementing the NAFTA rules of origin provisions of General Note 12, HTSUS, and Chapter Four of the NAFTA that were in effect prior to entry into force of the USMCA (*e.g.,* 19 CFR chapter I, 1994 edition, appendix to part 181) for vehicles that were covered under the alternative staging regime described in Article 403.6 of NAFTA as of the date of signature of USMCA, November 30, 2018. Requests will be subject to approval of a vehicle producer's alternative staging petition and the NAFTA regulations only will apply to such vehicles for the remainder of the period under the Article 403.6 alternative staging regime. After the expiration of the period under the Article 403.6 alternative staging regime and until the end of the permitted USMCA alternative staging period, these vehicles will need to meet the requirements under Section C or D to be eligible for preferential tariff treatment during the permitted alternative staging regime under the USMCA. After the expiration of the permitted USMCA alternative staging period, these vehicles will need to meet the requirements under Section D to be eligible for preferential tariff treatment under the USMCA.

III. Information Required in Petition

A vehicle producer requesting to use an alternative staging regime must submit a petition containing the following information:

A. Cover Letter

a. *Request for Use of the Alternative Staging Regime.* Identify vehicle models that would be subject to the alternative staging regime and the share these vehicles represent of the company's North American production.

b. *Statement of Period of Alternative Staging Regime.* Identify the period of alternative staging the company is requesting for each vehicle model, noting in particular the introduction date of each model and the period of each model cycle. For specific vehicle models with a model cycle that extends beyond five years from the date of entry into force of the Agreement, the petition must include a specific request to extend the applicability of the alternative staging plan beyond five years to those specific vehicle models.

c. *Commitment to Meet the Requirements During and After Expiration of the Alternative Staging Regime.* A petitioner must certify that it will meet the requirements for the alternative staging regime set out in Section II.C, for requested vehicle models claiming USMCA preferential treatment during the entirety of the alternative staging period. Additionally, petitioners must certify that vehicle models for which USTR grants an alternative staging regime will meet the requirements set out in Section II.D upon expiration of the alternative staging regime and confirm thereafter for all vehicles claiming USMCA preferential treatment.

d. *Understanding of Requirement to Notify Modifications to Plan.* A vehicle producer must state that it will notify USTR and the Committee as soon as practicable, of any material changes to the information contained in the petition that will affect the producer's ability to meet any of the requirements set forth in Articles 2 through 7 of the Automotive Appendix after the alternative staging period has expired. A vehicle producer may submit to the Committee a request for modification of its plan with respect to such changes and provide a list of the material changes to the information contained in the petition, including any supplemental information relating to the petition, and of any material changes to circumstances that will affect the producer's ability to meet any of the requirements set for in Articles 2 through 7 of the Automotive Appendix

after the alternative staging period has expired.

e. *Statement of Confidentiality of Information.* For any electronic submission that contains business confidential information, the file name should begin with the characters 'BC'. Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page and the submission should clearly indicate, via brackets, highlighting, or other means, the specific information that the petitioner contends is business confidential. If business confidential treatment is requested, a petitioner must certify in writing that it is private commercial or financial information that would not customarily be released to the public. A petitioner also should certify that the information concerns or relates to trade secrets, shipments, processes, operations, or other information of commercial value, the disclosure of which is likely to cause substantial harm to the competitive position of the company. USTR will treat properly marked business confidential information as private.

B. Corporate Information

a. Corporate name of parent company.

b. Corporate address, phone number, and website address of global headquarters.

c. Corporate address, phone number, and website address in the United States.

d. Corporate address, phone number, and website address in Canada.

e. Corporate address, phone number, and website address in Mexico.

f. Overview of the corporate structure in North America and relationship to the parent company.

g. Name, title, phone number, and email address of the senior executive certifying submission in the United States, Canada, and Mexico.

C. Assembly Capacity

Provide information about the company's vehicle assembly, engine assembly, transmission assembly, and advanced battery assembly capacity, and note if such capacity would be originating under the product-specific rules under the Automotive Appendix. Include information regarding any new assembly capacity that the petitioner plans to install within five years of entry into force of the USMCA, and note the date of completion of the new production capacity. Information should include:

a. Three-shift annual production capacity of existing vehicle assembly plants in North America (by plants) in calendar year 2019.

b. Three-shift annual production capacity of existing engine plants in North America (by plants) in calendar year 2019.

c. Three-shift annual production capacity of existing transmission plants in North America (by plants) in calendar year 2019.

d. Three-shift annual production capacity of existing advanced battery plants in North America (by plants) in calendar year 2019. If production is in partnership with another company, please identify the partner and type of relationship.

D. Production

Provide the following information:

a. Corporate structure of production assets in the United States, Canada, and Mexico.

b. List of North American production facilities by location and type (*e.g.,* vehicle assembly, engine assembly, transmission assembly, and advanced battery assembly).

c. Total number of vehicles assembled in the United States, Canada, and Mexico (by country, plant, and model), in calendar years 2017, 2018, and 2019, and projections for calendar years 2020–2025.

d. Total value of self-produced auto parts in the United States, Canada, and Mexico (by country) in calendar year 2019.

e. Total value of purchased auto parts produced in the United States, Canada, and Mexico (by country) in calendar year 2019.

f. Total value of purchased non-North American imported auto parts in the United States, Canada, and Mexico (by country) in calendar year 2019.

E. Sales

Provide the following information:

a. Corporate structure of vehicle distribution and sales in the United States, Canada, and Mexico.

b. Total number of vehicles assembled in the United States that are sold in the United States, Canada, and Mexico (by country and by model), in calendar years 2017, 2018, and 2019, and projections for calendar years 2020–2025.

c. Total number of vehicles assembled in Canada that are sold in the United States, Canada, and Mexico (by country and by model), in calendar years 2017, 2018, and 2019, and projections for calendar years 2020–2025.

d. Total number of vehicles assembled in Mexico that are sold in the United States, Canada, and Mexico (by country and by model), in calendar years 2017, 2018, and 2019, and projections for calendar years 2020–2025.

F. Vehicle Models

Provide the following information for vehicles assembled in the United States, Canada, and Mexico (by country) for which alternative staging is being requested:

a. Describe the company's sourcing timelines with respect to new vehicle model introductions, next-generation vehicle model introductions, and mid-cycle vehicle updates.

b. Date (month and year) of the start of each current vehicle model's production.

c. Date (month and year) of the mid-cycle refresh of each current vehicle model's production.

d. Date (month and year) of the planned start of the next generation of each vehicle model's production.

e. For vehicles for which production began prior to entry into force of the USMCA, identify the actual or estimated RVC for those vehicle models under both the NAFTA rules of origin and the USMCA rules of origin. Also, provide the estimated RVC for core parts for each of these vehicle models.

f. For vehicles for which production begins after entry into force of the USMCA, identify the estimated RVC for those vehicle models under the USMCA rules of origin. Also, provide the estimated RVC for core parts for each of these vehicle models.

g. Provide the date (month and year) when each current or new vehicle model will be fully compliant with the USMCA rules of origin.

G. Steel and Aluminum

a. Provide the value of corporate purchases of steel in North America in calendar year 2019 (by country and total), including direct purchases, directed-buy purchases, and the estimated value of steel used in the production of purchased major body stampings and chassis frames.

b. Provide the value of corporate purchases of aluminum in North America in calendar year 2019 (by country and total), including direct purchases, directed-buy purchases, and the estimated value of aluminum used in the production of purchased major body stampings and chassis frames.

c. Provide an estimate of the percentage of the total North American steel purchases and North American aluminum purchases, respectively, which is originating in North America according to the product-specific rules identified in Chapter 4 of the Agreement. For this percentage, the vehicle producer need only estimate

purchases of flat-rolled steel or aluminums in coils; tubes, pipes or hollow profiles of steel or aluminum; and any other structural steel or aluminum used in the production of major body stampings or chassis frames for passenger vehicles or light trucks.

H. Wages

a. Provide the company's expenditures on wages for Research and Development (R&D) and Information Technology (IT) in North America for 2019. R&D expenditures include expenditures for research and development including prototype development, design, engineering, testing, or certifying operations. IT expenditures include expenditures on software development, technology integration, vehicle communications, and information technology support operations.

b. Provide the company's total expenditures on wages to direct production workers in North America for 2019.

c. Provide the ratio of the expenditures of paragraph (a) to paragraph (b), expressed as a percentage.

I. Detailed and Credible Plan

A detailed and credible plan must contain the following information:

a. A description of how the requested alternative staging vehicle models meet each of the necessary requirements for acceptance into the alternative staging regime as identified in Section II of this notice.

b. A description of the changes the company plans to make to its operations, sourcing, and vehicle content to meet the USMCA rules of origin for each of the alternative staging vehicle models, as well as the company's ability to meet the requirements for steel, aluminum, and LVC. Provide detailed information regarding investments, sourcing changes, jobs, and other procurement or operational changes that demonstrate that these plans are detailed and credible. Address each of the requirements for RVC, core parts, steel and aluminum, and LVC, and how such changes will allow each vehicle model to comply with the USMCA rules of origin.

c. An annual calendar of new investments, sourcing changes, jobs, and other changes to operations, beginning with changes that occurred in calendar year 2019, and plans for 2020–2025.

d. A description of the corporate approval process for investments, sourcing changes, and other operational changes identified in the company's plans.

J. Certification

a. Provide a certification that all vehicle models requested under alternative staging will meet the standard automotive rules at the end of the alternative staging period.

b. Confirm that the company will communicate any modifications to the information in the petition to the Committee as soon as practicable.

c. Provide the title, signature, and contact information of the certifying official.

IV. Procedures for Reviewing and Accepting Petitions

A. USMCA Interagency Committee on Trade in Automotive Goods

USTR will make determinations based on the information contained in a vehicle producer's petition for use of an alternative staging regime. In making such determinations, USTR will seek advice from the Committee, which has been authorized to provide advice, as appropriate, on the implementation, enforcement, and modification of provisions of the Agreement that relate to automotive goods, including the automotive rules of origin and the alternative staging regime that are part of such rules.

B. Criteria for Approval

a. Ten Percent Threshold

If the passenger vehicles or light trucks covered by the petition for an alternative staging regime are not more than ten percent of the vehicle producer's total passenger vehicle or light truck production in the territories of the United States, Canada, and Mexico according to the calculation methodology described under Article 8.3 of the Automotive Appendix, then no other information—other than the information under Section III.A—is required in order for such vehicles to be eligible to receive preferential tariff treatment under the alternative staging requirements. If the petition is for a quantity of vehicles greater than ten percent according to the same methodology, then the vehicle producer must include all the information in Section III in its request.

b. Above Ten Percent Threshold

If the passenger vehicles or light trucks covered by the petition for the alternative staging regime are greater than ten percent of the petitioner's total passenger vehicle or light truck production in the territories of the United States, Canada, and Mexico, evaluation of the petition will be based on the level of detail and credibility of the information supplied in accordance with Section III. The petitioner should identify the specific vehicle models it estimates will not meet the standard staging regime under the Automotive Appendix upon entry into force of the Agreement. The petitioner also should identify any North American investments and sourcing, preferably by calendar year and location, which will allow such vehicles to meet the standard USMCA rules after the expiration of the alternative staging period. Consider the following examples:

- As part of the plan outline in Section III, a vehicle producer might request the alternative staging regime for certain vehicle models representing more than ten percent of its vehicle production in the United States, Canada, and Mexico. The petitioner might indicate that a specific vehicle model is unable to meet the rules under the standard staging regime, because it can meet a vehicle RVC of only 64 percent, a core parts RVC of only 68 percent (as certain core parts or key components used to make such core parts are not produced in North America), and an LVC materials and manufacturing percentage of only 8 percent. The producer should then provide details on specific investments and sourcing that will allow the vehicle to meet the standard USMCA rules after the expiration of the alternative staging period.
- A producer might describe the North American sourcing of engine or transmission components to meet the vehicle RVC and core parts RVC requirements, an advanced battery in a high-wage North American plant or facility to meet the LVC requirement, and additional purchases of originating steel or aluminum to meet the steel and aluminum purchasing requirements. The petition does not need to include this specific sourcing information if the vehicle producer can demonstrate other actions it will take in order to meet the rules. If the vehicle producer does not provide sufficient detail or the petition has missing information, then USTR may not accept the petition as a 'detailed and credible' plan.
- USTR may consider a petition insufficiently detailed if it does not identify the vehicle models for which it is requesting use of the alternative staging regime, fails to describe how they are not compliant with the standard rules, or fails to describe the planned actions under Section III to bring these vehicles into compliance with the requirements after the

alternative staging period. USTR may deem a plan not credible if the producer provides investment or sourcing plans the company's management has not approved, or does not include any supplemental information that supports the plan, such as location of planned additional investments or parts sourcing. If the vehicle producer provides sufficient information under Section III for all vehicles covered by the petition for alternative staging and the information is not false or misleading, then USTR will consider the petition as ''detailed and credible''.

C. Providing a Determination

USTR, in consultation with the Committee, will promptly determine whether to authorize use of the alternative staging regime. USTR will provide the determination in writing to the producer. If USTR denies the petition, the vehicle producer may request the reasons for the denial.

D. Notification of Any Deficiencies in Petition

No later than 30 days after receipt of a petition, USTR, in consultation with the Committee, will notify the petitioner if there are deficiencies, such as missing, inaccurate, or imprecise information that would result in the denial of the petition. No later than August 31, 2020, petitioners must submit a final alternative staging plan correcting any deficiencies. Petitioners also should provide the necessary corrections to the governments of Canada and Mexico. If the producer does not correct deficiencies by August 31, 2020, then USTR may deny the petition.

E. Summary of Petitions to Congressional Subcommittees

Before making a final determination, USTR will provide to the appropriate congressional committees a summary of the requests to use an alternative staging regime. These summaries will exclude any information for which petitioners have requested business confidential treatment.

F. Public List of Approved Producers

USTR will maintain a public list of the names of vehicle producers it has authorized to use the alternative staging regime. If USTR subsequently determines that a producer has failed to meet the requirements of its alternative staging regime, USTR may remove the name of the producer from this list and it no longer will be eligible to claim preferential treatment under its previously approved alternative staging regime.

G. Approval by Canada and Mexico

An authorization by USTR to use an alternative staging regime will apply only to the producer's eligibility to use the regime for imports into the United States. A vehicle producer will need to provide a similar petition to Canada or Mexico under its respective procedures, in order to have the petition approved by each of the three Parties to the USMCA.

V. Alternative Staging Regime Review and Modification

A. Request for Modification of Plans

A vehicle producer must notify USTR and the Committee as soon as practicable through the address provided above, of any material changes to the information contained in the petition that will affect the producer's ability to meet any of the requirements set for in Articles 2 through 7 of the Automotive Appendix after the alternative staging period has expired. A vehicle producer may submit to USTR and the Committee a request for modification of its plan with respect to such changes.

B. Information Required in Modification Request

A vehicle producer's modification request should provide a list of the material changes to the information contained in the petition, including any supplemental information relating to the petition, and any material changes to circumstances that will affect the producer's ability to meet any of the requirements set for in Articles 2 through 7 of the Automotive Appendix after the alternative staging period has expired. The modification request also must include a statement by the producer recommitting to its intention to meet the requirements during and after expiration of the alternative staging regime period as outlined in Section III.

C. Approval Process of Modification

No later than 90 days after receiving the modification request, USTR, in consultation with the Committee, will make a determination, based on the modified plan whether the producer still is able to meet the requirements set forth in Articles 2 through 7 of the Automotive Appendix after the alternative staging period has expired. USTR will provide its determinations to the petitioner in writing. If USTR denies the modification request, the vehicle producer may request the reasons for the denial.

D. Inability To Meet Requirements for Use of the Alternative Staging Regime

If USTR, in consultation with the Committee, determines that the information provided by the vehicle producer in the modified plan will no longer be able to meet the requirements set forth in the Automotive Appendix, USTR will notify the vehicle producer in writing, and no claim for preferential treatment may be made, on or after the date of the determination, with respect to covered vehicles of the producer pursuant to the alternative staging regime. A producer may continue to make a claim of preferential tariff treatment pursuant to the requirements set forth in the Automotive Appendix.

VI. Failure To Meet Requirements for Use of the Alternative Staging Regime

An importer may not make a claim for preferential treatment with respect to a covered vehicle of a producer pursuant to an alternative staging regime, if USTR, in consultation with the Committee, makes a determination that:

a. The producer has failed to take the steps outlined in its request under Section III and, as a result, no longer will be able to meet the requirements set forth in the Automotive Appendix after the alternative staging regime has expired.

b. The producer has provided false or misleading information in its request under Section III.

c. If a vehicle producer is authorized to use the alternative staging regime for more than ten percent of its total production of passenger vehicles or light trucks in USMCA countries, the producer has failed to notify USTR of material changes to circumstances that will prevent the producer from meeting any of the requirements set forth in the Automotive Appendix after the alternative staging regime has expired.

USTR will provide its determinations to the producer in writing and provide the producer with a reasonable opportunity to respond to the determination.

VII. Producers of Heavy Trucks or Other Vehicles

For the period ending seven years after entry into force of the Agreement, if a producer certifies an LVC for a heavy truck that is higher than 45 percent by increasing the amount of high-wage material and manufacturing expenditures above 30 percentage points, the producer may use the points above 30 percentage points as a credit towards the RVC percentages under Article 4.1 of the Automotive Appendix, provided that the RVC percentage is not

below 60 percent. A producer of heavy trucks also may request the alternative staging regime per the requirements set out in Section II. A producer should contact USTR through the address provided above as soon as possible and well in advance of the submission due date if it intends to submit such a request.

Daniel Watson,

Acting Assistant U.S. Trade Representative for the Western Hemisphere, Office of the United States Trade Representative.

[FR Doc. 2020–08405 Filed 4–20–20; 8:45 am]

BILLING CODE 3290–F0–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–0385]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Competition Plans, Passenger Facility Charges

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, the FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection.

DATES: Written comments should be submitted by June 22, 2020.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Rachel McCoy, Office of Airport Planning and Programming, Federal Aviation Administration, 800 Independence Ave. SW, Suite 620, Washington, DC 20591.

By fax: 202–267–5302.

FOR FURTHER INFORMATION CONTACT: For further information please contact Amanda Shotto by email at: *amanda.j.shotto@faa.gov;* phone: 202–267–8744

SUPPLEMENTARY INFORMATION: The FAA, in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), provides the general public and Federal agencies with an opportunity to comment on proposed, revised, and continuing collections of information. This helps the FAA assess the impact of its information collection requirements and minimize the public's reporting burden.

The FAA invites comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for the FAA's performance; (b) the accuracy of the estimated burden; (c) ways for the FAA to enhance the quality, utility and clarity of the information collection; and (d) ways that the burden could be minimized without reducing the quality of the collected information. The agency will summarize and/or include your comments in the request for OMB's clearance of this information collection.

OMB Control Number: 2120–0661.

Title: Competition Plans, Passenger Facility Charges.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The DOT/FAA will use any information submitted in response to this requirement to carry out the intent of Title 49, Sections 40117(k) and 47106(f). These rules assure that a covered airport has, and implements, a plan that provides opportunities for competitive access by new entrant air carriers or air carriers seeking to expand. The affected public includes public agencies controlling medium or large hub airports.

Respondents: 5 affected airports annually.

Frequency: On occasion.

Estimated Average Burden per Response: Approximately 150 hours.

Estimated Total Annual Burden: Approximately 750 annually.

Issued in Washington, DC, on April 15, 2020.

David F. Cushing,

Manager, Airports Financial Assistance Division, APP–500.

[FR Doc. 2020–08363 Filed 4–20–20; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0255]

Agency Information Collection Activities; Renewal of an Approved Information Collection: Training Certification for Drivers of Longer Combination Vehicles

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice; request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for approval and invites public comment. FMCSA requests approval to renew the ICR titled ''Training Certification for Drivers of Longer Combination Vehicles (LCVs),'' OMB Control No. 2126–0026. This ICR relates to Agency requirements for drivers to be certified to operate LCVs, and associated reporting and recordkeeping requirements that motor carriers must satisfy before permitting their drivers to operate LCVs. Motor carriers, upon inquiry by authorized Federal, State or local officials, must produce an LCV Driver-Training Certificate for each of their LCV drivers.

DATES: Please send your comments by May 21, 2020. OMB must receive your comments by this date in order to act on the ICR.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Ms. Pearlie Robinson, Driver and Carrier Operations Division, DOT, FMCSA, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–366–4325. Email: *MCPSD@dot.gov.*

SUPPLEMENTARY INFORMATION:

Title: Training Certification for Drivers of LCVs.

OMB Control Number: 2126–0026.

Type of Request: Renewal and correction of a currently-approved information collection.

Respondents: LCV training providers who train new LCV drivers; drivers who complete LCV training each year; current LCV drivers who submit their LCV Driver-Training Certificate to prospective employers; and employers (motor carriers) receiving and maintaining copies of the LCV Driver-Training certificates of their drivers.

Estimated Number of Respondents: 50,708, consisting of 218 LCV training providers, plus 218 newly-certified LCV drivers, plus 25,027 currently-certified LCV drivers seeking new employment, plus 25,245 motor carriers hiring certified and newly-certified LCV drivers seeking new employment.

Estimated Time per Response: 10 minutes for training providers to

prepare LCV Driver-Training Certificates for drivers who successfully complete the LCV training; 5 minutes for newly-certified drivers, as well as 5 minutes for currently-certified drivers, to provide LCV Training Certification documents to motor carriers; and 5 minutes for motor carriers to retain the LCV training certifications.

Expiration Date: May 31, 2020.

Frequency of Response: On occasion.

Estimated Total Annual Burden: 4,244 hours. The total number of drivers who will be subjected to these requirements each year is 25,245, which consists of 218 newly-certified LCV drivers seeking employment, and 25,027 currently-certified LCV drivers obtaining new employment. Also, there are 218 LCV training providers who will be required to prepare the training certificates for newly-certified drivers. Additionally, there are 25,245 (218 + 25,027) motor carriers who will hire the drivers. The total annual information collection burden is approximately 4,244 hours = 36 hours for preparation of LCV Driver-Training Certificates [218 training providers prepare certificates for drivers successfully completing training × 10 minutes ÷ 60 minutes/hour] + 18 hours for newly-certified LCV drivers to provide certification documents to motor carriers [218 drivers × 5 minutes ÷ 60 minutes/hour] + 2,086 hours for currently-certified LCV drivers to provide certification documents to motor carriers [25,027 drivers × 5 minutes ÷ 60 minutes/hour] + 2,104 hours for currently-certified LCV drivers to provide certification documents to motor carriers [25,245 drivers × 5 minutes ÷ 60 minutes/hour].

Estimated Total Cost to Respondents: $135,734.

Background

An LCV is any combination of a truck-tractor and two or more semi-trailers or trailers that operates on the National System of Interstate and Defense Highways (according to 23 CFR 470.107) and has a gross vehicle weight greater than 80,000 pounds. To enhance the safety of LCV operations on our Nation's highways, Section 4007(b) of the Motor Carrier Act of 1991 directed the Secretary of Transportation to establish Federal minimum training requirements for drivers of LCVs [Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102–240, 105 Stat. 1914, 2152]. The Secretary of Transportation delegated responsibility for establishing these requirements to FMCSA (49 CFR 1.87), and on March 30, 2004, after appropriate notice and solicitation of public comment, FMCSA established the current training requirements for operators of LCVs (69 FR 16722). The regulations bar motor carriers from permitting their drivers to operate an LCV if they have not been properly trained in accordance with the requirements of 49 CFR 380.113. Drivers receive an LCV Driver-Training Certificate upon successful completion of these training requirements. Motor carriers employing an LCV driver must verify the driver's qualifications to operate an LCV, and must maintain a copy of the LCV Driver-Training Certificate and present it to authorized Federal, State, or local officials upon request.

Renewal of This Information Collection (IC)

The currently approved burden hour estimate associated with this IC, approved by OMB on May 19, 2017, is 5,565 hours. The Agency requests a reduction in the burden hour estimates from 5,565 hours to 4,244 hours. The reduction in burden hour estimates and costs is the result of correcting an error; the incorrect growth rate from the Bureau of Labor Statistics was previously used to estimate the number of new drivers requiring LCV driver training certificates. As a result, FMCSA over-estimated the number of new drivers, annual burden hours, hours for preparing training certificates, number of drivers who undergo the hiring process, number of respondents, number of responses, and costs to respondents.

Separately, the currently approved version of this IC incorrectly accounted for LCV driver training costs, estimated to be $7,035,160 annually. Training is not considered to be an information collection burden. For this updated version of the ICR, the Agency is removing the costs associated with training. Instead, FMCSA has calculated the labor costs associated with the LCV driver training recordkeeping requirements. The annual cost burden is estimated to be $135,734.

The expiration date of the current ICR is May 31, 2020. Through this request, FMCSA requests a renewal of the paperwork burden associated with the ICR titled ''Training Certification for Drivers of Longer Combination Vehicles (LCVs),'' OMB Control No. 2126–0026. This ICR corrects and updates all of the affected areas, as shown in the table below.

Estimate	Current approved IC	Proposed updated IC	Difference
Number of Drivers Engaged in the Operation of LCVs in the U.S.	44,095	38,503	(5,592)
Total Annual Burden	5,565	4,244	(1,321)
Number of New Drivers	2,360	218	(2,142)
Number of Hours for Preparing Training Certificates	394	36	(358)
Number of Drivers Who Undergo Hiring Process	31,022	25,245	(5,777)
Number of Respondents	59,684	50,708	(8,976)
Number of Responses	59,684	50,708	(8,976)
Labor Costs to Respondents	$0	$135,734	$135,734
Annual Costs to Respondents	$7,035,160	$0	($7,035,160)

On December 18, 2019, FMCSA published a **Federal Register** notice allowing for a 30-day comment period on this ICR. There were no comments submitted to the docket in response to that notice.

Public Comments Invited:

You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for FMCSA's performance; (2) the accuracy of the estimated burden; (3) ways for FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. The Agency will summarize or include your comments in the request for OMB's clearance of this information collection.

Issued under the authority of 49 CFR 1.87.

Kenneth Riddle,

Acting Associate Administrator for Registration and Research.

[FR Doc. 2020–08358 Filed 4–20–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

[Docket No. FMCSA–2019–0269]

Agency Information Collection Activities; Renewal of a Currently-Approved Information Collection Request: Request for Revocation of Authority Granted

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FMCSA announces its plan to submit the Information Collection Request (ICR) described below to the Office of Management and Budget (OMB) for review and approval and invites public comment. FMCSA requests approval to renew an ICR titled ''Request for Revocation of Authority Granted.''

DATES: Please send your comments by May 21, 2020. OMB must receive your comments by this date in order to act quickly on the ICR.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Jeff Secrist, Office of Registration and Safety Information, Department of Transportation, Federal Motor Carrier Safety Administration, West Building 6th Floor, 1200 New Jersey Avenue SE, Washington, DC 20590. Telephone: 202–385–2367; email *jeff.secrist@dot.gov.*

Office hours are from 9 a.m. to 5 p.m., Monday through Friday, except Federal Holidays.

SUPPLEMENTARY INFORMATION:

Title: Request for Revocation of Authority Granted.

OMB Control Number: 2126–0018.

Type of Request: Renewal of a currently approved information collection.

Respondents: Motor Carrier (motor carrier clerical staff).

Estimated Number of Respondents: 5,901.

Estimated Time per Response: 15 minutes (0.25 hours).

Expiration Date: September 30, 2020.

Frequency of Response: On occasion, as needed.

Estimated Total Annual Burden: 1,475 hours.

Background

FMCSA registers for-hire motor carriers of regulated commodities under 49 U.S.C. 13902, surface freight forwarders under 49 U.S.C. 13903, and property brokers under 49 U.S.C. 13904. Each registration is effective from the date specified under 49 U.S.C. 13905(c).

Subsection (d) of 49 U.S.C. 13905 also provides that on application of the registrant, the Secretary may amend or revoke a registration, and hence the registrant's operating authority. Form OCE–46 allows these registrants to apply voluntarily for revocation of their operating authority or parts thereof. If the registrant fails to maintain evidence of the required level of insurance coverage on file with FMCSA, its operating authority will be revoked involuntarily. Although the effect of both types of revocation is the same, some registrants prefer to request voluntary revocation. For various business reasons, a registrant may request revocation of some part, but not all, of its operating authority.

This information collection, which supports the DOT Strategic Goal of Safety, reflects modified estimates of burden hours and costs. For respondents, the program adjustment has resulted in increased total burden hours and an increase in respondent costs. The burden hour increase is due to an estimated increase in the number of annual filings of Form OCE–46 from 3,501 to 5,901 per year, resulting in an increase of 2,400 responses and 600 burden hours.

The previous iteration of this ICR did not include estimated labor costs for respondents; it only reported the estimated annual burden hours. This version adds estimated labor costs according to best practices. The estimated annual labor cost for industry resulting from submitting Form OCE–46 is $49,527.

The total annual respondent cost has decreased by $20,190. This decrease is due to the fact that respondents may now file the form online, at no charge. While the online submission option exists, FMCSA still estimates that approximately 1,567 respondents will continue to file the form by mail, which incurs notarization and postage fees.

For the Federal Government, the program costs have increased by $11,176. While this ICR revised the Federal labor wage load factor downward to be consistent with the methodology used in other FMCSA ICRs, the overall cost to the Federal Government increased due to the increase in the number of forms received by FMCSA.

Public Comments Invited: You are asked to comment on any aspect of this information collection, including: (1) Whether the proposed collection is necessary for the FMCSA to perform it's functions; (2) the accuracy of the estimated burden; (3) ways for the FMCSA to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information.

Issued under the authority delegated in 49 CFR 1.87.

Kenneth Riddle,

Acting Associate Administrator,Office of Research and Registration.

[FR Doc. 2020–08373 Filed 4–20–20; 8:45 am]

BILLING CODE 4910–EX–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request Relating to the Guidance on Cost Recovery Under the Income Forecast Method

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 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 the guidance on cost recovery under the income forecast method. More specifically, the burden associated with filing Form 8866, *Interest Computation Under the Look-Back Method for Property Depreciated Under the Income Forecast Method.*

DATES: Written comments should be received on or before June 22, 2020 to be assured of consideration.

ADDRESSES: Direct all written comments to Kinna Brewington, Internal Revenue Service, Room 6529, 1111 Constitution Avenue NW, Washington, DC 20224. Requests for additional information or copies of the regulations should be directed to Ronald J. Durbala, at Internal Revenue Service, Room 6129, 1111

Constitution Avenue NW, Washington, DC 20224, or through the internet, at *RJoseph.Durbala@irs.gov.*

SUPPLEMENTARY INFORMATION:

Title: Guidance on Cost Recovery Under the Income Forecast Method.

OMB Number: 1545–1622.

Form Number: 8866.

Abstract: Taxpayers depreciating property under the income forecast method and placed in service after September 13, 1995, must use Form 8866 to compute and report interest due or to be refunded under Internal Revenue Code 167(g)(2). The Internal Revenue Service uses the information on Form 8866 to determine if the interest has been figured correctly.

Current Actions: There is no change to the burden previously approved by OMB. This request is being submitted for renewal purposes only.

Type of Review: Extension of a currently approved collection.

Affected Public: Individuals or households, and business or other for-profit organizations.

Estimated Number of Respondents: 3,300.

Estimated Time per Respondent: 13 hours, 51 min.

Estimated Total Annual Burden Hours: 45,738.

The following paragraph applies to all 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 if 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.

Desired Focus of Comments: The Internal Revenue Service (IRS) is particularly interested in comments that:

- 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;
- 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;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including using appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* by permitting electronic submissions of responses.

Comments submitted in response to this notice will be summarized and/or included in the ICR for OMB approval of the extension of the information collection; they will also become a matter of public record.

Approved: April 14, 2020.

Ronald J. Durbala,

IRS Tax Analyst.

[FR Doc. 2020–08351 Filed 4–20–20; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of Nonconventional Source Production Credit Reference Price for Calendar Year 2019

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the reference price for the nonconventional source production credit for calendar year 2019.

FOR FURTHER INFORMATION CONTACT: Christopher Price, CC:PSI:6, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, Telephone Number (202) 317–6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The credit period for the nonconventional source production credit ended on December 31, 2013 for facilities producing coke or coke gas (other than from petroleum based products). However, the reference price continues to apply in determining the amount of the enhanced oil recovery credit under section 43 of title 26 of the U.S.C., the marginal well production credit under section 45I of title 26 of the U.S.C., and the applicable percentage under section 613A of title 26 of the U.S.C. to be used in determining percentage depletion in the case of oil and natural gas produced from marginal properties.

The reference price under section 45K(d)(2)(C) of title 26 of the U.S.C. for calendar year 2019 applies for purposes of sections 43, 45I, and 613A for taxable year 2020.

Reference Price: The reference price under section 45K(d)(2)(C) for calendar year 2019 is $55.55.

Christopher T. Kelley,

Special Counsel, Passthroughs and Special Industries.

[FR Doc. 2020–08355 Filed 4–20–20; 8:45 am]

BILLING CODE 4830–01–P

FEDERAL REGISTER

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Part II

Department of Defense

Department of the Army, Corps of Engineers

Environmental Protection Agency

33 CFR Part 328

40 CFR Parts 110, 112, 116, et al.

The Navigable Waters Protection Rule: Definition of ''Waters of the United States''; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 328

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 110, 112, 116, 117, 120, 122, 230, 232, 300, 302, and 401

[EPA–HQ–OW–2018–0149; FRL–10004–88–OW]

RIN 2040–AF75

The Navigable Waters Protection Rule: Definition of "Waters of the United States"

AGENCY: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army are publishing a final rule defining the scope of waters federally regulated under the Clean Water Act. The Navigable Waters Protection Rule is the second step in a comprehensive, two-step process intended to review and revise the definition of ''waters of the United States'' consistent with the Executive Order signed on February 28, 2017, ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' Once effective, it replaces the rule published on October 22, 2019. This final rule implements the overall objective of the Clean Water Act to restore and maintain the integrity of the nation's waters by maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress' policy directive to preserve States' primary authority over land and water resources. This final definition increases the predictability and consistency of Clean Water Act programs by clarifying the scope of ''waters of the United States'' federally regulated under the Act.

DATES: This rule is effective on June 22, 2020.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OW–2018–0149. All documents in the docket are listed on the *http://www.regulations.gov* website. 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 electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael McDavit, Oceans, Wetlands, and Communities Division, Office of Water (4504–T), Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; telephone number: (202) 566–2465; email address: *CWAwotus@epa.gov;* or Jennifer A. Moyer, Regulatory Community of Practice (CECW–CO–R), U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314; telephone number: (202) 761–5903; email address: *USACE_CWA_Rule@usace.army.mil.*

SUPPLEMENTARY INFORMATION:

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I. General Information

A. Where can I find information related to this rulemaking?

1. *Docket.* An official public docket for this action has been established under Docket ID No. EPA–HQ–OW–2018–0149. The official public docket consists of the documents specifically referenced in this action and other information related to this action. The official public docket is the collection of materials that is available for public viewing at the OW Docket, EPA West, Room 3334, 1301 Constitution Ave. NW, Washington, DC 20004. This Docket Facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The OW Docket telephone number is (202) 566–2426. A reasonable fee will be charged for copies.

2. *Electronic Access.* You may access this **Federal Register** document electronically under the ''**Federal Register**'' listings at *http://www.regulations.gov.* An electronic version of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. You may access EPA Dockets at *http://www.regulations.gov* to view public comments as they are submitted and posted, access the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically, including the economic and regulatory analyses for the final rule. For additional information about

EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the Docket Facility.

B. What action are the agencies taking?

In this notice, the agencies are publishing a final rule defining ''waters of the United States'' in 33 CFR 328.3 and 40 CFR 120.2.

C. What is the agencies' authority for taking this action?

The authority for this action is the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.,* including sections 301, 304, 311, 401, 402, 404, and 501.

II. Background

A. The Final Rule

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Army or Corps) (together, ''the agencies'') are publishing the Navigable Waters Protection Rule defining the scope of waters subject to federal regulation under the Clean Water Act (CWA or the Act), in light of the U.S. Supreme Court cases in *United States* v. *Riverside Bayview Homes* (*Riverside Bayview*), *Solid Waste Agency of Northern Cook County* v. *United States* (*SWANCC*), and *Rapanos* v. *United States* (*Rapanos*), and consistent with Executive Order 13778, signed on February 28, 2017, entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.''

In this final rule, the agencies interpret the term ''waters of the United States'' to encompass: The territorial seas and traditional navigable waters; perennial and intermittent tributaries that contribute surface water flow to such waters; certain lakes, ponds, and impoundments of jurisdictional waters; and wetlands adjacent to other jurisdictional waters. Paragraph (a) of the final rule identifies four categories of waters that are ''waters of the United States.'' These waters are referred to as ''jurisdictional'' in this notice and in the regulatory text. Paragraph (b) of the final rule identifies those waters and features that are excluded from the definition of ''waters of the United States.'' These waters are referred to as ''non-jurisdictional'' or ''excluded'' in this notice and as ''non-jurisdictional'' in the regulatory text. Paragraph (c) of the final rule defines applicable terms.

As a baseline concept, this final rule recognizes that waters of the United States are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, ponds, and wetlands, and that not all waters are waters of the United States. The final rule includes the agencies' longstanding category of the territorial seas and traditional navigable waters. A ''tributary'' is defined in the final rule as a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a territorial sea or traditional navigable water in a typical year either directly or indirectly through other tributaries, jurisdictional lakes, ponds, or impoundments, or adjacent wetlands. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to be perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or other similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term ''tributary'' includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch is perennial or intermittent and contributes surface water flow to a traditional navigable water or territorial sea in a typical year.

The final rule defines ''lakes and ponds, and impoundments of jurisdictional waters'' as standing bodies of open water that contribute surface water flow in a typical year to a territorial sea or traditional navigable water either directly or through a tributary, another jurisdictional lake, pond, or impoundment, or an adjacent wetland. The agencies note that to be jurisdictional, an ''impoundment of a jurisdictional water'' must be an impoundment of a territorial sea or traditional navigable water, tributary, jurisdictional lake or pond, or an adjacent wetland, and must meet the conditions in paragraph (c)(6) of the final rule. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake, pond, or impoundment of a jurisdictional water is also jurisdictional if, in a typical year, it is inundated by flooding from a territorial sea or traditional navigable water, or tributary, or from another jurisdictional lake, pond, or impoundment.

The final rule defines ''adjacent wetlands'' as wetlands that abut a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water; are inundated by flooding from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water in a typical year; are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by a natural berm, bank, dune, or similar natural feature; or are physically separated from a territorial sea or traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrological surface connection to the territorial sea or traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. ''Abut'' means when a wetland touches a territorial sea, traditional navigable water, tributary, or lake, pond, or impoundment of a jurisdictional water at least at one point or side. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

The final rule excludes from the definition of ''waters of the United States'' all waters or features not mentioned above. In addition to this general exclusion, the final rule specifically clarifies that waters of the United States do not include the following:

- Groundwater, including groundwater drained through subsurface drainage systems;
- ephemeral features that flow only in direct response to precipitation, including ephemeral streams, swales, gullies, rills, and pools;
- diffuse stormwater runoff and directional sheet flow over upland;
- ditches that are not traditional navigable waters, tributaries, or that are

not constructed in adjacent wetlands, subject to certain limitations;

- prior converted cropland;
- artificially irrigated areas that would revert to upland if artificial irrigation ceases;
- artificial lakes and ponds that are not jurisdictional impoundments and that are constructed or excavated in upland or non-jurisdictional waters;
- water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;
- stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;
- groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters; and
- waste treatment systems.

In addition, the agencies have defined the terms ''upland,'' ''prior converted cropland,'' and ''waste treatment system'' to improve regulatory predictability and clarity.

To develop this revised definition of ''waters of the United States,'' the agencies looked to the text and structure of the CWA, as informed by its legislative history and Supreme Court guidance, and took into account the agencies' expertise, policy choices, and scientific principles. This final rule presents a unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas. This definition strikes a reasonable and appropriate balance between Federal and State waters and carries out Congress' overall objective to restore and maintain the integrity of the nation's waters in a manner that preserves the traditional sovereignty of States over their own land and water resources. The final rule also provides clarity and predictability for Federal agencies, States, Tribes, the regulated community, and the public. This final rule is intended to ensure that the agencies operate within the scope of the Federal government's authority over navigable waters under the CWA and the Commerce Clause of the U.S. Constitution.

B. History of This Rulemaking

1. The Clean Water Act

Congress amended the Federal Water Pollution Control Act (FWPCA), or the CWA as it is commonly called,[1] in 1972 to address longstanding concerns regarding the quality of the nation's waters and the federal government's ability to address those concerns under existing law. Prior to 1972, the ability to control and redress water pollution in the nation's waters largely fell to the Corps under the Rivers and Harbors Act of 1899 (RHA). While much of that statute focused on restricting obstructions to navigation on the nation's major waterways, section 13 of the RHA made it unlawful to discharge refuse ''into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water.'' [2] 33 U.S.C. 407. Congress had also enacted the Water Pollution Control Act of 1948, Public Law 80–845, 62 Stat. 1155 (June 30, 1948), to address interstate water pollution, and subsequently amended that statute in 1956 (giving the statute its current formal name), 1961, and 1965. The early versions of the CWA promoted the development of pollution abatement programs, required States to develop water quality standards, and authorized the Federal government to bring enforcement actions to abate water pollution.

These early statutory efforts, however, proved inadequate to address the decline in the quality of the nation's waters, *see City of Milwaukee* v. *Illinois,* 451 U.S. 304, 310 (1981), so Congress performed a ''total restructuring'' and ''complete rewriting'' of the existing statutory framework in 1972, *id.* at 317 (quoting legislative history of 1972 amendments). That restructuring resulted in the enactment of a comprehensive scheme (including voluntary as well as regulatory programs) designed to prevent, reduce, and eliminate pollution in the nation's waters generally, and to regulate the discharge of pollutants into navigable waters specifically. *See, e.g., S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.,* 547 U.S. 370, 385 (2006) (noting that ''the Act does not stop at controlling the 'addition of pollutants,' but deals with 'pollution' generally'').

The objective of the new statutory scheme was ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). In order to meet that objective, Congress declared two national goals: (1) ''that the discharge of pollutants into the navigable waters be eliminated by 1985''; and (2) ''that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983 . . . .'' *Id.* at 1251(a)(1)–(2).

Congress also established several key policies that direct the work of the agencies to effectuate those goals. For example, Congress declared as a national policy ''that the discharge of toxic pollutants in toxic amounts be prohibited; . . . that Federal financial assistance be provided to construct publicly owned waste treatment works; . . . that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; . . . [and] that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.'' 33 U.S.C. 1251(a)(3)–(7).

Congress provided a major role for the States in implementing the CWA, balancing the preservation of the traditional power of States to regulate land and water resources within their borders with the need for a national water quality regulation. For example, the statute highlighted ''the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources.'' 33 U.S.C. 1251(b). Congress also declared as a national policy that States manage the major construction grant program and implement the core permitting programs authorized by the statute, among other responsibilities. *Id.* Congress added that ''[e]xcept as expressly provided in this Act, nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' *Id.* at 1370.[3] Congress

[1] The FWPCA is commonly referred to as the CWA following the 1977 amendments to the FWPCA. Public Law 95–217, 91 Stat. 1566 (1977). For ease of reference, the agencies will generally refer to the FWPCA in this notice as the CWA or the Act.

[2] The term ''navigable water of the United States'' is a term of art used to refer to waters subject to federal jurisdiction under the RHA. *See, e.g.,* 33 CFR 329.1. The term is not synonymous with the phrase ''waters of the United States'' under the CWA, *see id.,* and the general term ''navigable waters'' has different meanings depending on the context of the statute in which it is used. *See, e.g., PPL Montana, LLC* v. *Montana,* 565 U.S. 576, 591–93 (2012).

[3] 33 U.S.C. 1370 also prohibits authorized States from adopting any limitations, prohibitions, or

pledged the Federal government to provide technical support and financial aid to the States ''in connection with the prevention, reduction, and elimination of pollution.'' *Id.* at 1251(b).

To carry out these policies, Congress broadly defined ''pollution'' to mean ''the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,'' 33 U.S.C. 1362(19), in keeping with the objective of the Act ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' *Id.* at 1251(a). Congress then crafted a non-regulatory statutory framework to provide technical and financial assistance to the States to prevent, reduce, and eliminate pollution in the nation's waters generally. For example, section 105 of the Act, ''Grants for research and development,'' authorized the EPA ''to make grants to any State, municipality, or intermunicipal or interstate agency for the purpose of assisting in the development of any project which will demonstrate a new or improved method of preventing, reducing, and eliminating the discharge into *any waters* of pollutants from sewers which carry storm water or both storm water and pollutants.'' *Id.* at 1255(a)(1) (emphasis added). Section 105 also authorized the EPA ''to make grants to any State or States or interstate agency to demonstrate, in *river basins or portions thereof,* advanced treatment and environmental enhancement techniques to control pollution from all sources . . . including nonpoint sources, . . . [and] . . . to carry out the purposes of section 301 of this Act . . . for research and demonstration projects for prevention of pollution of *any waters* by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants.'' *Id.* at 1255(b)–(c) (emphasis added); *see also id.* at 1256(a) (authorizing the EPA to issue ''grants to States and to interstate agencies to assist them in administering programs for the prevention, reduction, and elimination of pollution'').

Section 108, ''Pollution control in the Great Lakes,'' authorized the EPA to enter into agreements with any State to develop plans for the ''elimination or control of pollution, *within all or any part of the watersheds* of the Great Lakes.'' 33 U.S.C. 1258(a) (emphasis added); *see also id.* at 1268(a)(3)(C) (defining the ''Great Lakes System'' as ''*all* the streams, rivers, lakes, and other bodies of water within the drainage basin of the Great Lakes'') (emphasis added). Similar broad pollution control programs were created for other major watersheds, including, for example, the Chesapeake Bay, *see id.* at 1267(a)(3), Long Island Sound, *see id.* at 1269(c)(2)(D), and Lake Champlain, *see id.* at 1270(g)(2). Some commenters noted that the Great Lakes, Long Island Sound, Chesapeake Bay, and Lake Champlain are waters of the United States to which regulatory programs apply, and that the purpose of the technical assistance and grants in the cited sections is to assist states and others in achieving the requirements of the Act. The agencies agree that these waters are waters of the United States, but the emphasized language in the cited provisions above makes clear that these provisions address all bodies of water in the watersheds of the Great Lakes, Long Island Sound, Chesapeake Bay, and Lake Champlain, regardless of the jurisdictional status of those waters.

In addition to the Act's non-regulatory measures to control pollution of the nation's waters generally, Congress created a federal regulatory permitting program designed to address the discharge of pollutants into a subset of those waters identified as ''navigable waters,'' defined as ''the waters of the United States,'' 33 U.S.C. 1362(7). Section 301 contains the key regulatory mechanism: ''Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.'' *Id.* at 1311(a). A ''discharge of a pollutant'' is defined to include ''any addition of any pollutant to navigable waters from any point source,'' defined to mean ''any discernible, confined and discrete conveyance'' such as a pipe or ditch. *Id.* at 1362(12), (14). The term ''pollutant'' means ''dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.'' *Id.* at 1362(6). Thus, it is unlawful to discharge pollutants into the ''waters of the United States'' from a point source unless the discharge is in compliance with certain enumerated sections of the CWA, including obtaining authorization pursuant to the section 402 National Pollutant Discharge Elimination System (NPDES) permit program or the section 404 dredged or fill material permit program. *See id.* at 1342, 1344. Congress therefore intended to achieve the Act's objective ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters'' by addressing pollution of all waters via non-regulatory means *and* federally regulating the discharge of pollutants to the subset of waters identified as ''navigable waters.''[4]

Many commenters on this rulemaking agreed with this summary of the CWA, stating that it accurately characterizes the full scope of the Act and the thoughtful, holistic approach Congress enacted to address water pollution in this country. Many commenters stated that Congress developed both regulatory and non-regulatory approaches for addressing water pollution, whereby ''navigable waters'' are subject to federal regulatory requirements under the CWA but many other classes of the ''nation's waters'' are not. Some commenters disagreed that the CWA distinguishes between the ''nation's waters'' and a subset of those waters known as the ''navigable waters.'' Many of these commenters suggested that the agencies' interpretation is not supported by the text or structure of the Act and is based instead on mischaracterizations of the Act's provisions. Some commenters argued that the two terms are synonymous under the Act, and others stated that the non-regulatory provisions of the CWA were intended to complement the regulatory requirements applicable to waters of the United States, as opposed to addressing a separate category of waters. Fundamental principles of statutory interpretation support the agencies' recognition of a distinction between the ''nation's waters'' and ''navigable waters.'' As the Supreme Court has observed, ''[w]e assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning.'' *Bailey* v. *United States,* 516 U.S. 137, 146 (1995)

standards that are less stringent than required by the CWA.

[4] Members of Congress were aware when they drafted the 1972 CWA amendments that different types of the Nation's waters would be subject to different degrees of federal control. For instance, in House debate regarding a proposed and ultimately failed amendment to prohibit the discharge of pollutants to groundwater in addition to navigable waters, Representative Don H. Clausen stated, ''Mr. Chairman, in the early deliberations within the committee which resulted in the introduction of H.R. 11896, a provision for ground waters . . . was thoroughly reviewed and it was determined by the committee that there was not sufficient information on ground waters to justify the types of controls that are required for navigable waters . . . . I refer the gentleman to the objectives of this act as stated in section 101(a). The objective of this act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. I call your attention to the fact that this does not say the Nation's [']navigable waters,' 'interstate waters,' or 'intrastate waters.' It just says 'waters.' This includes ground waters.'' 118 Cong. Rec. at 10,667 (daily ed. March 28, 1972).

(recognizing the canon of statutory construction against superfluity). Further, ''the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'' *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted); *see also United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Associates,* 484 U.S. 365, 371 (''Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear[.]'') (citation omitted). Here, the non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State and local partnerships to control pollution in the nation's waters *and* a federal regulatory prohibition on the discharge of pollutants to the navigable waters. If Congress had intended the terms to be synonymous, it would have used identical terminology. Instead, Congress chose to use separate terms, and the agencies are instructed by the Supreme Court to presume Congress did so intentionally.

Under the enacted statutory scheme, the States are primarily responsible for developing water quality standards for waters of the United States within their borders and reporting on the condition of those waters to the EPA every two years. 33 U.S.C. 1313, 1315. States must develop total maximum daily loads (TMDLs) for waters that are not meeting established water quality standards and must submit those TMDLs to the EPA for approval. *Id.* at 1313(d). States also have authority to issue water quality certifications or waive certification for every federal permit or license issued within their borders that may result in a discharge to navigable waters. *Id.* at 1341.

These same regulatory authorities can be assumed by Indian tribes under section 518 of the CWA, which authorizes the EPA to treat eligible Indian tribes with reservations in a manner similar to States for a variety of purposes, including administering each of the principal CWA regulatory programs. 33 U.S.C. 1377(e). In addition, States and Tribes retain authority to protect and manage the use of those waters that are not navigable waters under the CWA. *See, e.g., id.* at 1251(b), 1251(g), 1370, 1377(a). At this time, forty-seven States administer portions of the CWA section 402 permit program for those waters of the United States within their boundaries,[5] and two States (Michigan and New Jersey) administer the section 404 permit program for those waters that are assumable by States pursuant to section 404(g). Several additional states are exploring the possibility of assuming the section 404 permit program. At present, no Tribes administer the section 402 or 404 programs, although some are exploring the possibility. For additional information regarding State and tribal programs, see the Resource and Programmatic Assessment for the final rule.

2. Regulatory History

In May 1973, the EPA issued its first set of regulations to implement the new NPDES permit program established in the 1972 CWA amendments. Those regulations defined the phrase ''navigable waters'' as:

- All navigable waters of the United States;
- Tributaries of navigable waters of the United States;
- Interstate waters;
- Intrastate lakes, rivers, and streams which are utilized by interstate travelers for recreational or other purposes;
- Intrastate lakes, rivers, and streams from which fish or shellfish are taken and sold in interstate commerce; and
- Intrastate lakes, rivers, and streams which are utilized for industrial purposes by industries in interstate commerce.

38 FR 13528, 13529 (May 22, 1973) (codified at 40 CFR 125.1 (1973)).

In 1974, the Corps issued its first set of regulations defining ''waters of the United States'' for the purpose of implementing section 404 of the CWA as well as sections 9, 10, 11, 13, and 14 of the RHA. These regulations reaffirmed the Corps' view that its dredged and fill jurisdiction under section 404 was the same as its traditional jurisdiction under the RHA. *See* 39 FR 12115, 12119 (Apr. 3, 1974) (codified at 33 CFR 209.120). Specifically, the Corps defined the ''waters of the United States'' as waters that ''are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.'' *Id.*

Environmental organizations challenged the Corps' 1974 regulation in the U.S. District Court for the District of Columbia, arguing that the Corps' definition of ''navigable waters'' was inadequate because it did not include tributaries or coastal marshes above the mean high tide mark or wetlands above the ordinary high water mark. The District Court held that the term ''navigable waters'' is not limited to the traditional tests of navigability and ordered the Corps to revoke its definition and publish a new one ''clearly recognizing the full regulatory mandate of the Water Act.'' *Natural Resources Defense Council, Inc.* v. *Callaway,* 392 F. Supp. 685 (D.D.C. 1975).

In response to this decision, the Corps issued interim regulations in 1975 that defined the term ''navigable waters'' to include periodically inundated coastal wetlands contiguous with or adjacent to navigable waters, periodically inundated freshwater wetlands contiguous with or adjacent to navigable waters, and, as in the EPA's 1973 regulations, certain intrastate waters based on non-transportation impacts on interstate commerce. The Corps revised the definition in 1977 to encompass traditional navigable waters, tributaries to navigable waters, interstate waters, adjacent wetlands to those categories of waters, and ''[a]ll other waters'' the ''degradation or destruction of which could affect interstate commerce.'' 42 FR 37122, 37144 (Jul. 19, 1977).

The EPA and the Corps have maintained separate regulations defining the statutory term ''waters of the United States,'' but the text of the regulations has been virtually identical starting in 1986.[6] In 1986, for example, the Corps consolidated and recodified its regulations to align with clarifications that the EPA had previously promulgated. *See* 51 FR 41206 (Nov. 13, 1986). While the Corps stated in 1986 that the recodified regulation neither reduced nor expanded jurisdiction, its previous exclusion for ditches was moved from the regulatory text to the final rule preamble. *Id.* at 41216–17. And the Corps added to the preamble what later became known as the ''Migratory Bird Rule,'' which claimed jurisdiction over any waters which are or may be used by birds protected by migratory bird treaties, waters which may be used as habitat for birds flying across state lines, waters which may be used by endangered species, and waters used to

[5] Three States (Massachusetts, New Hampshire, and New Mexico) do not currently administer any part of the CWA section 402 program.

[6] For convenience, the agencies generally refer to the Corps' regulations throughout this notice at 33 CFR 328.3. The EPA's codification of the definition of ''waters of the United States'' is found at 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to Part 300. This final rule also codifies the definition of ''waters of the United States'' in a new section 120.2.

irrigate crops sold in interstate commerce. *Id.* at 41217.

The 1986 regulatory text identified the following as waters of the United States:

- All traditional navigable waters,[7] interstate waters, and the territorial seas;
- All impoundments of jurisdictional waters;
- All ''other waters'' such as lakes, ponds, and sloughs the ''use, degradation or destruction of which could affect interstate or foreign commerce'';
- Tributaries of traditional navigable waters, interstate waters, impoundments, or ''other waters''; and,
- Wetlands adjacent to traditional navigable waters, interstate waters, the territorial seas, impoundments, tributaries, or ''other waters'' (other than waters that are themselves wetlands).

33 CFR 328.3(a)(1)–(7) (1987). The 1986 regulation also excluded ''waste treatment systems'' from the definition of ''waters of the United States,'' consistent with the EPA's regulatory definition. *Id.* at 328.3 (a)(7), (b) (1987); *see also* 44 FR 32854 (June 7, 1979).

On August 25, 1993, the agencies amended the regulatory definition of ''waters of the United States'' to categorically exclude ''prior converted croplands.'' 58 FR 45008, 45031 (Aug. 25, 1993) (''1993 Rule'') (codified at 33 CFR 328.3(a)(8) (1994)). The stated purpose of the amendment was to promote ''consistency among various federal programs affecting wetlands,'' in particular the Food Security Act of 1985 (FSA) programs implemented by the U.S. Department of Agriculture (USDA) and the CWA programs implemented by the agencies.[8] 58 FR 45031. The agencies did not include a definition of ''prior converted cropland'' in the text of the Code of Federal Regulations but noted in the preamble to the 1993 Rule that the term was defined at that time by the USDA National Food Security Act Manual (NFSAM). *Id.* The agencies at that time also declined to establish regulatory text specifying when the prior converted cropland designation is no longer applicable. In the preamble to the 1993 Rule, the agencies stated that ''[t]he Corps and EPA will use the [Natural Resources Conservation Service's] provisions on 'abandonment,' thereby ensuring that PC cropland that is abandoned within the meaning of those provisions and which exhibit[s] wetlands characteristics will be considered wetlands subject to Section 404 regulation.'' *Id.* at 45034. The agencies summarized these abandonment provisions by explaining that prior converted cropland which meets wetland criteria is considered to be abandoned unless: At least once in every five years the area has been used for the production of an agricultural commodity, or the area has been used and will continue to be used for the production of an agricultural commodity in a commonly used rotation with aquaculture, grasses, legumes, or pasture production. *Id.*

Congress amended the FSA wetland conservation provisions in 1996 to state that USDA certifications of eligibility for program benefits (*e.g.,* determinations by the Natural Resources Conservation Service (NRCS) that particular areas constitute prior converted cropland) ''shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary [of Agriculture].'' Public Law 104–127, 322(a)(4), 110 Stat. 888 (1996); 16 U.S.C. 3822(a)(4). Thus, for purposes of farm program eligibility, the 1996 amendments designate as prior converted cropland those areas that may not have qualified for the CWA exclusion under the abandonment principles from the 1993 preamble, so long as such areas remain in agricultural use. The agencies did not update their prior converted cropland regulations for purposes of the CWA following the 1996 amendments to wetland conservation provisions of the FSA, as those regulations neither defined prior converted cropland nor specified when a valid prior converted cropland determination might cease to be valid. However, in 2005, the Army and USDA issued a joint Memorandum to the Field (the 2005 Memorandum) in an effort to again align the CWA section 404 program with the FSA amendments.[9] The 2005 Memorandum provided that a ''certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted] determination is no longer applicable and a new wetland determination is required for CWA purposes.'' 2005 Memorandum at 4.

The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any rulemaking process. *New Hope Power Co.* v. *U.S. Army Corps of Eng'rs,* 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010).

3. U.S. Supreme Court Decisions

From the earliest rulemaking efforts following adoption of the 1972 CWA amendments, to the agencies' most recent attempt to define ''waters of the United States'' in 2015, the sparse statutory definition has spurred substantial litigation testing the meaning of the phrase. Hundreds of cases and dozens of courts have attempted to discern the intent of Congress when crafting the phrase. *See, e.g., Rapanos* v. *United States,* 547 U.S. 715, 739 (2006) (Scalia, J., plurality) (briefly summarizing case history). The federal courts have established different analytical frameworks to interpret the phrase, and the applicable test may differ from State to State. *See, e.g.,* Memorandum from Dick Pedersen, President of the Environmental Council of the States (ECOS) of September 11, 2014, Concerning Waters of the United States under the Act at 2–23 (2014) (hereinafter, the ''ECOS Memorandum''), *available at http://acoel.org/file.axd?file=2014%2f9%2fWaters+of+the+U+S+Final+9_11_14.pdf* (summarizing case history following *Rapanos*).

As part of this complex litigation history, three key U.S. Supreme Court decisions have interpreted the term

[7] ''Traditional navigable waters'' (or waters that are traditionally understood as navigable) refers to all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters subject to the ebb and flow of the tide.

[8] Title XII of the Food Security Act of 1985, as amended, encourages participants in USDA programs to adopt land management measures by linking eligibility for USDA program benefits to farming practices on highly erodible land and wetlands (*i.e.,* the wetland conservation provisions). USDA policy guidance regarding implementation of the wetland conservation provisions is found in the current edition of the Natural Resource Conservation Service National Food Security Act Manual (NFSAM), including the procedures for how to delineate wetlands and make wetland determinations in accordance with Subpart C of 7 CFR part 12. Due to the unique statutory provisions of the FSA, USDA wetland determinations may identify certain areas as exempt under the 1985 Act but remain subject to the requirements of the CWA. To avoid potential confusion, USDA clearly informs program participants that USDA wetland determinations are for purposes of implementing the wetland conservation provisions only, and that participants should contact the Corps for clarification as to whether a particular activity will require a CWA section 404 permit.

[9] Natural Resources Conservation Service and U.S. Army Corps of Engineers. Memorandum to the Field on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and section 404 of the Clean Water Act (Feb. 25, 2005), *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.*

''waters of the United States'' and its implementing regulations and serve as guideposts for the agencies' interpretation of the phrase ''waters of the United States.'' In 1985, the Supreme Court deferred to the Corps' assertion of jurisdiction over wetlands actually abutting a traditional navigable water in Michigan, stating that adjacent wetlands may be regulated as waters of the United States because they are ''inseparably bound up'' with navigable waters and ''in the majority of cases'' have ''significant effects on water quality and the aquatic ecosystem'' in those waters. *United States* v. *Riverside Bayview Homes,* 474 U.S. 121, 131–35 & n.9 (1985). The Court recognized that ''[i]n determining the limits of its power to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins . . . . Where on this continuum to find the limit of 'waters' is far from obvious.'' *Id.* at 132. The Court acknowledged the ''inherent difficulties of defining precise bounds to regulable waters,'' and deferred to the agencies' interpretation that the close ecological relationship between adjacent wetlands and traditional navigable waters provided a legal justification for treating wetlands as waters. *Id.* at 134. The Court also ''conclude[d] that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'' *Id.* at 135.

The Supreme Court again addressed the definition of ''waters of the United States'' in *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (*SWANCC*). In *SWANCC,* the Court rejected a claim of federal jurisdiction over nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters, noting that the term ''navigable'' must be given meaning within the context and application of the statute. *Id.* The Court held that interpreting the statute to extend to nonnavigable, isolated, intrastate ponds that lack a sufficient connection to traditional navigable waters would invoke the outer limits of Congress' power under the Commerce Clause. *Id.* at 172. Where an administrative interpretation of a statute presses against the outer limits of Congress' constitutional authority, the Court explained, it expects a clear statement from Congress that it intended that result, and even more so when the broad interpretation authorizes federal encroachment upon a traditional State power. *Id.* The CWA contains no such clear statement. *Id.* at 174.

In January 2003, the EPA and the Corps issued joint guidance interpreting the Supreme Court decision in *SWANCC.*[10] The guidance indicated that *SWANCC* focused on nonnavigable, isolated, intrastate waters, and called for field staff to coordinate with their respective Corps or EPA Headquarters on jurisdictional determinations that asserted jurisdiction over such waters. The agencies at that time focused their interpretation of *SWANCC* to its facts, and applied the decision narrowly as restricting the exercise of federal jurisdiction solely based on the Migratory Bird Rule.

The Court most recently interpreted the term ''waters of the United States'' in *Rapanos* v. *United States,* 547 U.S. 715 (2006). *Rapanos* involved two consolidated cases in which the CWA had been applied to wetlands located near man-made ditches that were ultimately connected to traditional navigable waters. All members of the Court agreed that the term ''waters of the United States'' encompasses some waters that are not navigable in the traditional sense.

A four-Justice plurality interpreted the term ''waters of the United States'' to ''include[ ] only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes,' '' *Rapanos,* 547 U.S. at 739 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)), and ''wetlands with a continuous surface connection'' to a ''relatively permanent body of water connected to traditional interstate navigable waters.'' *Id.* at 742. The plurality explained that ''[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,*'' and thus do not have the ''necessary connection'' to covered waters that triggers CWA jurisdiction. *Id.* at 742. The plurality also noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (emphasis in original).

In a concurring opinion, Justice Kennedy took a different approach, concluding that ''to constitute 'navigable waters' under the Act, a water or wetland must possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made.'' *Rapanos,* 547 U.S. at 759 (Kennedy, J., concurring in the judgment) (citing *SWANCC,* 531 U.S. at 167, 172). He stated that adjacent wetlands possess the requisite significant nexus if the wetlands ''either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780.

Following *Rapanos,* on June 7, 2007, the agencies issued joint guidance entitled ''Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States* and *Carabell* v. *United States*'' to address the waters at issue in that decision. The guidance did not change the codified definition of ''waters of the United States.'' The guidance indicated that the agencies would assert jurisdiction over traditional navigable waters and their adjacent wetlands, relatively permanent nonnavigable tributaries of traditional navigable waters and wetlands that abut them, nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water, and wetlands adjacent to nonnavigable tributaries that are not relatively permanent if they have a significant nexus with a traditional navigable water. The guidance was reissued with minor changes on December 2, 2008 (hereinafter, the ''*Rapanos* Guidance'').[11] After issuance of the *Rapanos* Guidance, Members of Congress, developers, farmers, State and local governments, environmental organizations, energy companies, and others asked the agencies to replace the guidance with a regulation that would provide clarity and certainty regarding the scope of the waters federally regulated under the CWA.

Since *Rapanos,* litigation has continued to confuse the regulatory landscape. *See, e.g.,* ECOS Memorandum at 2–23. The Supreme

[10] *See* U.S. EPA and U.S. Army Corps of Engineers. Legal Memoranda Regarding *Solid Waste Agency of Northern Cook County (SWANCC)* v. *United States* (Jan. 15, 2003), *available at https://www.epa.gov/sites/production/files/2016-04/documents/swancc_guidance_jan_03.pdf.*

[11] *See* U.S. EPA and U.S. Army Corps of Engineers. Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos* v. *United States & Carabell* v. *United States* at 1 (Dec. 2, 2008) (''*Rapanos* Guidance''), *available at https://www.epa.gov/sites/production/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf.*

Court also has twice weighed in on topics related to the agencies' implementation of their authorities under the CWA to help clarify federal authority in this area. In each case, members of the Court noted the longstanding confusion regarding the scope of federal jurisdiction under the CWA and the importance of providing clear guidance to the regulated community. In 2012, for example, the Supreme Court unanimously rejected the EPA's longstanding position that compliance orders issued under the CWA to force property owners to restore wetlands are not judicially reviewable as final agency actions. *See Sackett* v. *EPA,* 566 U.S. 120, 131 (2012). In a concurring opinion, Justice Alito referred to the jurisdictional reach of the CWA as ''notoriously unclear'' and noted that the Court's decision provided only ''a modest measure of relief.'' *Id.* at 133 (Alito, J., concurring) (''For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase ['waters of the United States']'').

In 2016, the Supreme Court in a unanimous opinion rejected the Corps' longstanding position that jurisdictional determinations issued by the Corps were not judicially reviewable as final agency actions. Writing for the Court, the Chief Justice recognized that it ''is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.'' *U.S. Army Corps of Eng'rs* v. *Hawkes Co.,* 136 S. Ct. 1807, 1812 (2016). Given those important consequences, the Court held that jurisdictional determinations are subject to immediate judicial review when made. Justice Kennedy authored a concurring opinion, ''not to qualify what the Court says but to point out that, based on the Government's representations in this case, the reach and systemic consequences of the Clean Water Act remain a cause for concern.'' *Id.* at 1816–17 (referring to the ''ominous reach'' of the Act). On remand, the lower court found that the Corps' assertion of jurisdiction over a peat farm more than 90 miles from the nearest traditional navigable water based on the ''significant nexus'' test described in the agencies' *Rapanos* Guidance was ''arbitrary and capricious.'' *Hawkes Co.* v. *U.S. Army Corps of Eng'rs,* No. 13–107 ADM/TNL, 2017 U.S. Dist. LEXIS 10680 at *33 (D. Minn. Jan. 24, 2017).

4. The 2015 Rule

On June 29, 2015, the agencies issued a final rule (80 FR 37054) amending various portions of the CFR that set forth a definition of ''waters of the United States,'' a term contained in the CWA's definition of ''navigable waters,'' 33 U.S.C. 1362(7). One of the stated purposes of the 2015 Rule was to ''increase CWA program predictability and consistency by clarifying the scope of 'waters of the United States' protected under the Act.'' 80 FR 37054. The 2015 Rule defined the geographic scope of the CWA by placing waters into three categories: (A) Waters that are categorically ''jurisdictional by rule'' in all instances (*i.e.,* without the need for any additional analysis); (B) waters that are subject to case-specific analysis to determine whether they are jurisdictional; and (C) waters that are categorically excluded from jurisdiction. Waters considered ''jurisdictional by rule'' included (1) waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) interstate waters, including interstate wetlands; (3) the territorial seas; (4) impoundments of waters otherwise identified as jurisdictional; (5) tributaries of the first three categories of ''jurisdictional by rule'' waters; and (6) waters adjacent to a water identified in the first five categories of ''jurisdictional by rule'' waters, including ''wetlands, ponds, lakes, oxbows, impoundments, and similar waters.'' *See* 80 FR 37104.

The 2015 Rule relied on a scientific literature review—the Connectivity Report [12]—to support exerting federal jurisdiction over certain waters. *See* 80 FR 37065 (''[T]he agencies interpret the scope of 'waters of the United States' protected under the CWA based on the information and conclusions in the [Connectivity] Report . . . .''). Although the agencies acknowledged that science cannot dictate where to draw the line of federal jurisdiction, *see, e.g., id.* at 37060, notwithstanding that qualifier, the agencies relied on the Connectivity Report extensively in establishing the 2015 Rule's definition of ''waters of the United States.'' *See id.* at 37057 (''The [Connectivity] Report provides much of the technical basis for [the] rule.'').

The 2015 Rule added new definitions of key terms such as ''tributaries'' and revised previous definitions of terms such as ''adjacent'' (by adding a new definition of ''neighboring'' that is used in the definition of ''adjacent'') that would determine whether waters were ''jurisdictional by rule.'' *See* 80 FR 37105. Specifically, a ''tributary'' under the 2015 Rule is a water that contributes flow, either directly or through another water, to a water identified in the first three categories of ''jurisdictional by rule'' waters that is characterized by the presence of the ''physical indicators'' of a bed and banks and an ordinary high water mark. According to the 2015 Rule's preamble, ''[t]hese physical indicators demonstrate there is volume, frequency, and duration of flow sufficient to create a bed and banks and an ordinary high water mark, and thus to qualify as a tributary.'' *Id.*[13] Tributaries under the 2015 Rule could be natural, man-altered, or man-made, and do not lose their status as a tributary if, for any length, there is one or more constructed breaks (such as bridges, culverts, pipes, or dams), or one or more natural breaks (such as wetlands along the run of a stream, debris piles, boulder fields, or a stream that flows underground) so long as a bed and banks and an ordinary high water mark could be identified upstream of the break. *Id.* at 37105–06.

In the 2015 Rule, the agencies did not expressly amend the longstanding definition of ''adjacent'' (defined as ''bordering, contiguous, or neighboring''), but the agencies added, for the first time, a definition of ''neighboring'' that changed the meaning of ''adjacent.'' The 2015 Rule defined ''neighboring'' to encompass all waters located within 100 feet of the ordinary high water mark of a category (1) through (5) ''jurisdictional by rule'' water; all waters located within the 100-year floodplain of a category (1) through (5) ''jurisdictional by rule'' water and not more than 1,500 feet from the ordinary high water mark of such water; all waters located within 1,500 feet of the high tide line of a category (1) through (3) ''jurisdictional by rule'' water; and all waters within 1,500 feet of the ordinary high water mark of the Great Lakes. 80 FR 37105. The entire water would be considered ''neighboring'' if any portion of it lies

[12] U.S. EPA. Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence (Jan. 2015) (EPA/600/R–14/475F).

[13] The 2015 Rule did not delineate jurisdiction specifically based on categories with established scientific meanings such as ephemeral, intermittent, and perennial waters that are based on the source of the water and nature of the flow. *See* 80 FR 37076 (''Under the rule, flow in the tributary may be perennial, intermittent, or ephemeral.''). Under the 2015 Rule, tributaries also did not need to possess any specific volume, frequency, or duration of flow, or to contribute flow to a traditional navigable water in any given year or specific time period.

within one of these zones. *See id.* These quantitative measures did not appear in the proposed rule and, as discussed in the 2019 Rule and below, the agencies concluded that they were not sufficiently supported in the administrative record for the final rule.

In addition to the six categories of ''jurisdictional by rule'' waters, the 2015 Rule identified certain waters that would be subject to a case-specific analysis to determine if they had a ''significant nexus'' to a water that is jurisdictional. 80 FR 37104–05. The first category consists of five specific types of waters in specific regions of the country: Prairie potholes, Carolina and Delmarva bays, pocosins, western vernal pools in California, and Texas coastal prairie wetlands. *Id.* at 37105. The second category consists of all waters located within the 100-year floodplain of any category (1) through (3) ''jurisdictional by rule'' water and all waters located within 4,000 feet of the high tide line or ordinary high water mark of any category (1) through (5) ''jurisdictional by rule'' water. *Id.* These quantitative measures did not appear in the proposed rule and, as discussed in the 2019 Rule and below, the agencies concluded that they were not sufficiently supported in the administrative record for the final 2015 Rule.

The 2015 Rule defined ''significant nexus'' to mean a water, including wetlands, that either alone or in combination with other similarly situated waters in the region, significantly affected the chemical, physical, or biological integrity of a category (1) through (3) ''jurisdictional by rule'' water. 80 FR 37106. ''For an effect to be significant, it must be more than speculative or insubstantial.'' *Id.* The term ''in the region'' meant ''the watershed that drains to the nearest'' primary water. *Id.* This definition was different from the test articulated by the agencies in their 2008 *Rapanos* Guidance. That guidance interpreted ''similarly situated'' to include all wetlands (not waters) adjacent to the same tributary.

Under the 2015 Rule, to determine whether a water, alone or in combination with similarly situated waters across the watershed of the nearest primary water, had a significant nexus, one had to consider nine functions such as sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions. 80 FR 37106. A single function performed by a water, alone or together with similarly situated waters in the region, that contributed significantly to the chemical, physical, or biological integrity of the nearest category (1) through (3) ''jurisdictional by rule'' water was sufficient to establish a significant nexus. *Id.* Taken together, the enumeration of the nine functions and the more expansive consideration of ''similarly situated waters in the region'' in the 2015 Rule meant that the vast majority of water features in the United States may have come within the jurisdictional purview of the Federal government.[14]

The 2015 Rule also retained exclusions from the definition of ''waters of the United States'' for prior converted cropland and waste treatment systems. 80 FR 37105. In addition, the agencies codified several exclusions that, in part, reflected longstanding agency practice and added others such as ''puddles'' and ''swimming pools'' in response to concerns raised by stakeholders during the public comment period on the proposed 2015 Rule. *Id.* at 37096–98, 37105.

Following the 2015 Rule's publication, 31 States[15] and numerous non-state parties, including environmental groups and groups representing farming, recreational, forestry, and other interests, filed complaints and petitions for review in multiple federal district[16] and appellate[17] courts challenging the 2015 Rule. In those cases, the challengers alleged numerous procedural deficiencies in the development and promulgation of the 2015 Rule and substantive deficiencies in the 2015 Rule itself. Some challengers argued that the 2015 Rule was too expansive, while others argued that it excluded too many waters from federal jurisdiction.

The day before the 2015 Rule's August 28, 2015 effective date, the U.S. District Court for the District of North Dakota preliminarily enjoined the 2015 Rule in the 13 States that challenged the rule in that court.[18] The district court found those States were ''likely to succeed'' on the merits of their challenge to the 2015 Rule because, among other reasons, ''it appears likely that the EPA has violated its Congressional grant of authority in its promulgation of the Rule.'' *North Dakota* v. *EPA,* 127 F. Supp. 3d 1047, 1051 (D.N.D. 2015). In particular, the court noted concern that the 2015 Rule's definition of ''tributary'' ''includes vast numbers of waters that are unlikely to have a nexus to navigable waters.'' *Id.* at 1056. Further, the court found that ''it appears likely the EPA failed to comply with [Administrative Procedure Act (APA)] requirements when promulgating the Rule,'' suggesting that certain distance-based measures were not a logical outgrowth of the proposal to the 2015 Rule. *Id.* at 1051, 1058. No party sought an interlocutory appeal.

The numerous petitions for review filed in the courts of appeals were consolidated in the U.S. Court of Appeals for the Sixth Circuit. In that litigation, State and industry petitioners raised concerns about whether the 2015 Rule violated the Constitution and the CWA and whether its promulgation violated the APA and other statutes. Environmental petitioners also challenged the 2015 Rule, claiming in part that the 2015 Rule was too narrow because of the distance limitations and other issues. On October 9, 2015, approximately six weeks after the 2015 Rule took effect in the 37 States, the District of Columbia, and U.S.

[14] ''[T]he vast majority of the nation's water features are located within 4,000 feet of a covered tributary, traditional navigable water, interstate water, or territorial sea.'' U.S. EPA and Department of the Army, Economic Analysis of the EPA-Army Clean Water Rule at 11 (May 20, 2015) (''2015 Rule Economic Analysis'') (Docket ID: EPA–HQ–OW–2011–0880–20866), available at *https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20866*.

[15] Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico (Environment Department and State Engineer), North Carolina (Department of Environment and Natural Resources), North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming. Iowa joined the legal challenge later in the process, bringing the total to 32 States. Colorado, New Mexico, and Wisconsin have since withdrawn from litigation against the 2015 Rule.

[16] U.S. District Courts for the Northern and Southern Districts of Georgia, District of Minnesota, District of North Dakota, Southern District of Ohio, Northern District of Oklahoma, Southern District of Texas, District of Arizona, Northern District of Florida, District of the District of Columbia, Western District of Washington, Northern District of California, and Northern District of West Virginia. In April 2019, an additional challenge against the 2015 Rule was filed in the U.S. District Court for the District of Oregon.

[17] U.S. Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

[18] Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming. Iowa's motion to intervene in the case was granted after issuance of the preliminary injunction. In May 2019, the court granted motions from Colorado and New Mexico to withdraw from the litigation and lifted the preliminary injunction as to Colorado and New Mexico. Order, *North Dakota* v. *EPA,* No. 3:15–cv–00059 (D.N.D. May 14, 2019). At the same time, the court stated that the preliminary injunction would remain in effect as to a plaintiff-intervenor that represents ten counties in New Mexico. The agencies filed a motion seeking clarification of the applicability of the court's preliminary injunction to those ten counties in New Mexico. Defendants' Motion for Clarification Regarding the Scope of the Court's Preliminary Injunction, *North Dakota* v. *EPA,* No. 3:15–cv–00059 (D.N.D. May 24, 2019). As of the time of signature of this final rule, that motion is pending before the court.

Territories that were not subject to the preliminary injunction issued by the District of North Dakota, the Sixth Circuit stayed the 2015 Rule nationwide after concluding, among other things, that State petitioners had demonstrated ''a substantial possibility of success on the merits of their claims.'' *In re EPA & Dep't of Def. Final Rule,* 803 F.3d 804, 807 (6th Cir. 2015) (''*In re EPA*'').

On January 13, 2017, the U.S. Supreme Court granted *certiorari* on the question of whether the courts of appeals have original jurisdiction to review challenges to the 2015 Rule. *See Nat'l Ass'n of Mfrs.* v. *Dep't of Def.,* 137 S. Ct. 811 (2017). The Sixth Circuit granted petitioners' motion to hold in abeyance the briefing schedule in the litigation challenging the 2015 Rule pending a Supreme Court decision on the question of the court of appeals' jurisdiction. On January 22, 2018, the Supreme Court, in a unanimous opinion, held that the 2015 Rule is subject to direct review in the district courts. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.,* 138 S. Ct. 617, 624 (2018). Throughout the pendency of the Supreme Court litigation (and for a short time thereafter), the Sixth Circuit's nationwide stay remained in effect. In response to the Supreme Court's decision, on February 28, 2018, the Sixth Circuit lifted the stay and dismissed the corresponding petitions for review. *See In re Dep't of Def. & EPA Final Rule,* 713 Fed. Appx. 489 (6th Cir. 2018).

Following the Supreme Court's jurisdictional ruling, district court litigation regarding the 2015 Rule resumed. At this time, the 2015 Rule continues to be subject to a preliminary injunction issued by the District of North Dakota as to 12 States: Alaska, Arizona, Arkansas, Idaho, Iowa, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming.[19] The 2015 Rule also is subject to a preliminary injunction issued by the U.S. District Court for the Southern District of Georgia as to 11 more States: Georgia, Alabama, Florida, Indiana, Kansas, Kentucky, North Carolina, South Carolina, Utah, West Virginia, and Wisconsin. *Georgia* v. *Pruitt,* 326 F. Supp. 3d 1356, 1364 (S.D. Ga. 2018). The Southern District of Georgia subsequently issued an order remanding the 2015 Rule to the agencies, finding that the 2015 Rule exceeded the agencies' statutory authority under the CWA and was promulgated in violation of the APA. *Georgia* v. *Wheeler,* No. 2:15–cv–079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). ''[I]n light of the serious defects identified,'' the court retained its injunction against the 2015 Rule. *Id.* at *36.[20]

In September 2018, the U.S. District Court for the Southern District of Texas issued a preliminary injunction against the 2015 Rule in response to motions filed by the States of Texas, Louisiana, and Mississippi and several business associations, finding that enjoining the rule would provide ''much needed governmental, administrative, and economic stability'' while the rule undergoes judicial review. *See Texas* v. *EPA,* No. 3:15–cv–162, 2018 WL 4518230, at *1 (S.D. Tex. Sept. 12, 2018). The court observed that if it did not temporarily enjoin the rule, ''it risks asking the states, their governmental subdivisions, and their citizens to expend valuable resources and time operationalizing a rule that may not survive judicial review.'' *Id.* In May 2019, the court remanded the 2015 Rule to the agencies on the grounds that the rule violated the APA. Specifically, the court found that the rule violated the APA's notice and comment requirements because: (1) The 2015 Rule's definition of ''adjacent'' waters (which relied on distance-based limitations) was not a ''logical outgrowth'' of the proposal's definition of ''adjacent'' waters (which relied on ecologic and hydrologic criteria); and (2) the agencies denied interested parties an opportunity to comment on the final version of the Connectivity Report, which served as the technical basis for the final rule. *See Texas* v. *EPA,* 389 F. Supp. 3d 497 (S.D. Tex. 2019).[21]

In July 2019, the U.S. District Court for the District of Oregon issued a preliminary injunction against the 2015 Rule in the State of Oregon. Order, *Or. Cattlemen's Ass'n* v. *EPA,* No. 19–00564 (D. Or. July 26, 2019). As a result, the 2015 Rule was enjoined in more than half of the States.

Three additional States (Ohio, Michigan, and Tennessee) sought a preliminary injunction against the 2015 Rule in the U.S. District Court for the Southern District of Ohio. In March 2019, the court denied the States' motion, finding that the States had ''failed to demonstrate that they will suffer imminent and irreparable harm absent an injunction.'' *See Ohio* v. *EPA,* No. 2:15–cv–02467, 2019 WL 1368850 (S.D. Ohio Mar. 26, 2019). The court subsequently denied the States' motion for reconsideration of its order denying the preliminary injunction motion, and the States have since filed an appeal of the court's order in the Sixth Circuit. *See Ohio* v. *EPA,* No. 2:15–cv–02467, 2019 WL 1958650 (S.D. Ohio May 2, 2019); Plaintiffs' Notice of Appeal, *Ohio* v. *EPA,* No. 2:15–cv–02467 (S.D. Ohio May 28, 2019).[22]

C. Executive Order 13778 and the ''Step One'' Rulemaking

On February 28, 2017, the President issued Executive Order 13778 entitled ''Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule.'' Section 1 of the Executive Order states, ''[i]t is in the national interest to ensure that the Nation's navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of the Congress and the States under the Constitution.'' The Executive Order directs the EPA and the Army to review the 2015 Rule for consistency with the policy outlined in Section 1 of the Order and to issue a proposed rule rescinding or revising the 2015 Rule as appropriate and consistent with law (Section 2). The Executive Order also directs the agencies to ''consider interpreting the term 'navigable waters' . . . in a manner consistent with'' Justice Scalia's plurality opinion in *Rapanos* v. *United States,* 547 U.S. 715 (2006) (Section 3).

On March 6, 2017, the agencies published a notice of intent to review the 2015 Rule and provide notice of a forthcoming proposed rulemaking consistent with the Executive Order. 82 FR 12532. Shortly thereafter, the agencies announced that they would implement the Executive Order in a two-step approach. On July 27, 2017,

[19] As of the date this final rule was signed, the applicability and scope of the North Dakota district court's preliminary injunction in New Mexico is unclear. *See supra* note 18.

[20] The Southern District of Georgia later denied as moot plaintiffs' motions for reconsideration asking the court to vacate, rather than remand, the 2015 Rule. Order, *Georgia* v. *Wheeler,* No. 2:15–cv–079 (S.D. Ga. Jan. 3, 2020).

[21] The Southern District of Texas later denied plaintiffs' motions for reconsideration urging the court to vacate, rather than remand, the 2015 Rule. Order, *Texas* v. *EPA,* No. 3:15–cv–00162 (S.D. Tex. Nov. 6, 2019).

[22] Parties challenging the 2015 Rule in the U.S. District Court for the Northern District of Oklahoma, including the State of Oklahoma and the U.S. Chamber of Commerce, unsuccessfully sought a motion for a preliminary injunction against the 2015 Rule and later stipulated to a voluntary dismissal of the case. *See* Opinion & Order, *Oklahoma* v. *EPA,* No. 4:15–cv–00381 (N.D. Okla. May 29, 2019); Stipulation of Voluntary Dismissal, *Oklahoma* v. *EPA,* No. 4:15–cv–00381 (N.D. Okla. Jan. 7, 2019). Following the effective date of the 2019 Rule, an additional motion for a preliminary injunction against the 2015 Rule was denied as moot in the U.S. District Court for the Western District of Washington. Order, *Wash. Cattlemen's Ass'n* v. *EPA,* No. 19–00569 (W.D. Wash. Dec. 30, 2019).

the agencies published the ''Definition of 'Waters of the United States'—Recodification of Pre-Existing Rules'' notice of proposed rulemaking (NPRM) (82 FR 34899) that proposed to repeal the 2015 Rule and recodify the regulatory text that governed prior to the promulgation of the 2015 Rule, consistent with Supreme Court decisions and informed by applicable guidance documents and longstanding agency practice. The agencies refer to this as the ''Step One'' rule. The agencies invited comment on the NPRM over a 62-day period. On July 12, 2018, the agencies published a supplemental notice of proposed rulemaking (SNPRM) to clarify, supplement, and seek additional comment on the proposed repeal and recodification. 83 FR 32227. The agencies invited comment on the SNPRM over a 30-day period.

On October 22, 2019, the agencies published a final rule repealing the 2015 Rule and recodifying the pre-existing regulations as an interim matter until this final rule becomes effective. 84 FR 56626. In developing the final Step One rule (referred to as the ''2019 Rule''), the agencies reviewed approximately 690,000 public comments received on the NPRM and approximately 80,000 comments received on the SNPRM from a broad spectrum of interested parties. In the NPRM and SNPRM the agencies sought comment on all aspects of the NPRM, the economic analysis for the NPRM, and the SNPRM, including the repeal of the 2015 Rule, the recodification of the prior regulations, the considerations underlying the proposal and agencies' reasons for the proposal, and the agencies' proposed conclusions that the 2015 Rule exceeded the agencies' authority under the CWA.

The agencies finalized the 2019 Rule, which became effective December 23, 2019, and repealed the 2015 Rule for four primary reasons. First, the agencies concluded that the 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos.* Second, the agencies concluded that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources.'' 33 U.S.C. 1251(b). Third, the agencies repealed the 2015 Rule to avoid interpretations of the CWA that push the envelope of their constitutional and statutory authority absent a clear statement from Congress authorizing the encroachment of federal jurisdiction over traditional State land-use planning authority. Lastly, the agencies concluded that the 2015 Rule's distance-based limitations suffered from certain procedural errors and a lack of adequate record support. The agencies found that these reasons, collectively and individually, warranted repealing the 2015 Rule.

At this time, the regulations defining the scope of federal CWA jurisdiction are those portions of the CFR as they existed before the amendments promulgated in the 2015 Rule. The agencies concluded that it was appropriate as an interim matter to restore the pre-existing regulations to provide regulatory certainty as the agencies considered the proposed revised definition of ''waters of the United States'' and because, as implemented, those prior regulations adhere more closely than the 2015 Rule to the jurisdictional limits reflected in the statute and case law. As anticipated in the 2019 Rule, this final rule replaces the recodified pre-2015 regulations, upon its effective date.

As of the time of signature of this final rule, challenges to the agencies' 2019 Rule are pending in six district courts, wherein both environmental and industry groups have either filed new complaints or sought to supplement existing complaints to challenge the rule in whole or in part. *See New York* v. *Wheeler,* No. 19–11673 (S.D.N.Y., complaint filed Dec. 20, 2019); *Wash. Cattlemen's Ass'n* v. *EPA,* No. 2:19–cv–00569 (W.D. Wash., supplemental amended complaint filed Dec. 20, 2019); *Murray* v. *Wheeler,* No. 1:19–cv–01498 (N.D.N.Y., complaint filed Dec. 4, 2019); *S.C. Coastal Conservation League* v. *Wheeler,* No. 2:19–cv–3006 (D.S.C., complaint filed Oct. 23, 2019); *N.M. Cattle Growers' Ass'n* v. *EPA,* No. 1:19–cv–988 (D.N.M., complaint filed Oct. 22, 2019); *Pierce* v. *EPA,* No. 0:19–cv–2193 (D. Minn., supplemental complaint filed Oct. 22, 2019).

D. Summary of Stakeholder Outreach and the ''Step Two'' Rulemaking

Following the March 6, 2017 **Federal Register** notice announcing the agencies' intent to review and rescind or revise the 2015 Rule, the agencies initiated an effort to engage the public to hear perspectives as to how the agencies could define ''waters of the United States,'' including creating a new website to provide information on the rulemaking. *See www.epa.gov/wotus-rule.* On April 19, 2017, the agencies held an initial Federalism consultation meeting with State and local government officials as well as national organizations representing such officials. The agencies also convened several additional meetings with intergovernmental associations and their members to solicit input on the future rule. The EPA, with participation from the Army, initiated Tribal consultation on April 20, 2017, under the *EPA Policy on Consultation and Coordination with Indian Tribes. See* Section VI for further details on the agencies' consultations. The agencies considered comments received from federalism and tribal consultations as they developed this final rule.

In addition to engaging State, tribal, and local officials through federalism and tribal consultations, the agencies sought feedback on the definition of ''waters of the United States'' from a broad audience of stakeholders, including small entities (small businesses, small organizations, and small government jurisdictions), through a series of outreach webinars that were held September 9, 2017, through November 21, 2017, and through an in-person meeting for small entities on October 23, 2017. A summary of these public listening sessions is available in the docket (Docket Id. No. EPA–HQ–OW–2018–0149–0091) for this rule. The webinars were tailored to specific sectors, including agriculture (row crop, livestock, silviculture); conservation (hunters and anglers); small entities (small businesses, small organizations, small government jurisdictions); construction and transportation; environment and public advocacy (including health and environmental justice); mining; energy and chemical industry; scientific organizations and academia; stormwater, wastewater management, and drinking water agencies; and the general public.

At the pre-proposal webinars and meetings with stakeholders, the agencies provided a presentation and sought input on specific issues, such as potential approaches to defining the phrases ''relatively permanent'' waters and ''continuous surface connections'' as articulated by the plurality opinion in *Rapanos,* as well as other considerations addressing specific geomorphological features, exclusions and exemptions, costs and benefits, and aquatic resource data that the agencies might consider in the technical analyses for a future rule. As part of this outreach effort, the agencies established a public recommendations docket (Docket ID No. EPA–HQ–OW–2017–0480) that opened

August 28, 2017, and closed November 28, 2017. Participant comments and letters submitted represent a diverse range of interests, positions, suggestions, and recommendations provided to the agencies. The agencies received over 6,300 recommendations (available on *Regulations.gov* at *https://www.regulations.gov/docket?D=EPA-HQ-OW-2017-0480*) that were considered as the agencies developed the proposed revised definition of ''waters of the United States.'' The agencies also considered recommendations as to how the agencies should define ''waters of the United States'' that were submitted in public comments on the agencies' proposed ''Step One'' rule (82 FR 34899, July 27, 2017) and the July 2018 SNPRM (83 FR 32227, July 12, 2018).

The agencies continued their pre-proposal engagement with States and Tribes via additional webinars and in-person meetings. On March 8 and 9, 2018, the agencies held an in-person State Co-Regulators Workshop with representatives from nine States (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming) and convened a subsequent in-person meeting on March 22, 2018, with representatives from all States at the spring meeting of the Environmental Council of the States. The agencies also held an in-person Tribal Co-Regulators Workshop on March 6 and 7, 2018, with representatives from 20 tribes. These meetings were intended to seek technical input as the agencies developed the proposed rule. The agencies also sought pre-proposal input from Tribes through national and regional tribal meetings, including through listening sessions at the Tribal Land and Environment Forum (August 16, 2017 and August 15, 2018) and the National Congress of American Indians Annual Convention (October 24, 2018).

On December 12, 2018, the agencies signed the proposed rule to revise the definition of ''waters of the United States,'' as the second step of the comprehensive two-step process consistent with Executive Order 13778. The proposal was published on February 14, 2019. 84 FR 4154. The agencies proposed to interpret the term ''waters of the United States'' to encompass: Traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters; and wetlands adjacent to other jurisdictional waters. The 60-day public comment period for the proposed revised definition of ''waters of the United States'' (''Step Two'' Rule) closed on April 15, 2019.[23]

The agencies conducted a variety of stakeholder outreach on the proposed rule upon its publication in the **Federal Register**. On February 14, 2019, the agencies held a public webcast to present key elements of the proposed rule (*see https://www.youtube.com/watch?v=ZZ6kFJasDhg&feature=youtu.be*), and held a public hearing in Kansas City, Kansas, on February 27 and 28, 2019, to hear feedback from individuals from regulated industry sectors, environmental and conservation organizations, State agencies, tribal governments, and private citizens. The agencies also continued engagement with States and Tribes through a series of in-person meetings with State and tribal representatives in Kansas City, Kansas; Atlanta, Georgia; Albuquerque, New Mexico; and Seattle, Washington during the public comment period for the proposed rule. During these meetings, the agencies provided an overview of the proposed rule, responded to clarifying questions from participants, discussed implementation considerations, and heard feedback on the agencies' interest in developing geospatial datasets of jurisdictional waters. A transcript of the public hearing and related materials and summaries of the State and tribal meetings can be found in the docket for the final rule. At the request of individual Tribes, the agencies also continued to hold staff-level and leader-to-leader meetings with individual Tribes.

In developing this final rule, the agencies reviewed and considered approximately 620,000 comments received on the proposed rule from a broad spectrum of interested parties. Commenters provided a wide range of feedback on the various aspects of the proposal, including the legal basis for the proposed rule, the agencies' proposed treatment of categories of jurisdictional waters and those features that would not be jurisdictional, the economic analysis and resource and programmatic assessment for the proposed rule, and the agencies' considerations for developing geospatial datasets of jurisdictional waters in partnership with other federal agencies, States, and Tribes. The agencies discuss comments received and their responses in the applicable sections of this final rule. A complete response to comments document is available in the docket for this final rule at Docket ID No. EPA–HQ–OW–2018–0149.

The agencies also engaged with the EPA's Science Advisory Board (SAB) during the development of the rule on several occasions. The agencies met with the SAB prior to the proposed rule and following publication of the proposed rule to explain the basis for the rule and to address the SAB's questions and initial observations. The SAB issued a draft commentary on the proposed rule on December 31, 2019, and held a public meeting on the matter on January 17, 2020. The SAB's draft commentary asserted that the proposed rule did not fully incorporate the Connectivity Report and offers no comparable body of peer reviewed evidence to support this departure. As the agencies made clear in the proposed rule preamble and explain in greater detail in this notice, the agencies used the Connectivity Report to inform certain aspects of the definition of ''waters of the United States,'' but recognize that science cannot dictate where to draw the line between Federal and State waters, as this is a legal question that must be answered based on the overall framework and construct of the CWA. The SAB's draft also addresses the absence of ''ground water protection;'' the exclusion of ''irrigation canals'' from regulatory jurisdiction; the exclusion of ''adjacent wetlands that do not abut or have a direct hydrologic surface connection to otherwise jurisdictional waters;'' and the absence of ''long term clarity'' as a result of the asserted lack of scientific basis for the proposed rule.

The relevant comments raised by the SAB were also raised by public commenters throughout the rulemaking process, and as a result, have been addressed by the agencies in the final rule, supporting documents, and throughout this notice. In brief, however, the agencies note that the final rule is consistent with the agencies' longstanding position that ''waters of the United States'' do not include groundwater; that the agencies do not use the term ''irrigation canals'' in the final rule; that ''irrigation ditches'' constructed in uplands and ''irrigation return flows'' generally have been not been subject to CWA regulatory requirements; and that the agencies have expanded jurisdiction over certain ''adjacent wetlands'' compared to the proposal to better incorporate common principles from the *Rapanos* plurality and concurring opinions, that the final rule strikes a better balance between the objective and policy in CWA sections 101(a) and 101(b), respectively; and that

[23] The pre-publication of the proposed rule was published on EPA's website on December 12, 2018, approximately 60 days prior to its publication in the **Federal Register** and the date the formal public comment period began.

the final rule is consistent with the text, structure, legislative history, and applicable Supreme Court guidance. A memorandum summarizing the agencies' interactions with the SAB and the SAB's draft commentary are available in the docket for this final rule.

E. Overview of Legal Construct for the Final Rule

As the preceding summary of the statutory and regulatory history makes clear, the central term delineating the federal geographic scope of authority under the CWA—''waters of the United States''—has been the subject of debate and litigation for many years. The agencies are promulgating a regulation to define ''waters of the United States'' adhering to Constitutional and statutory limitations, the policies and objective of the CWA, and case law. The revised definition will allow the regulatory agencies and the regulated community to protect navigable waters from pollution while providing an implementable approach to determining regulatory jurisdiction under the CWA. This subsection summarizes the legal principles that inform the agencies' final rule, and the following section (Section III) describes how the agencies are applying those legal principles to support the final revised definition of ''waters of the United States.''

1. Statutory Framework

To determine the scope of executive branch authority under the CWA, the agencies begin with the text of the statute. The objective of the CWA, as established by Congress, is ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a). As discussed in Section II.B, in order to meet that objective, Congress declared two national water quality goals and established several key policies that direct the work of the agencies. Congress also envisioned a major role for the States in implementing the CWA, carefully balancing the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies have developed regulatory and non-regulatory programs designed to ensure that the full statute is implemented as Congress intended. *See, e.g., Hibbs* v. *Winn,* 542 U.S. 88, 101 (2004) (''A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.''). This includes pursuing the overall ''objective'' of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' 33 U.S.C. 1251(a), while implementing the specific ''policy'' directives from Congress to, among other things, ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources.'' *Id.* at 1251(b); *see also* Webster's II, New Riverside University Dictionary (1994) (defining ''policy'' as a ''plan or course of action, as of a government[,] designed to influence and determine decisions and actions;'' an ''objective'' is ''something worked toward or aspired to: Goal'').[24] The agencies therefore recognize a distinction between the specific word choices of Congress, including the need to develop regulatory and non-regulatory programs that aim to accomplish the goals of the Act while implementing the specific policy directives of Congress.[25] To do so, the agencies must determine what Congress had in mind when it defined ''navigable waters'' in 1972 as ''the waters of the United States.''

Congress' authority to regulate navigable waters under the CWA derives from its power to regulate the ''channels of interstate commerce'' under the Commerce Clause. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheat.) 1 (1824). In *United States* v. *Lopez,* the Supreme Court explained that the Commerce Clause gives Congress the authority to regulate in three areas: The ''channels of interstate commerce,'' the ''instrumentalities of interstate commerce,'' and those additional activities having ''a substantial relation to interstate commerce.'' 514 U.S. 549, 558–59 (1995). Some commenters stated that Congress' authority over ''waters of the United States'' is not tethered to navigable channels of interstate commerce, but is also derived from its authority over the ''instrumentalities of interstate commerce'' and activities that ''substantially affect'' interstate commerce. *See id.* The agencies disagree with these comments. The Supreme Court made clear in *SWANCC* that the term ''navigable'' indicates ''what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' 531 U.S. 159, 172 (2001). The Court further explained that nothing in the legislative history of the Act provides any indication that ''Congress intended to exert anything more than its commerce power over navigation.'' *Id.* at 168 n.3. The Supreme Court, however, has recognized that Congress intended ''to exercise its powers under the Commerce clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term.'' *Riverside Bayview,* 474 U.S. at 133; *see also SWANCC,* 531 U.S. at 167.

The classical understanding of the term ''navigable'' was first articulated by the Supreme Court in *The Daniel Ball:*

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

77 U.S. (10 Wall.) 557, 563 (1871). Subsequently, this traditional test was expanded to include waters that had been used in the past for interstate commerce, *see Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 123 (1921), and waters that are susceptible

[24] The legislative history of the CWA further illuminates the distinction between the terms ''policy'' and ''objective,'' or ''goal.'' As Congress drafted the 1972 CWA amendments, the Senate bill set the ''no-discharge of pollutants into the navigable water by 1985'' provision as a policy whereas the House bill set it as a goal. The Act was ultimately passed with the ''no-discharge by 1985'' provision established as a goal. *See* 33 U.S.C 1251(a)(1). During the House's consideration of the Conference Report, Representative Robert E. Jones, Jr. captured the policy versus goal distinction in section 101(a)(1) as follows: ''The objective of this legislation is to restore and preserve for the future the integrity of our Nation's waters. The bill sets forth as a national goal the complete elimination of all discharges into our navigable waters by 1985, but . . . the conference report states clearly that achieving the 1985 target date is a goal, not a national policy. As such, it serves as a focal point for long-range planning, and for research and development in water pollution control technology . . . . While it is our hope that we can succeed in eliminating all discharge into our waters by 1985, without unreasonable impact on the national life, we recognized in this report that too many imponderables exist, some still beyond our horizons, to prescribe this goal today as a legal requirement.'' 118 Cong. Rec. H. 33749 (daily ed. October 4, 1972).

[25] *See, e.g., Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. 519, 544 (2012) (''Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.''); *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (''[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'')

for use with reasonable improvement, *see United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 407–10 (1940).

By the time the 1972 CWA amendments were enacted, the Supreme Court had held that Congress' authority over the channels of interstate commerce was not limited to regulation of the channels themselves but could extend to activities necessary to protect the channels. *See Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U.S. 508, 523 (1941) (''Congress may exercise its control over the non-navigable stretches of a river in order to preserve or promote commerce on the navigable portions.''). The Supreme Court had also clarified that Congress could regulate waterways that formed a part of a channel of interstate commerce, even if they are not themselves navigable or do not cross state boundaries. *See Utah* v. *United States,* 403 U.S. 9, 11 (1971).

These developments were discussed during the legislative process leading up to the passage of the 1972 CWA amendments, and certain members referred to the scope of the amendments as encompassing waterways that serve as a ''link in the chain'' of interstate commerce as it flows through various channels of transportation, such as railroads and highways. *See, e.g.,* 118 Cong. Rec. 33756–57 (1972) (statement of Rep. Dingell); 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie).[26] Other references suggest that congressional committees at least contemplated applying the ''control requirements'' of the Act ''to the navigable waters, portions thereof, and their tributaries.'' S. Rep. No. 92–414, at 77 (1971). Some commenters on this rulemaking stated that Congress' authority under the CWA is limited to waters that actually transport commerce, not their tributaries or adjacent wetlands, and that this limitation on CWA jurisdiction would fully preserve the authority of States to address pollution. The agencies disagree with these commenters based on the Supreme Court's holdings and the legislative history of the 1972 amendments discussed above, as well as the text of the 1977 amendments to the CWA. Specifically, in 1977, when Congress authorized State assumption over the section 404 dredged or fill material permitting program, Congress limited the scope of waters that could be assumed by a State or Tribe by requiring the Corps to retain permitting authority over RHA waters (as identified by the test outlined in *The Daniel Ball*) plus wetlands adjacent to those waters, minus historic-use-only waters. *See* 33 U.S.C. 1344(g)(1).[27] This suggests that Congress had in mind a broader scope of waters subject to CWA jurisdiction than waters traditionally understood as navigable. *See SWANCC,* 531 U.S. at 171; *Riverside Bayview,* 474 U.S. at 138 n.11. Thus, Congress intended to assert federal authority over more than just waters traditionally understood as navigable, and Congress rooted that authority in ''its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. However, there must be a limit to that authority and to what water is subject to federal jurisdiction. How the agencies should exercise that authority has been the subject of dispute for decades, but the Supreme Court on three occasions has analyzed the issue and provided some instructional guidance for the agencies to consider in developing this final rule.

2. U.S. Supreme Court Precedent

a. Adjacent Wetlands

In *Riverside Bayview,* the Supreme Court considered the Corps' assertion of jurisdiction over ''low-lying, marshy land'' immediately abutting a water traditionally understood as navigable on the grounds that it was an ''adjacent wetland'' within the meaning of the Corps' then-existing regulations. 474 U.S. at 124. The Court addressed the question of whether non-navigable wetlands may be regulated as waters of the United States on the basis that they are ''adjacent to'' navigable-in-fact waters and ''inseparably bound up with'' them because of their ''significant effects on water quality and the aquatic ecosystem.'' *See id.* at 131–35 & n.9.

In determining whether to give deference to the Corps' assertion of jurisdiction over adjacent wetlands, the Court acknowledged the difficulty in determining where federal jurisdiction ends, noting that the line is somewhere between open water and dry land:

> *In determining the limits of its power* to regulate discharges under the Act, the Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: The transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ''waters'' is far from obvious.

Id. at 132 (emphasis added). Within this statement, the Supreme Court identifies a basic principle for adjacent wetlands: The limits of jurisdiction lie within the ''continuum'' or ''transition'' ''between open waters and dry land.'' Observing that Congress intended the CWA ''to regulate at least some waters that would not be deemed 'navigable,' '' the Court held that it is ''a permissible interpretation of the Act'' to conclude that ''a wetland that actually abuts on a navigable waterway'' falls within the ''definition of 'waters of the United States.' '' *Id.* at 133, 135. Thus, a wetland that abuts a water traditionally understood as navigable is subject to CWA jurisdiction because it is ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 134. ''This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.'' *Id.*

The Supreme Court also noted that the agencies can establish categories of jurisdiction for adjacent wetlands. *See id.* at 135 n.9. It made clear that these categories could be reasonable if the Corps concludes that ''in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem.'' *Id.* A definition of ''waters of the United States'' ''can stand'' even if it potentially sweeps in individual wetlands that are not sufficiently ''intertwined with the ecosystem of adjacent waterways'' to warrant protection. *Id.* In such cases, if the regulating entity determines that a particular wetland lacks importance to the aquatic environment, or its importance is outweighed by other factors, that wetland could be developed through the permit issuance process. *Id.*

Some commenters noted that the definition of ''adjacent wetlands'' that the Supreme Court unanimously upheld in *Riverside Bayview* included categories of wetlands that would not be *per se* ''adjacent'' under the proposed rule, including all ''[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.'' 51 FR 41251 (Nov. 13, 1986). These commenters stated that the Court deferred to the Corps' judgment that

[26] The agencies recognize that individual member statements are not a substitute for full congressional intent, but they do help provide context for issues that were discussed during the legislative debates. For a detailed discussion of the legislative history of the 1972 CWA amendments, *see* Albrecht & Nickelsburg, *Could SWANCC Be Right? A New Look at the Legislative History of the Clean Water Act,* 32 ELR 11042 (Sept. 2002).

[27] For a detailed discussion of the legislative history supporting the enactment of CWA section 404(g), *see Final Report of the Assumable Waters Subcommittee* (May 2017), App. F., *available at https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf* < Caution-*https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteefinalreprort_05-2017_tag508_05312017_508.pdf.*

wetlands may affect the water quality of jurisdictional waterbodies even if the waterbodies do not inundate the wetlands. *See Riverside Bayview,* 474 U.S. at 133–35. The proposed rule included wetlands as jurisdictional absent inundation by another water. *See e.g.,* 84 FR 4187 (''The proposed definition of 'adjacent wetlands' would not require surface water exchange between wetlands and the jurisdictional waters they abut to create the jurisdictional link[.]''). As explained in Section III.G., the agencies have considered public comments in light of the statutory text and other relevant considerations and are finalizing a definition of ''adjacent wetlands'' that is more encompassing than the proposal. In any event, the agencies note that a Court's deference to an agency's particular interpretation of a statute does not foreclose alternative interpretations. The Supreme Court has held that ''a court's choice of one reasonable reading of an ambiguous statute does not preclude an implementing agency from later adopting a different reasonable interpretation.'' *United States* v. *Eurodif S.A.,* 555 U.S. 305, 315 (2009). This principle follows from *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), which ''established a 'presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.' '' *Nat'l Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 982 (2005) (quoting *Smiley* v. *Citibank,* 517 U.S. 735, 740–41 (1996)). Moreover, an ''initial agency interpretation is not instantly carved in stone.'' *Chevron,* 467 U.S. at 863; *see also Encino Motorcars, LLC* v. *Navarro,* 136 S. Ct. 2117, 2125 (2016) (''[A]gencies are free to change their existing policies as long as they provide a reasoned explanation for the change.'') (citations omitted). Consistent with the APA and applicable case law, in this final rule the agencies have provided ample justification for a change in interpretation of the CWA concerning the scope of jurisdiction over waters and wetlands, including any changes from their prior interpretations.

The Supreme Court in *Riverside Bayview* declined to decide whether wetlands that are not adjacent to navigable waters could also be regulated by the agencies. *See* 474 U.S. at 124 n.2 and 131 n.8. In *SWANCC* a few years later, however, the Supreme Court analyzed a similar question in the context of an abandoned sand and gravel pit located some distance from a traditional navigable water, with excavation trenches that ponded—some only seasonally—and served as habitat for migratory birds. 531 U.S. at 162–63. The Supreme Court rejected the government's stated rationale for asserting jurisdiction over such ''nonnavigable, isolated, intrastate waters'' as outside the scope of CWA jurisdiction. *Id.* at 171–72. In doing so, the Supreme Court noted that *Riverside Bayview* upheld ''jurisdiction over wetlands that actually abutted on a navigable waterway'' because the wetlands were ''inseparably bound up with the 'waters' of the United States.'' *Id.* at 167.[28] As summarized by the *SWANCC* majority:

> It was the significant nexus between the wetlands and ''navigable waters'' that informed our reading of the CWA in *Riverside Bayview Homes.* Indeed, we did not ''express any opinion'' on the ''question of authority of the Corps to regulate discharges of fill material into wetlands that are not adjacent to bodies of open water . . . .'' In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 167–68 (internal citations and emphasis omitted).

The Court also rejected the argument that the use of the abandoned ponds by migratory birds fell within the power of Congress to regulate activities that in the aggregate have a substantial effect on interstate commerce, or that the CWA regulated the use of the ponds as a municipal landfill because such use was commercial in nature. *Id.* at 173. Such arguments, the Court noted, raised ''significant constitutional questions.'' *Id.* ''Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result.'' *Id.* at 172–73 (''Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.''). This is particularly true ''where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.'' *Id.* at 173; *see also Will* v. *Michigan Dep't of State Police,* 491 U.S. 58, 65 (1989) (''[I]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' '' (quoting *Atascadero State Hospital* v. *Scanlon,* 473 U.S. 234, 242 (1985))); *Gregory* v. *Ashcroft,* 501 U.S. 452, 460–61 (1991) (''[The] plain statement rule . . . acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.''). ''Rather than expressing a desire to readjust the federal-state balance in this manner, Congress chose [in the CWA] to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'' *SWANCC,* 531 U.S. at 174 (quoting 33 U.S.C. 1251(b)). The Court found no clear statement from Congress that it had intended to permit federal encroachment on traditional State power and construed the CWA to avoid the significant constitutional questions related to the scope of federal authority authorized therein. *Id.*[29]

Historically, the Federal government has interpreted and applied the *SWANCC* decision more narrowly, focusing on the specific holding in the case as rejecting federal jurisdiction over the isolated ponds and mudflats at issue in that case based on their use by migratory birds. By contrast, members of the regulated community, certain States and other interested stakeholders have

[28] At oral argument during *Riverside Bayview,* the attorney representing the United States characterized the wetland at issue as ''in fact an adjacent wetland, adjacent—by adjacent, I mean it is immediately next to, abuts, adjoins, borders, whatever other adjective you might want to use, navigable waters of the United States.'' Transcript of Oral Argument at 16, *United States* v. *Riverside Bayview Homes,* 474 U.S. 121 (1985) (No. 84–701).

[29] The agencies note that during oral argument in *SWANCC,* Justice Kennedy stated, ''[T]his case, it seems to me, does point up the problem that petitioner's counsel raised quoting from page 1 of the blue brief, 'it is the primary responsibility of the states to eliminate pollution and to plan development and use of land' . . . . It seems to me that this illustrates that the way in which the Corps has promulgated its regulation departs from the design of the statute.'' Transcript of Oral Argument at 40, *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159 (2001) (No. 99–1178) (emphasis added). And several years later, during oral argument in *Rapanos,* after the U.S. Solicitor General stated, ''[W]hat Congress recognized in 1972 is that they had to regulate beyond traditional navigable waters,'' Justice Kennedy stated, ''But the Congress in 1972 also . . . said it's a statement of policy to reserve to the States the power and the responsibility to plan land use and water resources. And under your definition, I just see that we're giving no scope at all to that clear statement of the congressional policy.'' Transcript of Oral Argument at 58, *Rapanos* v. *United States* and *Carabell* v. *United States,* 547 U.S. 715 (2006) (Nos. 04–1034, 04–1384). Although the agencies do not give independent weight to these statements at oral argument, the statements are consistent with the agencies' interpretation of the CWA and applicable Supreme Court decisions.

argued that *SWANCC* stands for a broader proposition based on key federalism and separation of powers principles.[30] In the preamble to the proposed rule, the agencies solicited comment as to the proper scope and interpretation of *SWANCC.* 84 FR 4165. Some commenters argued that the *SWANCC* decision should be interpreted narrowly to apply only to the facts presented in that case; other commenters argued that the agencies should apply the reasoning of the *SWANCC* decision broadly, in a manner similar to how the agencies had previously interpreted the reasoning of Justice Kennedy's concurring opinion in *Rapanos* to extend beyond wetlands to tributaries and other waters, for example. The agencies agree with commenters that the interpretation and implementation of these Supreme Court decisions within agency regulatory programs should be consistent, and that the reasoning in the *SWANCC* decision stands for key principles related to federalism and the balancing of the traditional power of States to regulate land and water resources within their borders with the need for national water quality regulation.

The agencies recently repealed the 2015 Rule and explained in the preamble of that action that the 2015 Rule had improperly allowed for the application of the significant nexus standard in a manner that would result in the assertion of jurisdiction over waters that the Court deemed non-jurisdictional in *SWANCC.* 84 FR 56626–27. By allowing federal jurisdiction to reach certain isolated ponds, such as those at issue in *SWANCC,* and certain physically remote wetlands that ''do not implicate the boundary-drawing problem of *Riverside Bayview,*'' the agencies concluded that the 2015 Rule asserted federal control over some features that ''lack the necessary connection to covered waters . . . described as a 'significant nexus' in *SWANCC*[.]'' *Rapanos,* 547 U.S. at 742 (Scalia, J., plurality); *see also Hawkes,* 136 S. Ct. at 1817 (Kennedy, J., concurring in the judgment) (''[T]he *reach* and systemic consequences of the Clean Water Act remain a cause for concern.'' (emphasis added)). This final rule, in contrast to the 2015 Rule, avoids pressing against the outer limits of the agencies' authority under the Commerce Clause and Supreme Court case law and recognizes the limiting principles articulated by the *SWANCC* decision. This final rule would not allow for the exercise of jurisdiction over waters similar to those at issue in *SWANCC.*

Several years after *SWANCC,* the Supreme Court considered the concept of adjacency in consolidated cases arising out of the Sixth Circuit. *See Rapanos* v. *United States,* 547 U.S. 715 (2006). In one case, the Corps had determined that wetlands on three separate sites were subject to CWA jurisdiction because they were adjacent to ditches or man-made drains that eventually connected to traditional navigable waters several miles away through other ditches, drains, creeks, and rivers. *Id.* at 719–20, 729. In another case, the Corps had asserted jurisdiction over a wetland separated from a man-made drainage ditch by a four-foot-wide man-made berm. *Id.* at 730. The ditch emptied into another ditch, which then connected to a creek, and eventually connected to Lake St. Clair,[31] a traditional navigable water, approximately a mile from the parcel at issue. The berm was largely or entirely impermeable but may have permitted occasional overflow from the wetland to the ditch. *Id.* The Court, in a fractured opinion, vacated and remanded the Sixth Circuit's decision upholding the Corps' asserted jurisdiction over the four wetlands at issue, with Justice Scalia writing for the plurality and Justice Kennedy concurring in the judgment but on alternative grounds. *Id.* at 757 (Scalia, J., plurality); *id.* at 787 (Kennedy, J., concurring in the judgment).

The plurality determined that CWA jurisdiction extended to only adjacent ''wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands.'' *Rapanos,* 547 U.S. at 742 (Scalia, J., plurality). The plurality then concluded that ''establishing . . . wetlands . . . covered by the Act requires two findings: First, that the adjacent channel contains a 'wate[r] of the United States,' (*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins.'' *Id.* (alteration in original).

In reaching the adjacency component of the two-part analysis, the plurality interpreted *Riverside Bayview* and the Court's subsequent *SWANCC* decision characterizing *Riverside Bayview* as authorizing jurisdiction over wetlands that physically abutted traditional navigable waters. *Id.* at 740–42. The plurality focused on the ''inherent ambiguity'' described in *Riverside Bayview* in determining where on the continuum between open waters and dry land the scope of federal jurisdiction should end. *Id.* at 740. It was ''the inherent difficulties of defining precise bounds to regulable waters,'' *id.* at 741 n.10, according to the plurality, that prompted the Court in *Riverside Bayview* to defer to the Corps' inclusion of adjacent wetlands as ''waters'' subject to CWA jurisdiction based on proximity. *Id.* at 741 (''When we characterized the holding of *Riverside Bayview* in *SWANCC,* we referred to the close connection between waters and the wetlands they gradually blend into: 'It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes.*' ''); *see also Riverside Bayview,* 474 U.S. at 134 (''For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States, as these wetlands are part of this aquatic system.'' (quoting 42 FR 37128 (July 19, 1977))). The plurality also noted that ''*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview* . . . provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'' *Rapanos,* 547 U.S. at 741–42 (emphasis in original).

Justice Kennedy disagreed with the plurality's conclusion that adjacency requires a ''continuous surface connection'' to covered waters. *Id.* at 772 (Kennedy, J., concurring in the judgment). In reading the phrase ''continuous surface connection'' to mean a continuous ''surface-*water* connection,'' *id.* at 776 (emphasis

[30] The agencies also recognize that Justice Stevens, writing for himself and three other Justices in dissent in *SWANCC,* interpreted the *SWANCC* majority opinion to apply beyond the Migratory Bird Rule and the specific ponds at issue in *SWANCC.* His dissent stated that the decision ''invalidates the 1986 migratory bird regulation *as well as the Corps' assertion of jurisdiction over all waters except for actually navigable waters, their tributaries, and wetlands adjacent to each.*'' 531 U.S. at 176–77 (Stevens, J., dissenting) (emphasis added).

[31] Lake St. Clair is a Rivers and Harbors Act section 10 water. *See* p. 7: *https://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/GENSEC10.pdf.* It is also described in Justice Kennedy's opinion in *Rapanos* as ''a 430-square mile lake located between Michigan and Canada that is popular with boating and fishing and produces some 48 percent of the sport fish caught in the Great Lakes[.]'' *Rapanos,* 547 U.S. at 764 (Kennedy, J., concurring in the judgment).

added), and interpreting the plurality's standard to include a ''surface-*water*-connection requirement,'' *id.* at 774 (emphasis added), Justice Kennedy stated that ''when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority.'' *Id.* at 776. He noted that the *Riverside Bayview* Court ''deemed it irrelevant whether 'the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water.'' *Id.* at 772 (internal citations omitted); *see also Riverside Bayview,* 474 U.S. at 134 (''[A]djacent wetlands may be defined as waters under the Act. This holds true even for wetlands that are not the result of flooding or permeation by water having its source in adjacent bodies of open water.'').

The plurality did not directly address the precise distinction raised by Justice Kennedy regarding his interpretation of the plurality's ''continuous surface connection'' requirement to mean a continuous ''surface-water connection.'' The plurality did note in response, however, that the ''*Riverside Bayview* opinion required'' a ''continuous *physical* connection,'' *Rapanos,* 547 U.S. at 751 n.13 (Scalia, J., plurality) (emphasis added), and focused on evaluating adjacency between a ''water'' and a wetland ''in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.'' *Id.* at 757. The plurality also noted that its standard includes a ''*physical*-connection requirement,'' not hydrological, between wetlands and covered waters. *Id.* at 751 n.13 (emphasis added). In other words, the plurality appeared to be more focused on the abutting nature rather than the source of water creating the wetlands at issue in *Riverside Bayview* to describe the legal constructs applicable to adjacent wetlands. *See id.* at 747; *see also* Webster's II, New Riverside University Dictionary (1994) (defining ''abut'' to mean ''to border on'' or ''to touch at one end or side of something''). The plurality agreed with Justice Kennedy and the *Riverside Bayview* Court that ''[a]s long as the wetland is 'adjacent' to covered waters . . . its creation *vel non* by inundation is irrelevant.'' *Rapanos,* 547 U.S. at 751 n.13 (Scalia, J., plurality).[32]

Because wetlands with a physically remote hydrologic connection do not raise the same boundary-drawing concerns presented by actually abutting wetlands, the plurality determined that the ''inherent ambiguity in defining where water ends and abutting ('adjacent') wetlands begin'' upon which *Riverside Bayview* rests does not apply to such features. *Id.* at 742 (''Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*[.]''). The plurality supported this position by referring to the Court's treatment of certain isolated waters in *SWANCC* as non-jurisdictional. *Rapanos,* 547 U.S. at 741–42; *see also id.* at 726 (''We held that 'nonnavigable, isolated, intrastate waters—which, unlike the wetlands at issue in *Riverside Bayview,* did not 'actually abu[t] on a navigable waterway,'—were not included as 'waters of the United States.' '') (internal citations omitted). It interpreted the reasoning of *SWANCC* to exclude isolated waters. The plurality also found ''no support for the inclusion of physically unconnected wetlands as covered 'waters' '' based on *Riverside Bayview's* treatment of the Corps' definition of adjacent. *Id.* at 747; *see also id.* at 746 (''[T]he Corps' definition of 'adjacent' . . . has been extended beyond reason . . . .'').

Although ultimately concurring in the judgment, Justice Kennedy focused on the ''significant nexus'' between adjacent wetlands and traditional navigable waters as the basis for determining whether a wetland is a water subject to CWA jurisdiction. He quotes the *SWANCC* decision, which explains that ''[i]t was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the [Act] in *Riverside Bayview Homes*.'' *SWANCC,* 531 U.S. at 167. But Justice Kennedy also interpreted the reasoning of *SWANCC* to exclude certain isolated waters. His opinion notes that: ''Because such a nexus [in that case] was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps' action.'' *Rapanos,* 547 U.S. at 767 (Kennedy, J., concurring in the judgment) (internal citation omitted). It further states that the wetlands at issue in *Riverside Bayview* were ''adjacent to [a] navigable-in-fact waterway[ ]'' while the ''ponds and mudflats'' considered in *SWANCC* ''were isolated in the sense of being unconnected to other waters covered by the Act.'' *Id.* at 765–66. ''Taken together, these cases establish that in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking.'' *Id.* at 767.

According to Justice Kennedy, whereas the isolated ponds and mudflats in *SWANCC* lacked a ''significant nexus'' to navigable waters, it is the ''conclusive standard for jurisdiction'' based on ''a reasonable inference of ecological interconnection'' between adjacent wetlands and navigable-in-fact waters that allows for their categorical inclusion as ''waters of the United States.'' *Rapanos,* 547 U.S. at 780 (''[T]he assertion of jurisdiction for those wetlands [adjacent to navigable-in-fact waters] is sustainable under the Act by showing adjacency alone.''). Justice Kennedy surmised that it may be that the same rationale ''without any inquiry beyond adjacency . . . could apply equally to wetlands adjacent to certain major tributaries.'' *Id.* He noted that the Corps could establish by regulation categories of tributaries based on volume of flow, proximity to navigable waters, or other relevant factors that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Id.* at 780–81. However, ''[t]he Corps' existing standard for tributaries'' provided Justice Kennedy ''no such assurance'' to infer the categorical existence of a requisite nexus between waters traditionally understood as navigable and wetlands adjacent to nonnavigable tributaries. *Id.* at 781. That is because:

> [T]he breadth of the [tributary] standard—which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases, wetlands

[32] In the *Rapanos* Guidance, the agencies interpreted the plurality's ''continuous surface connection'' as not requiring a continuous surface water connection. *See, e.g., Rapanos* Guidance at 7 n.28 (''A continuous surface connection does not require surface water to be continuously present between the wetland and the tributary.''). The agencies continue to endorse that interpretation. In *Rapanos,* both Justice Scalia and Justice Kennedy recognized that a wetland can be adjacent to a jurisdictional water absent inundation from that water.

adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*

Rapanos, 547 U.S. at 781–82.

To avoid this outcome, Justice Kennedy stated that, absent development of a more specific regulation and categorical inclusion of wetlands adjacent to ''certain major'' or even ''minor'' tributaries as was established in *Riverside Bayview, id.* at 780–81, the Corps ''must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps' regulations, this showing is necessary to avoid unreasonable applications of the statute.'' *Id.* at 782. Justice Kennedy stated that adjacent ''wetlands possess the requisite nexus, and thus come within the statutory phrase 'navigable waters,' if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.' '' *Id.* at 780. ''Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region.'' *Id.* at 782. In establishing this significant nexus test, Justice Kennedy relied, in part, on the overall objective of the CWA to ''restore and maintain the chemical, physical and biological integrity of the Nation's waters.'' *Id.* at 779 (quoting 33 U.S.C. 1251(a)). However, Justice Kennedy also acknowledged that ''environmental concerns provide no reason to disregard limits in the statutory text.'' *Id.* at 778. With respect to wetlands adjacent to nonnavigable tributaries, Justice Kennedy therefore determined that ''mere adjacency . . . is insufficient[.] A more specific inquiry, based on the significant-nexus standard, is . . . necessary.'' *Id.* at 786. Justice Kennedy noted that under the Corps' interpretation at issue in the case, which did not require adjacent wetlands to possess a significant nexus with navigable waters, federal regulation would be permitted ''whenever wetlands lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps' interpretation of the statute does not extend so far.'' *Id.* at 778–79.

Since the *Rapanos* decision, the Federal government has adopted a broad interpretation of Justice Kennedy's concurring opinion, arguing that his ''significant nexus'' test provides an independent basis for establishing jurisdiction over certain waters of the United States. And rather than limiting the application of Justice Kennedy's opinion to the specific facts and wetlands at issue in that case, similar to their treatment of the *SWANCC* decision, the agencies previously have applied Justice Kennedy's reasoning more broadly to include, for example, the application of the significant nexus test to determining jurisdiction over tributaries, not just wetlands. Many courts have deferred to this position, and some courts rely exclusively on Justice Kennedy's significant nexus test while other courts have held that jurisdiction can be established under either the plurality or concurring opinions. The agencies' final rule, as explained in Section III, is informed in several key aspects by Justice Kennedy's opinion, but the agencies now appropriately recognize some of the limiting principles articulated within his concurring opinion. The agencies also recognize that the reasoning in *SWANCC* contains more instruction than the agencies have historically acknowledged.

In summary, although the standards that the *Rapanos* plurality and Justice Kennedy established are not identical, and each standard excludes some waters and wetlands that the other standard does not, the standards contain substantial similarities. The plurality and Justice Kennedy agreed in principle that the determination must be made using a basic two-step approach that considers (1) the connection of the wetland to the tributary; and (2) the status of the tributary with respect to downstream traditional navigable waters. The plurality and Justice Kennedy also agreed that the connection between the wetland and the tributary must be close. The plurality referred to that connection as a ''continuous surface connection'' or ''continuous physical connection,'' as demonstrated in *Riverside Bayview. Id.* at 742, 751 n.13. Justice Kennedy recognized that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act.'' *Id.* at 767. The second part of their common analytical framework is addressed in the next section.

b. Tributaries

As some commenters noted, the definition of ''tributary'' was not addressed in either *Riverside Bayview* or *SWANCC,* nor were tributaries the waters at issue in *Rapanos.* Yet while the focus of *Rapanos* was on whether the Corps could regulate wetlands adjacent to nonnavigable tributaries far removed from navigable-in-fact waters, the plurality and concurring opinions provide some guidance as to the scope of CWA coverage of tributaries to waters more traditionally understood as navigable.

The plurality and Justice Kennedy both recognized the jurisdictional scope of the CWA is not restricted to traditional navigable waters. *Rapanos,* 547 U.S. at 731 (Scalia, J., plurality) (''[T]he Act's term 'navigable waters' includes something more than traditional navigable waters.''); *id.* at 767 (Kennedy, J., concurring in the judgment) (''Congress intended to regulate at least some waters that are not navigable in the traditional sense.''). Both also agreed that federal authority under the Act has limits. *See id.* at 731–32 (Scalia, J., plurality) (' '[T]he waters of the United States' . . . cannot bear the expansive meaning that the Corps would give it.''); *id.* at 778–79 (Kennedy, J., concurring in the judgment) (''The deference owed to the Corps' interpretation of the statute does not extend'' to ''wetlands'' which ''lie alongside a ditch or drain, however remote or insubstantial, that eventually may flow into traditional navigable waters.'').

With respect to tributaries specifically, both the plurality and Justice Kennedy focused in part on a tributary's contribution of flow to and connection with traditional navigable waters. The plurality would include as ''waters of the United States'' ''only relatively permanent, standing or flowing bodies of water'' and would define such ''waters'' as including streams, rivers, oceans, lakes and other bodies of waters that form geographical features, noting that all such ''terms connote continuously present, fixed bodies of water.'' *Rapanos,* 547 U.S. at 732–33, 739 (Scalia, J., plurality). The plurality would have also required relatively permanent waters to be connected to traditional navigable waters in order to be jurisdictional. *See id.* at 742 (describing a ' 'wate[r] of the United States' '' as ''*i.e.,* a relatively permanent body of water *connected to* traditional interstate navigable waters'') (emphasis added). The plurality would also have excluded ephemeral flows and related features, stating ''[n]one of these terms encompasses transitory puddles or ephemeral flows of water.'' *Id.* at 733; *see also id.* at 734 (''In applying the definition to 'ephemeral streams,' . . .

the Corps has stretched the term 'waters of the United States' beyond parody. The plain language of the statute simply does not authorize this 'Land Is Waters' approach to federal jurisdiction.''). Justice Kennedy likely would exclude some streams considered jurisdictional under the plurality's opinion, but he may include some that would be excluded by the plurality. *See id.* at 769 (Kennedy, J., concurring in the judgment) (noting that under the plurality's test, ''[t]he merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not'').

Both the plurality and Justice Kennedy would have included some seasonal or intermittent streams as waters of the United States. *Rapanos,* 547 U.S. at 732 n.5, 733 (Scalia, J., plurality); *id.* at 769 (Kennedy, J., concurring in the judgment). The plurality noted, for example, that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought,'' or ''*seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (emphasis in original). Neither the plurality nor Justice Kennedy, however, defined with precision where to draw the line. *See, e.g., id.* (Scalia, J., plurality) (''[W]e have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.' It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that . . . streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' . . . or 'existing only, or no longer than, a day; diurnal . . . short-lived,' . . . are not.'') (internal citations omitted). The plurality provided, however, that ''navigable waters'' must have ''at a bare minimum, the ordinary presence of water,'' *id.* at 734, and Justice Kennedy noted that the Corps can identify by regulation categories of tributaries based on ''their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations'' that ''are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters,'' *id.* at 780–81 (Kennedy, J., concurring in the judgment).

Both the plurality and Justice Kennedy also agreed that the Corps' existing treatment of tributaries raised significant jurisdictional concerns. For example, the plurality was concerned about the Corps' broad interpretation of tributaries. *See Rapanos,* 547 U.S. at 738 (Scalia, J., plurality) (''Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.''). And Justice Kennedy objected to the categorical assertion of jurisdiction over wetlands adjacent to waters deemed tributaries under the Corps' then-existing standard, ''which seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it.'' *Id.* at 781 (Kennedy, J., concurring in the judgment); *see also id.* at 781–82 (''[I]n many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act's scope in *SWANCC.*'').

Beyond tributaries, the plurality and Justice Kennedy also offered some insight regarding CWA jurisdiction with respect to other relatively permanent bodies of water, such as lakes and ponds, and their connection to traditional navigable waters. The plurality describes a ''water of the United States'' as ''a relatively permanent body of water *connected to* traditional interstate navigable waters[.]'' *Id.* at 742 (emphasis added). The plurality did not specify, however, what would constitute a sufficient connection between such relatively permanent waters and downstream traditional navigable waters. When considered in the context of Justice Scalia's entire opinion, the plurality signaled concern that certain types of connections are likely insufficient to maintain jurisdiction; for instance, by characterizing an ''expansive definition of 'tributaries' '' as one that includes ''dry arroyos connected to remote waters through the flow of groundwater over 'centuries,' '' *id.* at 725–26 (internal citations omitted), and describing potential federal control over ''irrigation ditches and drains that intermittently connect to covered waters'' as ''sweeping.'' *Id.* at 726–27. In addition to ''tributaries,'' the plurality noted that the Corps and lower courts have ''define[d] 'adjacent' wetlands broadly'' to include wetlands ''hydrologically connected'' ''to covered waters'' ''through directional sheet flow during storm events,'' and wetlands ''connected to the navigable water by flooding, on average, once every 100 years[.]'' *Rapanos,* 547 U.S. at 728 (internal quotations and citations omitted). Justice Kennedy noted that ''in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water . . . and a navigable water may be so close, or potentially so close, that the Corps may deem the water . . . a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection.'' *Id.* at. 767 (Kennedy, J., concurring in the judgment). Justice Kennedy also stated that ''mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85.

Some commenters agreed that aspects of the plurality's and Justice Kennedy's opinions share similarities regarding the limits of federal jurisdiction under the CWA, while other commenters disagreed that the opinions share important commonalities. These commenters asserted that the opinions have disparate rationales that cannot be reconciled. While the agencies acknowledge that the plurality and Justice Kennedy viewed the question of federal CWA jurisdiction differently, as discussed above, the agencies find that there are sufficient commonalities between these opinions to help instruct the agencies on where to draw the line between Federal and State waters.

3. Principles and Considerations

As discussed in the previous sections, a few important principles emerge that can serve as the basis for the agencies' final regulatory definition. As a threshold matter, the power conferred on the agencies under the CWA to regulate the waters of the United States is grounded in Congress' commerce power over navigation. The agencies can choose to regulate beyond waters more traditionally understood as navigable, including some tributaries and relatively permanent bodies of water connected to those traditional navigable waters, but the agencies must provide a reasonable basis grounded in the language and structure of the Act for determining the extent of jurisdiction. The agencies can also choose to regulate wetlands adjacent to covered waters beyond those traditionally understood as navigable, if the wetlands are closely connected to those waters, such as in the transitional zone between open waters and dry land. The Supreme

Court's opinion in *SWANCC,* however, calls into question the agencies' authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to traditional navigable waters. The decision counsels that the agencies should avoid regulatory interpretations of the CWA that raise constitutional questions regarding the scope of their statutory authority. Finally, the agencies can regulate certain waters by category, which could improve regulatory predictability and certainty and ease administrative burdens while still effectuating the purposes of the Act.

In developing an appropriate regulatory framework for the final rule, the agencies recognize and respect the primary responsibilities and rights of States to regulate their land and water resources as reflected in CWA section 101(b). 33 U.S.C. 1251(b), *see also id.* at 1370. The oft-quoted objective of the CWA to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' *id.* at 1251(a), must be implemented in a manner consistent with Congress' policy directives to the agencies. The Supreme Court long ago recognized the distinction between federal waters traditionally understood as navigable and waters ''subject to the control of the States.'' *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 564–65 (1870). Over a century later, the Supreme Court in *SWANCC* reaffirmed the State's ''traditional and primary power over land and water use.'' *SWANCC,* 531 U.S. at 174; *accord Rapanos,* 547 U.S. at 738 (Scalia, J., plurality). While CWA section 101(b) does not specifically identify Tribes, the policy of preserving States' sovereign authority over land and water use is equally relevant to ensuring the primary authority of Tribes to address pollution and plan the development and use of tribal land and water resources. This final rule recognizes and preserves the autonomy of Tribes just as it recognizes and preserves the authority of States.

Ensuring that States and Tribes retain authority over their land and water resources, reflecting the policy in section 101(b), helps carry out the overall objective of the CWA and ensures that the agencies are giving full effect and consideration to the entire structure and function of the Act. *See, e.g., Rapanos,* 547 U.S. at 755–56 (Scalia, J., plurality) (''[C]lean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. 1251(b).'') (emphasis in original). That includes the dozens of non-regulatory grant, research, nonpoint source, groundwater, and watershed planning programs that were intended by Congress to assist the States in controlling pollution in the nation's waters, not just its navigable waters. These non-regulatory sections of the CWA reveal Congress' intent to restore and maintain the integrity of the nation's waters using federal assistance to support State, tribal, and local partnerships to control pollution of the nation's waters in addition to a federal regulatory prohibition on the discharge of pollutants to its navigable waters. *See e.g., id.* at 745 (''It is not clear that the state and local conservation efforts that the CWA explicitly calls for, *see* 33 U.S.C. 1251(b), are in any way inadequate for the goal of preservation.''). Regulating *all* of the nation's waters using the Act's federal regulatory mechanisms would call into question the need for the more holistic planning provisions of the Act and the State partnerships they entail. Therefore, by recognizing the distinctions between the nation's waters and its navigable waters and between the overall objective and goals of the CWA and the specific policy directives from Congress, the agencies can fully implement the entire structure of the Act while respecting the specific word choices of Congress. *See, e.g., Bailey,* 516 U.S. at 146; *Nat'l Fed'n of Indep. Bus.,* 567 U.S. at 544.

Some commenters agreed with the interpretation that the CWA establishes a comprehensive scheme to achieve the Act's objective through a combination of non-regulatory programs and grants for all of the nation's waters, and a more targeted federal permitting program for discharges of pollutants to the subset of the nation's waters identified as waters of the United States. Other commenters expressed concern that the proposed rule would not further the CWA's objective to ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' 33 U.S.C. 1251(a), because fewer waters would be jurisdictional under the proposal than were regulated under the 2015 Rule or the pre-2015 regulatory regime. The agencies disagree with these commenters. The agencies are mindful that ''no legislation pursues its purposes at all costs,'' *Rodriguez* v. *United States,* 480 U.S. 522, 525–26 (1987), including the CWA. The CWA's objective must be balanced with the policy of Congress to preserve the primary State responsibility for ordinary land-use decisions. The purpose of this rulemaking is to establish the boundary between regulated ''waters of the United States'' and the waters subject solely to State and tribal authority. The CWA's longstanding regulatory permitting programs, coupled with the controls that States, Tribes, and local entities choose to exercise over their land and water resources, will continue to address the discharge of pollutants into waters of the United States, and the CWA's non-regulatory measures will continue to address pollution of the nation's waters generally. These programs and measures collectively pursue the objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters.

Some commenters agreed with the statements in the preamble to the proposed rule that the CWA preserves a significant and primary role for the States in implementing various aspects of the CWA, reflecting an intent to balance the States' traditional powers to regulate land and water resources within their borders with the need for national water quality regulation. Other commenters stated that section 101(b) is primarily concerned with State implementation of water pollution control measures, not the jurisdictional reach of the Act, and that a lawful and protective definition of jurisdictional waters under the Act does not disturb or undermine the States' exercise of primary authority. Rather, they expressed concern that the rule would harm the States in exercising their authority as envisioned by section 101(b) by, for example, increasing the financial and administrative burden on States to protect their waters.

The agencies interpret the policy of Congress, set forth in section 101(b), as relevant to all aspects of the implementation of the CWA, both implementing federally-established standards as well as the scope of waters subject to such standards and regulatory programs. When promulgating the 2015 Rule, the agencies endorsed a narrower view of Congress' policy in section 101(b) as limited to implementation of the Act's regulatory programs by States and State authority to impose conditions on ''waters of the United States'' that are more stringent than the conditions that the agencies impose under the Act. In the final Step One Rule, the agencies concluded that such a view was improperly narrow and failed to place sufficient weight on the policy of Congress in section 101(b). *See* 84 FR 56654. Having considered the public comments submitted in this rulemaking, the agencies remain of the view that nothing in section 101(b) suggests that it is limited to implementing federal regulatory programs or imposing conditions on

''waters of the United States'' that are more stringent than the conditions that the agencies impose under the Act. Indeed, the overarching policy statement of 101(b) ''to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources,'' was included in the Act in 1972; the additional 101(b) policy statement ''that the States . . . implement the permit programs under sections 402 and 404 of this Act'' was not added until the 1977 amendments. 91 Stat. 1567, 1575 Public Law 95–217 (1977); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality) (''Thus, the policy [to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources] plainly referred to something beyond the subsequently added state administration program of 33 U.S.C. 1344(g)–(l).'') (citations omitted). The agencies acknowledge that States without comprehensive pre-existing programs that seek to regulate waters no longer jurisdictional under this final rule may incur new costs and administrative burdens, and they discuss those costs in the Economic Analysis for the final rule. Such obligations are inherent in the exercise of the States' authority that Congress embedded in the CWA. States are free to evaluate the most effective means of addressing their waters and may weigh the costs and benefits of doing so.

The agencies also heard from Tribes that because the agencies generally implement CWA programs on tribal lands, the proposed rule would affect Tribes differently than it would affect most States. Some Tribes have received Treatment as a State status to administer CWA programs, and other Tribes have established tribal water programs under tribal law or have the authority to establish such tribal water programs. Other Tribes may currently lack the capacity to create a tribal water program, to administer a program, or to expand programs that currently exist, and may rely on the Federal government for enforcement of water quality violations. *See* Chapter III of the Resource and Programmatic Assessment (RPA) for the final rule. The final rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA.

The agencies are also cognizant that the ''Clean Water Act imposes substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit.'' *Hawkes,* 136 S. Ct. at 1812; *see also Sackett,* 132 S. Ct. at 1374–75 (Alito, J., concurring) (''[T]he combination of the uncertain reach of the Clean Water Act and the draconian penalties imposed for the sort of violations alleged in this case still leaves most property owners with little practical alternative but to dance to the EPA's tune.''). As the Chief Justice observed in *Hawkes,* ''[i]t is often difficult to determine whether a particular piece of property contains waters of the United States, but there are important consequences if it does.'' 136 S. Ct. at 1812; *see also id.* at 1816–17 (Kennedy, J., concurring in the judgment) (stating that ''the reach and systemic consequences of the Clean Water Act remain a cause for concern'' and ''continue[] to raise troubling questions regarding the Government's power to cast doubt on the full use and enjoyment of private property throughout the Nation''). Given the significant civil and criminal penalties associated with the CWA, the agencies seek to promote regulatory certainty and to provide fair and predictable notice of the limits of federal jurisdiction. A number of commenters expressed support for the emphasis on the importance of fair notice in the proposed rule and cited in support Justice Gorsuch's concurring opinion in *Sessions* v. *Dimaya,* 138 S. Ct. 1204, 1223–25 (2018) (characterizing fair notice as possibly the most fundamental of the customary protections provided by the Constitution's guarantee of due process, and stating that vague laws are an exercise of ''arbitrary power . . . leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up'').

The agencies interpret their authority to include promulgation of a new regulatory definition of ''waters of the United States,'' as directed by Executive Order 13778, so long as the new definition is authorized under the law and based on a reasoned explanation. *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) (''*Fox*''). A revised rulemaking based on a change in interpretation of statutory authorities is well within federal agencies' discretion. *Nat'l Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1038 (D.C. Cir. 2012) (citing *Fox,* 556 U.S. at 514–15). Under this rule, the agencies do not view the definition of ''waters of the United States'' as conclusively determining which of the nation's waters warrant environmental protection and which do not; rather, the agencies interpret the definition as drawing the boundary between those waters subject to federal requirements under the CWA and those waters that States and Tribes are free to manage under their independent authorities. The agencies are establishing this line-drawing based primarily on their interpretation of their authority under the Constitution and the language, structure, and legislative history of the CWA, as articulated in decisions by the Supreme Court.

Some commenters viewed the proposed rule as complicated and, because one of the agencies' goals in proposing a new definition was to provide simplicity and clarity, stated that the proposal failed to meet that goal and is therefore arbitrary and capricious. The agencies disagree with these commenters' view that the proposed rule would not have provided necessary clarity. Notwithstanding this disagreement, the agencies have made certain enhancements to the final rule that will further promote clarity and provide fair notice to the public. As a threshold matter, the agencies for the first time have streamlined the regulatory text to four simple categories of jurisdictional waters, provided clear exclusions for many water features that traditionally have not been regulated, and defined the operative terms used in the regulatory text. And while the categories of jurisdiction in the final rule must be applied to specific facts to determine jurisdiction, the final rule does not include a regulatory category of case-specific jurisdiction as the 2015 Rule did in paragraphs (a)(7) and (a)(8). As such, the agencies believe the final rule will be clearer than either the 2015 Rule or the pre-existing regulatory regime restored by the 2019 Rule. However, clarity as an end in itself is not the primary or fundamental basis for the final rule.

Section III of this notice describes in detail the fundamental bases for this rule as the text and structure of the CWA and the constitutional boundaries within which Congress enacted the CWA. The final rule is securely grounded in the text of the CWA and is supported by legislative history and Supreme Court case law. As to simplicity and clarity, the agencies acknowledge that field work may frequently be necessary to verify whether a feature is a water of the United States; however, replacing the multi-factored case-specific significant nexus analysis with categorically jurisdictional and categorically excluded waters in the final rule provides clarifying value for members of the regulated community. The application of a clear test for categorically covered and excluded

waters, as presented in this final rule, is inherently less complicated than a complex multi-factored significant nexus test that must be applied on a case-by-case basis to countless waters and wetlands across the nation.

Some commenters stated that the agencies' desire to facilitate implementation of the regulatory definition does not override the agencies' legal obligations under the CWA, including fulfillment of the goals of the CWA. The agencies agree in principle. The agencies have determined that requiring surface water flow in a typical year from relatively permanent bodies of water to traditional navigable waters and wetlands adjacent to such waters as a core requirement of the rule is the most faithful way of interpreting the Federal government's CWA authority over a water. The agencies carefully considered the comments received on the proposal and have made certain revisions to the regulatory text that provide further clarity without sacrificing or undermining the fundamental legal and constitutional bases for the rule. A number of commenters stated that the proposed rule failed to incorporate scientific and ecological principles into the definition of ''waters of the United States.'' The agencies disagree. While science informs the agencies' interpretation of the definition of ''waters of the United States,'' science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA. The definition of ''waters of the United States'' must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court case law. The agencies are precluded from exceeding their authority under the CWA to achieve specific scientific, policy, or other outcomes. Within the legal limits of the CWA, the agencies have looked to scientific principles to inform implementation of the final rule as the agencies differentiate between waters of the United States and non-jurisdictional waters and features. For example, and as discussed further in Section III.A.1, in requiring the use of a ''typical year'' scenario to assess the surface water connection between a particular water or wetland and a downstream water identified in paragraph (a)(1), (2), or (3) (generally referred to as ''paragraph (a)(1) through (3) waters'' or ''a paragraph (a)(1) through (3) water'' in this notice), the agencies recognize the influence of precipitation, evapotranspiration, and other climatic variables on the flow of surface water in a tributary and its contribution of flow to downstream waters and the hydrologic surface connection between a jurisdictional water and an adjacent wetland. In other words, the agencies will evaluate the flow regime of a stream and the connectedness of a wetland within the context of what is typical for that water or wetland to avoid making erroneous jurisdictional determinations at times that may be too wet or too dry to be considered ''normal.'' The agencies also looked to science to inform other aspects of the final rule; for example, in defining the terms ''perennial,'' ''intermittent,'' and ''ephemeral''; in establishing that wetlands separated from jurisdictional waters only by a natural berm, bank, dune, or similar natural feature are ''inseparably bound up with'' and adjacent to those waters; and in accounting for the connectivity gradient [33] in deciding how to apply key principles from the *Riverside Bayview, SWANCC,* and *Rapanos* decisions.

The agencies consider the priorities they have outlined to be reasonable, especially in light of the long history of controversy and confusion over the definition of ''waters of the United States.'' In concurring with the *Rapanos* plurality opinion, Chief Justice Roberts stated that ''[g]iven the broad, somewhat ambiguous, but clearly limiting terms Congress employed in the Clean Water Act, the [agencies] would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority'' under the CWA, and that the agencies' interpretations under the Act are ''afforded generous leeway by the courts.'' *Rapanos,* 547 U.S. at 758 (Roberts, C.J., concurring) (emphasis in original); *see also id.* (''Rather than refining its view of its authority in light of our decisions in *SWANCC,* . . . the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.''). In this rule, as described in detail in Section III, the agencies are reasonably interpreting the scope of their authority under the Act in a manner that is consistent with its text, structure, legislative history, and applicable Supreme Court guidance. This final rule presents a unifying legal theory for federal jurisdiction over those waters and wetlands that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas.

F. Summary of Final Rule as Compared to the 1986 Regulations Recodified in the 2019 Rule and the 2015 Rule

The agencies are finalizing a definition of ''waters of the United States'' that they consider to be superior to the 1986 regulations re-codified in the 2019 Rule, as well as to the 2015 Rule. The agencies are revising previous regulatory definitions of this term to distinguish between waters that are ''waters of the United States'' subject to Federal regulation under the CWA and waters or features that are subject to exclusive State or tribal jurisdiction, consistent with the scope of jurisdiction authorized under the CWA and the direction in the Act to both ''restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'' 33 U.S.C. 1251(a), and ''recognize, preserve, and protect the primary responsibilities and rights of States to . . . plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' *Id.* at 1251(b). The Supreme Court has recognized that new administrations may reconsider the policies of their predecessors so long as they provide a reasonable basis for the change in approach. *Nat'l Ass'n of Home Builders,* 682 F.3d at 1043 (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part)). The agencies intend that the revised interpretation of the federal regulatory scope of the CWA will resolve longstanding confusion over broad and unclear definitions of ''waters of the United States.''

This final rule is more consistent with the agencies' constitutional and statutory authority than the 2015 Rule,

[33] As part of the 2015 Rule, EPA's SAB stressed that ''the EPA should recognize that there is a gradient of connectivity.'' *See* Letter to Gina McCarthy. SAB Review of the Draft EPA Report Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence at 3 (Oct. 17, 2014) (''SAB Review''). The SAB recommended that ''the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and *consequences* of physical, chemical, and biological connections.'' *Id.* at 2 (emphasis added); *see also* Connectivity Report at 1–18 (''Variation in the degree of connectivity is critical to the integrity and sustainability of downstream waters, and can be described in terms of the frequency, duration, magnitude, timing, and rate of change of fluxes to and biological exchanges with downstream waters. These descriptors characterize the range over which streams and wetlands vary and shift along connectivity gradients and the probable effects of different types (hydrologic, chemical, biological) and degrees of connectivity over time. . . . Ultimately, differences in the frequency, duration, magnitude, timing, and rate of change of physical, chemical, and biological connections describe different positions along the connectivity gradient and produce different types of downstream effects.'').

for the reasons discussed in the preamble to the 2019 Rule as well as the rest of this section and Section III of this notice. The 2015 Rule did not implement the legal limits on the scope of the agencies' authority under the CWA as intended by Congress and as reflected in Supreme Court cases, including Justice Kennedy's articulation of the significant nexus test in *Rapanos.* In the 2019 Rule, the agencies concluded that in promulgating the 2015 Rule the agencies failed to adequately consider and accord due weight to the policy of the Congress in CWA section 101(b) to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution'' and ''to plan the development and use . . . of land and water resources.'' 33 U.S.C. 1251(b). The 2015 Rule interpreted the CWA in a manner that pushed the envelope of the agencies' constitutional and statutory authority in the absence of a clear statement from Congress authorizing substantial encroachment upon traditional State land-use planning authority. *See Georgia* v. *Wheeler,* No. 2:15–cv–079, 2019 WL 3949922, at *23 (S.D. Ga. Aug. 21, 2019) (finding the 2015 Rule ''unlawful'' given its ''significant intrusion on traditional state authority'' without ''any clear or manifest statement to authorize intrusion into that traditional state power'').

In addition, the agencies recognize that the 2015 Rule has been remanded by the U.S. District Court for the Southern District of Texas for failing to comply with the APA. That court found that the 2015 Rule suffered from several problems, including that the distance-based limitations in the 2015 Rule were not a logical outgrowth of the proposal in violation of the APA's public notice and comment requirements. *See Texas* v. *EPA,* 389 F. Supp. 3d 497 (S.D. Tex. 2019). The court found this error ''significant'' because the specific distance-based limitations ''alter[ed] the jurisdictional scope of the Act.'' *Id.* at 504. Litigants challenging the 2015 Rule alleged other APA deficiencies, including the lack of record support for the distance-based limitations inserted into the final rule without adequate notice. Several commenters on the proposed repeal of the 2015 Rule raised similar concerns, arguing that the 2015 Rule was arbitrary and capricious because of the lack of record support for those limitations. The agencies recognize that the Federal government, in prior briefs before the various district courts that heard challenges to the 2015 Rule, defended the procedural steps the agencies took to develop and support the 2015 Rule. Having considered the public comments and relevant litigation positions, and the decision of the Southern District of Texas on related arguments, the agencies concluded in the 2019 rulemaking that the administrative record for the 2015 Rule did not contain sufficient record support for the distance-based limitations that appeared for the first time in that final rule. This conclusion is further supported by similar findings of the U.S. District Court for the Southern District of Georgia, which remanded the 2015 Rule to the agencies in August 2019 after identifying substantive and procedural errors with respect to numerous provisions, including the rule's distance limitations. *Georgia* v. *Wheeler,* 2019 WL 3949922, at *12–32. By contrast, for the reasons discussed elsewhere in this section and in Section III of this notice, this final rule remains within the bounds of the agencies' authority under the Constitution and the CWA, is properly supported by the record in this rulemaking, and is a logical outgrowth of the NPRM.

Finally, the agencies believe that this final rule will be clearer than the pre-existing regulatory regime restored by the regulatory text of the 2019 Rule and the prior implementation of that regime in response to adverse Supreme Court decisions and agency guidance. For the reasons discussed in the 2019 Rule preamble, that regulatory regime is preferable to the 2015 Rule; however, a clear, comprehensive regulation that encompasses the Supreme Court's interpretations is preferable to the pre-existing regulatory regime restored by the 2019 Rule. The language of the 2019 Rule regulatory text leaves substantially more room for discretion and case-by-case variation than does this final rule, particularly paragraph (a)(3) in the 2019 Rule, which claims jurisdiction over waters that are used by interstate or foreign travelers for recreational or other purposes, with no reference to navigable waters. Following the Supreme Court's opinions on the definition of ''waters of the United States,'' particularly *SWANCC* and *Rapanos,* the 2019 Rule must be implemented taking into account the Court's holdings and agency guidance interpreting those cases. In the decade since the *Rapanos* decision, the agencies and the public have become familiar with this multi-layered interpretive approach, which is in part why the agencies finalized the 2019 Rule to maintain the pre-existing regime during the process of developing and considering public comments on this final rule. The regulatory definition of ''waters of the United States'' set forth in this final rule reflects Supreme Court case law and clearly establishes the scope of jurisdictional waters under the CWA. It provides greater regulatory predictability than the regulatory regime restored by the 2019 Rule.

In sum, as compared with both the 2015 Rule and the regulatory regime restored by the 2019 Rule, this final rule more appropriately reflects the scope of the agencies' authority under the statute and the Constitution; respects the vital role of the States and Tribes in managing their land and water resources; and addresses the need of the public for predictable, more easily implementable regulations that aim to accomplish the objective of the Act, ''to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'' 33 U.S.C. 1251(a).

G. Existing Guidance

In several places in the preamble to the proposed rule, the agencies solicited comment on whether they should revoke the 2003 *SWANCC* Guidance or the 2008 *Rapanos* Guidance if the agencies were to finalize the proposal. 84 FR 4165, 4167. These guidance documents were drafted to inform the agencies' implementation of the 1986 and 1988 regulations, which the 2019 Rule recodified, in a manner consistent with the Supreme Court's decisions in *SWANCC* and *Rapanos.* Some commenters thought that the 2003 and 2008 guidance documents provided helpful information and assistance to the public in understanding how the agencies might implement a definition of ''waters of the United States.'' Other commenters thought that the documents should be rescinded to avoid confusion during implementation of this final rule, particularly because the agencies have totally restructured the regulatory definitions. The agencies considered these comments and conclude that, when this final rule becomes effective, these and other related agency guidance documents, memoranda, and materials will be rendered inoperative because they will no longer be necessary or material, and they may in fact create confusion as the agencies implement this final rule. The agencies can develop new guidance to facilitate implementation of this final rule should questions arise, if any, regarding the application of the rule to specific circumstances.[34]

[34] To the extent that, as a result of litigation, the 1986 and 1988 regulations, which the 2019 Rule recodified, remain or become legally effective after

III. Definition of ''Waters of the United States''

The following is a summary of the key elements and each substantive provision of this final rule. Each subsection describes what the agencies are finalizing, why the agencies are finalizing the regulatory text, and how the agencies plan to implement the final rule. To assist the reader, the longer subsections have internal headings.

In this final rule the agencies interpret the term ''the waters'' in the phrase ''the waters of the United States'' to encompass relatively permanent flowing and standing waterbodies that are traditional navigable waters in their own right or that have a specific surface water connection to traditional navigable waters, as well as wetlands that abut or are otherwise inseparably bound up with such relatively permanent waters. As the plurality decision in *Rapanos* notes, the term ''the waters'' is most commonly understood to refer to ''streams and bodies forming geographical features such as oceans, rivers, lakes,'' or ''the flowing or moving masses, as of waves or floods, making up such streams or bodies.'' 547 U.S. at 732 (citing *Webster's New International Dictionary* 2882 (2d ed. 1954)); *see also Riverside Bayview,* 474 U.S. at 131 (characterizing ''waters of the United States'' as including ''rivers, streams, and other hydrographic features more conventionally identifiable as 'waters' ''); *see also* 118 Cong. Rec. 33699 (Oct. 4, 1972) (statement of Sen. Muskie) (referring to ''navigable waters'' as ''water bodies''). According to the *Rapanos* plurality, however, the ordinary meaning of the term ''waters'' does not include areas that are dry most of the year, and which may occasionally contain ''transitory puddles or ephemeral flows of water.'' 547 U.S. at 733.

The agencies received considerable public comments on the scope of the proposed definition of ''waters of the United States.'' Some commenters stated that the proposed rule would include more waters and wetlands than appropriate under a strict reading of Justice Scalia's plurality opinion in *Rapanos* and is therefore inconsistent with Executive Order 13778. Some commenters agreed with the proposed rule, stating that it struck an appropriate balance of asserting jurisdiction over waters that should be regulated by the Federal government, provided clear direction for the regulated community, and respected State and tribal authority over their own land and water resources. Some commenters stated that the proposal failed to include ecologically important waters and wetlands and failed to give due weight to Justice Kennedy's concurring opinion in *Rapanos.* Other commenters stated that the proposed rule and supporting rationale were based exclusively on the CWA section 101(b) policy to ensure that States maintain primary authority over land and water resources and failed to give due weight to the objective in CWA section 101(a) to restore and maintain the chemical, physical, and biological integrity of the nation's waters.

The agencies disagree with commenters' suggestion that the Executive Order requires the agencies to rely exclusively on Justice Scalia's opinion in *Rapanos.* The Executive Order requires the agencies to consider that opinion, which is what the agencies have done here. The agencies also disagree with commenters' suggestion that the proposal failed to incorporate principles from Justice Kennedy's opinion, and further disagree with commenters' suggestion that the agencies failed to consider the objective of section 101(a) in determining where to draw the line of federal jurisdiction. However, the agencies considered these and other public comments, and have made modifications in the final rule to better incorporate common principles of the *Rapanos* plurality and concurring opinions, and to strike a careful balance between the clear directive from Congress to ensure that States maintain primary authority over land and water resources, and the importance of maintaining federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers.

The final definition of ''waters of the United States'' aligns with the intent of Congress to interpret the term ''navigable waters'' beyond just commercially navigable-in-fact waters. This definition recognizes Congress' intent ''to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term,'' *Riverside Bayview,* 474 U.S. at 133, but at the same time acknowledges that ''[t]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited.'' *SWANCC,* 531 U.S. at 173. The definition also recognizes the constitutional underpinning of the CWA, which was Congress' exercise of ''its commerce power over navigation.'' *Id.* at 168 n.3.

This final rule establishes categorical bright lines to improve clarity and predictability for regulators and the regulated community by defining ''waters of the United States'' to include the following four categories: (1) The territorial seas and traditional navigable waters; (2) tributaries of such waters; (3) certain lakes, ponds, and impoundments of jurisdictional waters; and (4) wetlands adjacent to other jurisdictional waters (other than waters that are themselves wetlands). The final rule eliminates the case-specific application of the agencies' previous interpretation of Justice Kennedy's significant nexus test in the *Rapanos* Guidance, and instead establishes clear categories of jurisdictional waters that adhere to the basic principles articulated in the *Riverside Bayview, SWANCC,* and *Rapanos* decisions while respecting the overall structure and function of the CWA.

A. Key Terms and Concepts

Each of the four categories of waters of the United States established by this final rule, as well as the waters that fall beyond CWA jurisdiction, is discussed in detail in Sections III.B through III.H below. Many of the operative terms used in the final rule are defined in paragraph (c), and their applicability is discussed at length throughout those subsections. This subsection summarizes a few key terms and concepts that help inform the overall implementation of the jurisdictional categories established by paragraph (a) and the non-jurisdictional waters established by paragraph (b), and are highlighted here for ease of reference and additional clarity.

One such term is ''typical year.'' As discussed above, the meaning of the phrase ''waters of the United States'' has been mired in confusion for decades. This is in part because courts, regulators, the regulated community, and members of the public have lacked clear guidance as to how far up the watershed federal jurisdiction extends, and what connection is required for waters to be considered part of the regulated tributary system to traditional navigable waters and the territorial seas. The last two Supreme Court cases on point—*SWANCC* and *Rapanos*—provided clear instruction to the agencies that their prior interpretations had exceeded their jurisdictional authority under the CWA. The phrase ''typical year'' as used in the final rule and throughout this notice is intended to provide a predictable framework in

the effective date of this rule as a result of litigation, the agencies intend to use the guidance documents relevant to those regulations, including the 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance, if necessary to inform implementation of those regulations.

which to establish federal jurisdiction over relatively permanent waters that contribute surface water flow to waters identified in paragraph (a)(1) (generally referred to as ''paragraph (a)(1) waters'' or ''a paragraph (a)(1) water'' in this notice), and wetlands adjacent to such waters. The term ''typical year'' is summarized in Section III.A.1 and is further discussed throughout the notice.

The agencies are also defining the terms ''perennial,'' ''intermittent,'' and ''ephemeral'' in the final rule, adding clarity and certainty for how these frequently used terms apply in the ''waters of the United States'' context. The agencies have used these terms to assess jurisdictional status under the CWA, but until this final rule have never defined them in the regulatory text. The terms have specific meaning in the scientific community, but when used in legal settings, common parlance often converges with scientific meaning, creating opportunities for misunderstanding. For example, while the *Rapanos* plurality stated that the term ''waters of the United States'' does not include ''ordinarily dry channels through which water occasionally or *intermittently* flows,'' 547 U.S. at 733 (emphasis added), it also stated the phrase does ''not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.''). *Id.* at 732 n.5 (emphasis in original). ''Seasonal rivers''—which the plurality would not categorically exclude—are known among scientists as ''intermittent streams''—which the plurality stated it would exclude. The plurality also appears to confuse the scientific understanding of the terms '' 'intermittent' and 'ephemeral' streams,'' conflating them to mean ''streams whose flow is . . . 'existing only, or no longer than, a day[.]' '' *Id.* Indeed, this description more accurately captures the hydrological definition of ''ephemeral streams'' which only flow during or in immediate response to rainfall. By contrast, ''intermittent streams'' typically flow for a more continuous period like the ''seasonal rivers'' the plurality describes. Because the definition of ''tributary'' specifically uses and relies on the terms ''perennial'' and ''intermittent,'' but not ''ephemeral,'' the agencies are clearly defining these terms in the final rule. These terms are summarized below in Section III.A.2 and are further discussed throughout the preamble.

Another challenging issue that has confounded the meaning of ''waters of the United States'' for years is what types of natural or artificial features potentially sever jurisdiction between the upstream and downstream portions of a waterway. For example, if the waters of a perennial headwater stream are diverted to another basin for consumptive use and the downstream reach runs dry for major portions of a year, or the flow of a stream disappears into the desert floor before reaching a traditional navigable water, questions are frequently raised regarding the jurisdictional status of those waters. Subsection III.A.3 below discusses the ''breaks'' topic in detail and how the agencies have addressed the various artificial and natural features that either maintain or sever jurisdiction under the final rule.

1. Typical Year

In this final rule, the agencies use the term ''typical year'' to help establish the surface water connection between a relatively permanent body of water and traditional navigable waters, and between certain wetlands and other jurisdictional waters, that is sufficient to warrant federal jurisdiction. ''Typical year'' is defined in the final rule to mean when precipitation and other climatic variables are within the normal periodic range (*e.g.,* seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period. Under this final definition, a typical year would generally not include times of drought or extreme flooding. In other words, the purpose of the term is to ensure that flow characteristics are not assessed under conditions that are too wet or are too dry. As discussed in Section III.G.2, climatic conditions, including flow or flooding, that may occur under ''typical year'' conditions do not necessarily occur in every calendar year.

The agencies proposed to use the term ''typical year'' to mean within the normal range of precipitation over a rolling thirty-year period for a particular geographic area; that is, during times when it is not too wet and not too dry. However, some commenters on the proposed rule expressed confusion about the proposed ''typical year'' definition, including how it is calculated and what timeframe it represents. Commenters also expressed concern that the proposed definition included only precipitation as a driver of streamflow classification. Other commenters supported the typical year concept as proposed. In response to these comments, the agencies have modified the definition of ''typical year'' to expressly include other climatic variables in addition to precipitation and additional description of the normal periodic range, signaling that such range need not be based on a calendar year. The agencies believe the revised definition more appropriately reflects what the agencies intended to measure, which is, simply put, the characteristics of a waterbody at times that are not too wet and not too dry.

To determine whether water features are being assessed during normal precipitation conditions, the agencies currently use data from the National Oceanic and Atmospheric Administration's (NOAA) Global Historic Climatology Network, which integrates climate data from over 20 sources. The agencies evaluate normal precipitation conditions based on the three 30-day periods preceding the observation date. For each period, a weighted condition value is assigned by determining whether the 30-day precipitation total falls within, above, or below the 70th and 30th percentiles for totals from the same date range over the preceding 30 years. The agencies make a determination of ''normal,'' ''wetter than normal,'' or ''drier than normal'' based on the condition value sum. While the agencies will generally use this method to implement this final rule, the agencies also recognize there may be other accurate and reliable measurements of normal precipitation conditions and will make adjustments to the approach as is scientifically warranted. The agencies may also consider alternative methods that are developed and appropriately validated, including different statistical percentiles, evaluation periods, or weighting approaches for condition values.

Some commenters on the proposed rule were concerned that a 30-year period may be too long or too short of a record, or that rolling 30-year climate percentiles would be difficult to calculate. The agencies have concluded that a rolling 30-year period would account for variability to provide a reliable indicator of the climate in a given geographic area without being confounded by a year or two of unusual climate data. A standard timeframe is necessary to ensure consistent application across the country, and 30 years is the most common and recognized timeframe utilized in other government climatic data programs (*e.g.,* NOAA's National Climatic Data Center climate normals, which are based on World Meteorological Organization requirements). Nearly a century ago, the International Meteorological Organization, now known as the World Metrological Organization, instructed member nations to calculate climate normals using 30-year periods, beginning with 1901 to 1930 (*see https://www.ncdc.noaa.gov/news/*

defining-climate-normals-new-ways). Recognizing that precipitation and temperature change over time, the agencies have determined that a rolling 30-year record is necessary to ensure that changing conditions are captured by the calculation. The agencies have considered other alternative time periods and are maintaining the well-established 30-year period.

The agencies proposed that the geographic area be on a watershed-scale basis to ensure specific climatic data are representative of the landscape in relation to the feature under consideration for meeting the ''tributary'' definition and sought comment on the appropriate watershed scale. Some commenters on the proposed rule suggested constraining precipitation data sources to the smallest practicable watershed scale (*e.g.,* a USGS HUC–12 scale). However, other commenters noted that 30 years of data may not always be available at that scale, and other considerations such as distance or ecoregion are also important for identifying appropriate climatic data. In response to these comments, the agencies have determined that specifying a particular watershed size or Hydrologic Unit Code (HUC) could preclude the use of the best available data sources, but that watershed boundaries should be a consideration when selecting climate records. Other considerations should include data availability, topography, and distance of climatic data collection in relation to the aquatic resource location.

The agencies recognize that precipitation data may not be the only appropriate indicator for determining ''typical year,'' as was noted by many commenters on the proposed rule. Although the agencies will generally use the methodology described in this notice for determining normal precipitation conditions, the agencies will consider and use the best available data and information, which provides the most accurate and reliable representative information for the aquatic resource in question, to determine ''typical year.'' For instance, determinations of ''typical year'' based on precipitation totals may conflict with other sources of information such as drought indices, which account for other hydrologic factors like evapotranspiration and water storage. The agencies currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources. These data sources include, but are not limited to, the Web-based Water-Budget Interactive Modeling Program (WebWIMP) for approximate dates of wet and dry seasons for any terrestrial location based on average monthly precipitation and estimated evapotranspiration (*http://climate.geog.udel.edu/~wimp/*); Climate Analysis for Wetlands Tables (known as WETS tables, or similar tools, as the WETS tables are currently in a fixed 30-year timeframe), which are provided by the NRCS National Water and Climate Center (*https://www.wcc.nrcs.usda.gov/climate/wets_doc.html*) and were calculated from long-term (30-year) weather records gathered at National Weather Service meteorological stations; and drought indices, such as the Palmer Drought Severity Index (PDSI) (Sprecher and Warne 2000), where time-series plots of PDSI values by month or year are available from the National Climatic Data Center (*https://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/psi/201811-201910* or *https://www.cpc.ncep.noaa.gov/products/monitoring_and_data/drought.shtml*).

2. Perennial, Intermittent, and Ephemeral

Though ''perennial,'' ''intermittent,'' and ''ephemeral'' are commonly used scientific terms, the agencies are including definitions of these terms in the final rule to ensure that the regulation is clear. In this final rule, the agencies define the term ''perennial'' to mean surface water flowing continuously year-round. The term ''intermittent'' in the final rule means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts). The phrase ''certain times of the year'' is intended to include extended periods of predictable, continuous surface flow occurring in the same geographic feature year after year. Continuous surface water flow during certain times of the year may occur seasonally such as in the spring when evapotranspiration is low and the groundwater table is elevated. Under these conditions, the groundwater table intersects the channel bed and groundwater provides continuous baseflow for weeks or months at a time even when it is not raining or has not very recently rained. Melting snowpack can be the sole or primary source of perennial or intermittent flow in a tributary. The term ''snowpack'' is defined as ''layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.,* in northern climes or mountainous regions).'' Perennial or intermittent flow in certain mountain streams, for example, may result primarily from melting snowpack, not from groundwater contributions to the channel. The term ''ephemeral'' in the final rule means surface water flowing or pooling only in direct response to precipitation, such as rain or snow fall. With these definitions, the agencies distinguish *ephemeral* flow resulting from a snow fall event from sustained *intermittent* flow resulting from melting snowpack that is continuous, such as for weeks or months at a time.

Some commenters requested that the final rule require that groundwater must be the source for perennial and intermittent flow in tributaries. The agencies recognize that groundwater input is an element of most scientific definitions of perennial and intermittent flow,[35] but have decided not to mandate groundwater input as part of the definition of ''perennial'' or ''intermittent'' in the final rule. As a threshold matter, the agencies believe that such an approach would too narrowly limit CWA jurisdiction over waters that provide continuous or intermittent and predictable flow to traditional navigable waters in a typical year. For example, many headwater streams in mountainous regions flow through channels incised in bedrock with no groundwater interface with the bed of the stream. These streams instead are fed by glacial or high elevation snowpack melt. The same scenario may also exist in northern climes, where spring flows could be fed almost exclusively through melting snowpack absent elevated groundwater tables. Mandating a groundwater interface and contribution of flow could also be challenging to implement, as identifying whether the channel bed intersects the groundwater table may be difficult to accomplish in the field, gathering the relevant data could be time consuming, and implementing a source water-based definition could require new tools and training of field staff and the regulated public. The requirement for a groundwater flow source could also render effluent-dependent streams non-jurisdictional. The agencies do not interpret the text or legislative history of the CWA or Supreme Court guidance to mandate groundwater input as a condition precedent for asserting jurisdiction over tributaries to traditional navigable waters.

A few commenters asked for clarification to better distinguish

[35] *See, e.g.,* 82 FR 2006 (Jan. 6, 2017) (Corps nationwide permit program); National Research Council. 2002. Riparian Areas: Functions and Strategies for Management. Washington, DC: The National Academies Press. *https://doi.org/10.17226/10327.*

between flow ''in direct response to precipitation'' versus ''more than in direct response to precipitation,'' as well as further clarification on the distinction between ephemeral and intermittent flow classifications in general. For example, they requested clarification on whether streams that flow continuously during a rainy season (*e.g.,* monsoon-driven streams in the arid West) are considered intermittent. The use of the term ''direct'' by the agencies in the proposed rule and maintained in this final rule is intended to distinguish between flow solely caused by individual precipitation events (including multiple, individual back-to-back storms), and continuous flow resulting, for example, from weeks- or months-long accumulation of precipitation in the form of snowpack that melts slowly over time or an elevated groundwater table that provides baseflow to the channel bed.

Ephemeral flow may occur simply because it is raining or has very recently rained or it has recently snowed and the snow has melted. For example, ephemeral flow could be the result of a small, brief storm event, one long storm event producing rainfall for several days without pause, or several back-to-back storms. Continuous flow occurring more than in direct response to precipitation could include ''seasonal'' flow, such as when snowpack melts or when groundwater is elevated and provides baseflow to the channel bed. Streamflow that occurs during the monsoon season in certain parts of the country (typically June through September in the arid West) may be ephemeral or intermittent, with the distinction made according to the definition of each term in the final rule. For example, a stream in the arid West is ephemeral if it flows only in direct response to rainfall, even if the flow may appear relatively continuous as a result of multiple, individual storms during the monsoon season. On the other hand, when monsoon floodwaters locally recharge the riparian aquifer through bank infiltration and supply sustained baseflow to streams in the arid West when it is not raining or has not recently rained, such streams meet the rule's definition of ''intermittent'' if they flow seasonally, for example, or ''perennial'' if they flow continuously year-round.[36]

Some commenters requested clarity on the specific geographic regions where ''snowpack'' as defined under the proposed rule would occur. Other commenters requested that the agencies clarify how melting snowpack is distinguished from melting snowfall and clearly articulate the amount of snow needed to meet the definition of ''snowpack,'' as well as provide clarity on what ''extended periods'' of time means. They also requested clarification on the sources of information (*e.g.,* from NOAA, NRCS, or another source) that can be used to identify ''snowpack.'' ''Extended periods of time'' refers to more than merely a single snowfall event or periodic events with repeated snowmelts after each occurrence, but rather recurring snow events which result in an accumulation of multiple layers of snow in certain geographic regions, which may include, for example, parts of North Dakota or Alaska, or at high elevation, to potentially include the Rocky, Sierra Nevada, or Cascade mountains. A foot of new snow fall on the high plains of southern Wyoming in May will typically melt quickly under the intense sun of subsequent days, while a foot of snow in northern Wisconsin in January will likely contribute to seasonal snowpack that may not melt until spring thaw. The first scenario is more likely to cause ephemeral flow, the second is more likely to cause intermittent flow. The agencies could consider any data sources that provide an accurate estimation of ''snowpack'' in identifying that feature. The agencies are not limiting the identification of snowpack to one data source, such as those provided by NOAA or NRCS, although those are reliable existing sources to find information on snowpack. The Bureau of Reclamation and several western States depend on accurate snow fall and accumulation data to project water availability for consumptive needs and the allocation of water rights. Analyzing the location and seasonality of snowpack is a common, well understood practice in other contexts and will not pose implementation challenges to the agencies under the final rule as they draw on the expertise of other Federal and State partners.

In certain parts of the country and during certain times of the year, snowpack may have a more significant influence on flow classifications than rainfall. Sources of information on ''snowpack'' can be found in the NOAA national snow analyses maps (*https://www.nohrsc.noaa.gov/nsa/*), in NRCS sources (*https://www.wcc.nrcs.usda.gov/snow/*), or by using hydrographs of subject locations as a potential guide to alert the regulated public and regulators as to which regions of the country have to consider snowpack scenarios. In these regions, for example, a hydrograph could indicate a large increase in discharge volume due to the late spring/early summer thaws of melting snowpack. These are indicators of a regular, predictable, seasonal occurrence of flow. The large water contribution source for those northern geographic regions which do not have significant elevation changes, but which do have a consistent, predictable snowfall that accumulates on the ground for extended periods of time, are covered in this rule's definition of ''snowpack'' in paragraph (c)(10), in addition to mountainous regions with snowpack.

3. Breaks

Under the proposed rule, an artificial or natural ephemeral feature (*e.g.,* an ordinarily dry channel only flowing during or in immediate response to precipitation) occurring in a typical year at any point along a tributary network would have severed jurisdiction upstream of the ''break'' because the waterbody would not convey surface water to a paragraph (a)(1) water year-round or continuously for extended periods of time. 84 FR 4173–74. To be jurisdictional, lakes and ponds that are not paragraph (a)(1) waters would have needed to maintain perennial or intermittent flow to a paragraph (a)(1) water in a typical year or be flooded by a jurisdictional water in a typical year. *Id.* at 4182. In other words, to be jurisdictional, the proposed rule would have required tributaries and most lakes and ponds to maintain a perennial or intermittent surface water connection all the way to a downstream paragraph (a)(1) water. The agencies received public comments indicating that this approach could affect the jurisdictional status of many waters, particularly in the arid West; that it could inadvertently subject otherwise exempt water transfers to CWA section 402 permitting; and it could create

[36] *See e.g.,* Baillie, M.N., J.F. Hogan, B. Ekwurzel, A.K. Wahi, and C.J. Eastoe. 2007. Quantifying water sources to a semiarid riparian ecosystem, San Pedro River, Arizona, *J. Geophysical Res.,* 112, GO3S02, doi: 10.1029/2006JG000263. Ballie et al. (2007) found that locally recharged monsoon floodwater is one of the dominant water sources in the main stem of the spatially intermittent San Pedro River in Arizona. The authors also define ''monsoon storms'' as ''short, intense rainstorms that generate significant amounts of flooding and *ephemeral flow* (*i.e.,* flow in ephemeral channels on the basin floor) and represent, on average, the bulk of summer moisture.'' (Emphasis added). *See also* Connectivity Report at B–39 (''Monsoon-generated, short-duration runoff dominates the San Pedro watershed. . . Most perennial and intermittent rivers in the Southwest are groundwater dependent, flowing primarily in a baseflow regime and supported by discharge from a connected regional or alluvial aquifer or both. . . . [P]art of the baseflow is often sustained or augmented by slow drainage of a shallow alluvial aquifer from past flooding.'')

implementation challenges. The agencies received other comments supporting the proposed approach.

As further discussed below, the final rule contains some important changes to address these concerns, which are intended to better incorporate common principles from the *Rapanos* plurality and concurring opinions, and to strike a better balance between the objective and policy in CWA sections 101(a) and 101(b), respectively. Changes made in the final rule, however, remain faithful to the overall text, structure, and legislative history of the CWA and the legal principles outlined in Section II.E. Many of the changes were designed to address questions and concerns regarding under what circumstances a natural or artificial feature severed upstream jurisdiction, as discussed in detail in this subsection and as further explained throughout Section III.

The Supreme Court has not spoken directly to the question of whether a non-jurisdictional ephemeral break along or downstream of an otherwise jurisdictional tributary, lake, pond, or impoundment would sever jurisdiction of upstream waters. As described in Section II.E, Supreme Court precedent provides some insight regarding CWA jurisdiction of relatively permanent bodies of water, including tributaries, lakes, and ponds, and their connection to traditional navigable waters, but it does not provide comprehensive guidance. For example, the *Rapanos* plurality describes a ''water of the United States'' as ''a relatively permanent body of water *connected to* traditional interstate navigable waters[.]'' *Rapanos,* 547 U.S. at 742 (emphasis added). Regarding the connection between a water in question and downstream navigable waters, Justice Kennedy noted that ''in some instances, as exemplified by *Riverside Bayview,* the connection between a nonnavigable water . . . and a navigable water may be so close, or potentially so close, that the Corps may deem the water . . . a 'navigable water' under the Act. In other instances, as exemplified by *SWANCC,* there may be little or no connection.'' *Id.* at. 767. Justice Kennedy also stated that ''mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85.

Although the *Rapanos* plurality opinion did not specify what would constitute a sufficient connection between relatively permanent waters and downstream traditional navigable waters, it did signal types of connections that are likely insufficient to maintain jurisdiction when read in context with the principles articulated throughout the balance of the opinion. For instance, the plurality characterized an ''expansive definition of 'tributaries' '' as including ''dry arroyos connected to remote waters through the flow of groundwater over 'centuries,' '' *id.* at 725–26 (internal citations omitted), and described federal control over ''irrigation ditches and drains that intermittently connect to covered waters'' as ''sweeping assertions of jurisdiction.'' *Id.* at 726–27. In addition to ''tributaries,'' the plurality noted with disapproval that the Corps and lower courts had ''define[d] 'adjacent' wetlands broadly'' to include wetlands ''hydrologically connected'' ''to covered waters'' '' 'through directional sheet flow during storm events,' '' and wetlands ''connected to the navigable water by flooding, on average, once every 100 years[.]'' *Id.* at 728. The agencies considered these observations in developing the final rule but recognize that the Supreme Court has not spoken directly to every aspect of the agencies' existing regulations or every fact pattern that may raise questions of federal jurisdiction. The final rule therefore is also based on the text, structure, and legislative history of the CWA, the reasoned policy choices of the executive branch agencies authorized by Congress to implement the Act, and the agencies' technical and scientific expertise administering the CWA over nearly five decades.

The proposed rule, which would have severed jurisdiction upstream of any ephemeral feature, reflected a reasonable interpretation of the CWA and incorporated relevant Supreme Court guidance. However, upon further consideration, the agencies conclude that the proposed rule's treatment of ephemeral features would have severed jurisdiction for certain relatively permanent bodies of water that are regularly ''connected to'' traditional navigable waters via channelized surface water flow, allowing such waters to connect and become indistinguishable when flowing. Some ephemeral reaches between upstream and downstream relatively permanent (*i.e.,* perennial or intermittent) waters convey surface water from the upstream water to the downstream covered water during a typical year. These reaches allow upstream relatively permanent jurisdictional waters to have a surface water connection to downstream jurisdictional waters in a typical year when there is sufficient water in the system. In contrast, other ephemeral streams, including those at the very headwaters of a channel network, do not connect relatively permanent jurisdictional waters to downstream jurisdictional waters; rather, they are merely ''channels that periodically provide drainage for rainfall.'' *Rapanos,* 547 U.S at 739 (Scalia, J. plurality). The agencies conclude in this final rule that certain ephemeral features between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters do not sever jurisdiction upstream so long as such features satisfy the conditions described further below. Like the proposed treatment of ephemeral features, the final rule is based on an equally reasonable interpretation of the CWA and Supreme Court precedent, and appropriately balances the plurality and concurring opinions in *Rapanos* and the objective of the Act and the policy of Congress set forth in CWA sections 101(a) and 101(b).

In the final rule, certain ephemeral features do not sever jurisdiction of an upstream relatively permanent jurisdictional water so long as they provide a surface water connection to a downstream jurisdictional water in a typical year. Specifically, the final rule provides that a tributary does not lose its jurisdictional status if it contributes surface water flow in a typical year to a downstream jurisdictional water through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. *See* paragraph (c)(12). The final rule applies the same basic principles to the category of lakes, ponds, and impoundments of jurisdictional waters. *See* paragraph (c)(6). A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through artificial features such as culverts and spillways. The agencies conclude that such features do not necessarily sever jurisdiction of upstream waters. However, if an artificial feature does not allow for the contribution of surface water flow to a downstream jurisdictional water in a typical year, it severs jurisdiction upstream of the artificial feature. The final rule treats natural features such as debris piles and boulder fields the same way that it treats the artificial features described above.

The changes made in the final rule address concerns raised by commenters about features that would sever the jurisdiction of upstream portions of the

tributary network, including relatively permanent upstream waters that contribute surface water flow to downstream waters when enough water is in the system. It also addresses concerns raised by water management interests that suggested the proposed rule could have inadvertently undermined the NPDES permitting exemption authorized by the EPA's Water Transfers Rule, 73 FR 33697 (June 13, 2008). That rule does not require NDPES permits for water transfers between waters of the United States because they do not result in the ''addition'' of a pollutant. *Id.* at 33699. In many regions of the country, particularly the arid West, inter- and intra-basin water transfers may originate in perennial or intermittent waters that may be disconnected from downstream waters by ephemeral breaks. In many circumstances, those ephemeral breaks may be caused by water management systems, including through water transfers, water storage reservoirs, flood irrigation channels, and similar structures. Not all diversions will cause a downstream portion of an otherwise perennial or intermittent stream to become ephemeral in a typical year; however, the modifications made by the final rule to the categories of tributaries and of lakes, ponds, and impoundments of jurisdictional waters help address the concerns raised by commenters regarding the potential impact of the proposed rule on longstanding water management practices in this country. The agencies are cognizant of the importance of water management in the States and the explicit policy directives of Congress to recognize the authority of States to allocate and manage water resources within their respective jurisdictions. *See* 33 U.S.C. 1251(g), 1370.

Under the final rule, ephemeral features and other excluded artificial and natural features are not jurisdictional and do not become jurisdictional even if they episodically convey surface water from upstream relatively permanent jurisdictional waters to downstream jurisdictional waters in a typical year, and thereby help maintain the jurisdictional status of the upstream waters. This approach incorporates the plurality's requirement that jurisdictional waters be continuously present, fixed bodies of water and that dry channels, transitory puddles, and ephemeral flows be excluded from jurisdiction. 547 U.S. at 733–34; *see also id.* at 731 (''[T]he CWA authorizes federal jurisdiction only over 'waters.' 33 U. S. C. 1362(7).''). This approach also requires a regular and predictable surface water connection—one that occurs in a typical year—which addresses Justice Kennedy's concern that speculative and insubstantial connections may not be sufficient to establish jurisdiction. *Id.* at 784–86. The types of connections that maintain jurisdiction between relatively permanent bodies of water are described more fully below.

The agencies conclude that tributaries, lakes, ponds, and impoundments of jurisdictional waters that are relatively permanent flowing or standing waterbodies upstream of certain excluded features are jurisdictional so long as the non-jurisdictional feature maintains a channelized surface water connection to downstream jurisdictional waters in a typical year. Paragraph (b) of the final regulation identifies twelve categories of excluded features, but only those features that convey channelized surface flow between upstream relatively permanent waters and downstream jurisdictional waters in a typical year can maintain jurisdiction of the upstream waters. For example, non-jurisdictional ditches could be capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters in a typical year. Similarly, a surface water connection may occur through an ephemeral channelized conveyance and may result in the mixing of upstream and downstream relatively permanent waters following sufficient precipitation, but in all cases such a connection must occur in a typical year.

The final rule also provides that other types of artificial or natural features, such as dams or boulder fields, may maintain jurisdiction so long as they convey surface water flow from an upstream tributary, lake, pond or impoundment of a jurisdictional water to a downstream jurisdictional water in a typical year. The agencies have concluded that water flowing through features such as dams or boulder fields can sustain a regular and predictable surface connection between upstream and downstream waters and therefore can maintain jurisdiction between such waters.

By contrast, diffuse stormwater runoff and directional sheet flow by their very nature do not convey channelized surface flow and do not provide regular and predictable surface water connections between upstream relatively permanent bodies of water and downstream jurisdictional waters. Unchannelized surface flow, such as diffuse runoff or overland sheet flow, lacks an adequate physical indicator of regular surface flow and can be ubiquitous across the landscape, occurring over parking lots and lawns, for example. As Justice Kennedy notes in *Rapanos,* ''mere hydrologic connection should not suffice in all cases[,]'' 547 U.S. at 784, and the agencies agree with the *Rapanos* plurality that ''[t]he plain language of the statute simply does not authorize [a] 'Land is Waters' approach to federal jurisdiction.'' *Id.* at 734. The agencies ''must necessarily choose some point at which water ends and land begins[,]'' *Riverside Bayview,* 474 U.S. at 132, and conclude that diffuse runoff and overland sheet flow connections are ''too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Rapanos,* 547 U.S. at 784–85 (Kennedy, J. concurring in the judgment). In this final rule, the agencies therefore conclude that surface water flowing as unchannelized runoff or sheet flow over land cannot sustain a regular or predictable surface water connection between upstream and downstream waters and therefore cannot maintain jurisdiction between such waters. By contrast, channelized ephemeral features may indicate that surface water predictably moves from upstream relatively permanent waters to downstream jurisdictional waters, such that they may be capable of providing a surface water connection sufficient to warrant federal regulation over the upstream water. As noted above, a non-jurisdictional feature remains non-jurisdictional even if it provides a channelized surface water connection between jurisdictional waters in a typical year.

Like diffuse overland flow, the agencies also conclude that relatively permanent bodies of water that are connected to downstream jurisdictional waters only via groundwater are not jurisdictional and are more appropriately regulated by the States and Tribes under their sovereign authorities. The agencies have long interpreted the CWA as not authorizing jurisdiction over groundwater and have historically excluded groundwater from the definition of ''waters of the United States.'' The agencies are retaining that longstanding principle in this final rule. *See* paragraph (b)(2). If groundwater is not jurisdictional, it also makes practical sense that surface water features connected only via groundwater likewise are not jurisdictional. *See Rapanos,* 547 U.S. at 725–26 (Scalia, J., plurality) (identifying groundwater connections as an example of the expansive interpretation of

tributaries under the Act). The term ''navigable'' as used in the statute must be given some meaning, *see SWANCC,* 531 U.S. at 172, and regulating surface waters with no surface water connection to traditionally navigable waters stretches that meaning ''beyond parody.'' *Rapanos,* 547 U.S. at 734 (Scalia, J., plurality). There are, however, certain unique subsurface connections that could maintain jurisdiction as discussed below; the agencies recognize that there are some relatively permanent tributaries that are relocated below ground to allow reasonable development to occur.

In urban areas, for example, it can be common for surface waters to be buried underground through an artificial tunnel system to facilitate urban development. *See, e.g.,* Connectivity Report at 3–3. Examples include Jones Falls, which flows under Baltimore, Maryland, and daylights into the Baltimore's Inner Harbor; Park River which flows under Hartford, Connecticut, and daylights into the Connecticut River; and Mill Creek, a tributary of Lake Erie, which is diverted underground beneath downtown Erie, Pennsylvania, and daylights into Presque Isle Bay. These underground tunnels and similar channelized subsurface features do not become groundwater, even though they flow under the surface of the ground for a period of time. These features do not break the jurisdictional status of upstream tributaries subject to the conditions of paragraph (c)(12). In some cases where such channels never return to the surface or otherwise do not contribute surface water flow to a paragraph (a)(1) water in a typical year, the upstream surface water features may not be jurisdictional under the final rule. In all cases, the underground or buried portion of a channel network is not jurisdictional under the final rule. By comparison, tributaries that are relocated through a ditch or similar artificial surface channel are jurisdictional under the final rule so long as they continue to meet the flow conditions of paragraph (c)(12), including through the relocated portion.

In very limited circumstances, a tributary can naturally, temporarily flow underground as a channelized river or stream, maintaining the same or very nearly the same flow volume underground and at the downstream point where it returns to the surface. These natural systems are commonly referred to as subterranean rivers or streams and can occur as a result of unique geologic formations, such as sink holes and lava tubes. Examples include the Popo Agie River in Wyoming, which becomes subterranean and daylights about a quarter of a mile downstream; the Lost River in Indiana, which flows underground for eight miles from where it disappears, to where it rises at two places to flow aboveground again; and formations like the St. Marks and Santa Fe Rivers in Florida, which flow into large sinkholes and reappear a little over one-half mile and three miles downstream, respectively. The agencies do not consider subterranean rivers to be groundwater, even though they flow under the surface of the ground for what is generally a short period of time through subterranean natural channels. Although it has never been promulgated in regulatory text, the agencies have historically treated these subterranean flowing connections as not severing jurisdiction over the upstream surface channel, and the Corps has developed expertise in performing field verifications for these unique waters. The final rule does not change this longstanding practice and for the first time provides certainty and transparency regarding the agencies' approach for making jurisdictional determinations. The agencies have added the phrase ''subterranean river'' to paragraph (c)(12) to clarify that subterranean rivers, as compared to groundwater and other subsurface waters, may not break jurisdiction of upstream tributaries, including any jurisdictional lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow through these tributaries, depending on the factual circumstances. These subterranean rivers are distinguished in this final rule from other surface waters that, for example, may disappear underground and never daylight or daylight as an aquifer-fed spring or headwater of another river.[37] The final rule does not maintain jurisdiction upstream of these other surface waters that may disappear underground and become part of the aquifer because the aquifer holds groundwater. The agencies have concluded that groundwater connections are an insufficient basis to assert jurisdiction over otherwise disconnected waters. In all cases, the underground portions of all waters are not jurisdictional under the final rule.

The final rule also establishes that waters that do not contribute surface water to a downstream territorial sea or traditional navigable water in a typical year are not jurisdictional. These waters include completely losing streams (*e.g.,* streams that experience a complete loss of surface water to a groundwater system) that do not reach traditional navigable waters in a typical year and waters that connect downstream only as a result of precipitation events that generally do not occur in a typical year (*e.g.,* 10-, 25-, 50-, 100- or 500-year storms or floods). These waters do not provide a regular surface water connection to jurisdictional waters. Given that the term ''navigable'' must be given some effect, and that the Supreme Court has cautioned the agencies to avoid interpretations of the statute that raise significant constitutional questions, the agencies conclude that such waters are more properly regulated as land and water resources of the States and Tribes. *See SWANCC,* 531 U.S. at 173.

As described in detail in Section III.G, adjacent wetlands are subject to a different jurisdictional test than tributaries, lakes, ponds, and impoundments of jurisdictional waters. According to the *Rapanos* plurality, for example, to be ''waters of the United States,'' a tributary, lake, pond, or impoundment must be ''a relatively permanent body of water connected to traditional interstate navigable waters,'' 547 U.S. at 742 (Scalia, J., plurality); to be ''waters of the United States,'' a wetland must have ''a continuous surface connection'' to such relatively permanent waters, ''making it difficult to determine where the 'water' ends and the 'wetland begins.'' *Id.* The final rule defines ''adjacent wetlands'' to include all wetlands that abut—meaning to touch at least one point or side of—a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water. The final rule also includes other wetlands that are inseparably bound up with jurisdictional waters and relies on certain regular hydrologic surface connections to establish jurisdiction. For instance, the ''adjacent wetlands'' definition includes wetlands physically separated only by artificial structures such as dikes, or barriers, or divided by roads and similar structures so long as the structure allows for a direct hydrologic surface connection in a typical year: For example, through a culvert, flood or tide gate, pump, or similar feature. Jurisdiction of the wetland is severed when, in a typical year, an artificial feature does not allow for a direct hydrologic surface connection between the wetland and the jurisdictional water, or the wetland is not inundated by flooding from a territorial sea, traditional navigable

[37] *See* Connectivity Report at A–1, defining ''aquifer'' as ''[a] geologic formation (*e.g.,* soil, rock, alluvium) with permeable materials partially or fully saturated with *ground water* that yields ground water to a well, spring, or stream.'' (emphasis added).

water, tributary, lake, pond, or impoundment of a jurisdictional water. *See* 547 U.S. at 742 (Scalia, J., plurality) (such wetlands ''do not implicate the boundary-drawing problem of *Riverside Bayview,*'' and thus do not have the ''necessary connection'' to jurisdictional waters that triggers CWA jurisdiction); *see also id.* at 747 (the plurality found ''no support for the inclusion of physically unconnected wetlands as covered 'waters' '').

Wetlands are jurisdictional if they are inundated by flooding from a territorial sea, traditional navigable water, tributary, lake, pond, or impoundment of a jurisdictional water in a typical year. The agencies conclude that these wetlands are inseparably bound up with their adjacent jurisdictional waters and are therefore jurisdictional. *See Rapanos,* 547 U.S. at 732 (Scalia, J., plurality) (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954)) (recognizing floods as ''making up such streams or bodies'' of water); *id.* at 740 (recognizing the principle that wetlands that adjoin other jurisdictional waters are part of those waters for purposes of CWA jurisdiction). The final rule likewise asserts jurisdiction over lakes, ponds, and impoundments of jurisdictional waters that are inundated in a typical year by flooding from a territorial sea, traditional navigable water, tributary, or another lake, pond, or impoundment of a jurisdictional water.

The final rule also provides that wetlands separated from jurisdictional waters only by a natural berm, bank, dune, or other similar natural feature are adjacent wetlands. These natural features are indicators of a sufficient hydrologic surface connection between the jurisdictional water and the wetland, and the agencies conclude that wetlands that are separated from jurisdictional waters only by such features are inseparably bound up with the adjacent jurisdictional waters and are therefore ''part of those waters.'' *Id.*

Physically remote isolated wetlands (*i.e.,* wetlands that do not abut, are separated by more than a natural berm from, are not inundated by flooding in a typical year from, and do not have a direct hydrologic surface connection in a typical year to a jurisdictional non-wetland water) are not adjacent wetlands under the final rule. For example, impoundments that are formerly adjacent wetlands that are physically disconnected from other jurisdictional waters in a typical year are not jurisdictional under the final rule. Additionally, in keeping with the agencies' longstanding practice, the final rule maintains that wetlands can be jurisdictional only if they are adjacent to the territorial seas or a traditional navigable water, tributary, lake, pond or impoundment of a jurisdictional water. In 1986, the Corps defined ''waters of the United States'' as including ''wetlands adjacent to [other jurisdictional] waters (other than waters that are themselves adjacent),'' 51 FR 41250, meaning that wetlands obtain jurisdictional status under the CWA by virtue of their adjacency to traditional navigable waters, tributaries, and other actual waters, not by adjacency to other wetlands.[38] In 2019, the agencies recodified this definition of ''waters of the United States.'' 84 FR 56626. Under this final rule, wetlands cannot be adjacent to other wetlands; they can only be adjacent to the territorial seas, a traditional navigable water, a tributary, or a lake, pond, or impoundment of a jurisdictional water. This holds true regardless of any hydrologic connection between a distinct wetland (*i.e.,* a wetland delineated with boundaries distinct from those of an adjacent wetland) and an adjacent wetland when the distinct wetland is physically separated from the adjacent wetland by upland or other artificial or natural features. Because the agencies believe that the final rule's definition of ''adjacent wetlands'' is clear on the jurisdictional linchpin for adjacency (by tethering jurisdiction to paragraph (a)(1) through (3) waters), the agencies are not including the ''other than waters that are themselves adjacent'' provision from the 2019 Rule (and earlier versions) in this final rule.

B. Territorial Seas and Traditional Navigable Waters

1. What are the agencies finalizing?

The agencies are making no substantive textual changes to the longstanding inclusion of traditional navigable waters and the territorial seas in the definition of ''waters of the United States.'' The agencies are finalizing this portion of the rule as proposed, with slight modifications discussed below. The final rule maintains these categories of ''waters of the United States'' but consolidates them into a single paragraph in the regulatory text.

Many commenters supported the retention of the agencies' longstanding foundational category of CWA jurisdiction, unchanged from previous regulatory text. They stated that the category was well understood, and its application guided by a developed body of case law. Most commenters supported integrating territorial seas into a single category with traditional navigable waters, agreeing with the agencies that it helped streamline the regulatory text, but some requested clarifications to maintain the distinction between the two types of waters. Some commenters requested that the agencies modify the test for traditional navigable waters by clarifying that such waters must be used to ''transport commerce'' rather than simply being ''used'' for or susceptible to ''use'' in interstate or foreign commerce, reflecting the terminology used by Congress in section 404(g) of the CWA. Responding to the agencies' request for comment on Appendix D, several commenters requested that the agencies eliminate or modify Appendix D to the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook (hereinafter, ''Appendix D''),[39] stating that Appendix D is confusing, overstates the agencies' authority under existing case law, and allows the agencies to regulate virtually any isolated water by misapplying the established judicial tests for navigability under the CWA. Other commenters suggested the agencies retain Appendix D as useful field guidance and to avoid

[38] The agencies note that at oral argument in *Rapanos,* Chief Justice Roberts recognized this principle, stating that the 1986 definition ''covers wetlands adjacent to waters other than waters that are themselves wetlands,'' and ''the Corps says we're not going to reach the wetland that is adjacent to another wetland.'' Transcript of Oral Argument at 45, 47, *Rapanos* v. *United States and Carabell* v. *United States,* 547 U.S. 715 (2006) (Nos. 04–1034, 04–1384). The Chief Justice added that this ''suggests that even the Corps recognized that at some point you've got to say stop because logically any drop of water anywhere is going to have some sort of connection through drainage. And they're stopping there, and I wonder if we ought to take that same instinct that you see in [the wetlands definition] and apply it to your definition of tributary and say, at some point, the definition of tributary has to have an end. Otherwise, you're going to go and reach too far, beyond what Congress reasonably intended.'' *Id.* at 46.

[39] U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook, *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2316.* The agencies note that Appendix D is sometimes referred to as ''Appendix D to the *Rapanos* Guidance'' and was inadvertently referred to as such in the preamble to the proposed rule. The appendix actually resides as an attachment to the Jurisdictional Determination Form Instructional Guidebook that was published in 2007 concurrently with the 2007 *Rapanos* Guidance. The *Rapanos* Guidance was later undated in 2008, but Appendix D has remained unchanged since 2007. Appendix D notes (at page 1) that ''EPA and the Corps are providing this guidance on determining whether a water is a 'traditional navigable water' for purposes of the *Rapanos* Guidance, the Clean Water Act (CWA), and the agencies' CWA implementing regulations.'' This sentence is what is often used to link the *Rapanos* Guidance to Appendix D, as the two were intended to operate in tandem, with other agency resources, to assist in guiding field implementation of CWA jurisdictional determinations.

confusion associated with any changes in the agencies' approach to traditional navigable water determinations.

The agencies have considered all of the public comments received addressing these topics and are finalizing paragraph (a)(1) as proposed, with slight modifications to address questions regarding the inclusion of the territorial seas within a single category with traditional navigable waters. The agencies are not modifying the definition of ''traditional navigable waters'' as it has existed in regulatory text for decades. As discussed in Section II.G, when this final rule becomes effective, certain agency guidance documents, memoranda, and materials (*e.g.,* the 2003 *SWANCC* Guidance and 2008 *Rapanos* Guidance) will be rendered inoperative because they will no longer be necessary or material, and they may in fact create confusion as the agencies implement this final rule. However, because the agencies have not modified the definition of ''traditional navigable waters,'' the agencies are retaining Appendix D to help inform implementation of that provision of this final rule, as discussed further in Section III.B.2.

2. Summary of Final Rule Rationale and Public Comment

The final rule defines ''waters of the United States'' to encompass traditional navigable waters and the territorial seas. The agencies' existing definition of ''waters of the United States'' includes all waters that are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide. *See, e.g.,* 33 CFR 328.3(a)(1). This paragraph of the 2019 Rule (and previous regulations) encompasses waters that are often referred to as waters more traditionally understood as navigable or ''traditional navigable waters.'' A separate paragraph of the 2019 Rule (and previous regulations) lists the territorial seas as jurisdictional. *See* 33 CFR 328.3(a)(6). To streamline and simplify the definition of ''waters of the United States,'' the agencies are finalizing the rule as proposed to include both traditional navigable waters and the territorial seas into a single paragraph of jurisdictional waters. The final rule makes no other substantive changes to these historically regulated categories of waters.

The agencies note that the term ''territorial seas'' is defined in CWA section 502(8), 33 U.S.C. 1362(8), as ''the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.'' The territorial seas establish the seaward limit of ''waters of the United States.'' The agencies did not propose including this definition in the rule because it is already defined by statute and are not including the definition or any further interpretation in the final rule.

In this final rule, the agencies are streamlining the regulation so that the first category of jurisdictional waters includes both traditional navigable waters and the territorial seas. Most commenters on this topic agreed with the proposal to combine the territorial seas and traditional navigable waters into one paragraph of the regulation, stating that it would streamline and simplify the definition of ''waters of the United States,'' and makes practical sense since the jurisdictional status of other categories of waters relies on their surface water connection to either a traditional navigable water or the territorial seas.

In the proposed rule, the agencies included the territorial seas as a type of traditional navigable water because the agencies had not identified an instance in which a territorial sea would not also be considered traditionally navigable and thus proposed that the broader term should suffice. A few commenters expressed concern that the proposed rule implied that the definition of ''waters of the United States'' included only the portions of the territorial seas that are navigable and capable of use in interstate or foreign commerce. The agencies did not intend to exclude any portion of the territorial seas as the term is defined in CWA section 502(8), 33 U.S.C. 1362(8). To avoid any confusion, the agencies have made minor modifications to the proposed rule text to further clarify that this category of foundational waters includes both traditional navigable waters and the territorial seas. The final rule states that the category of ''waters of the United States'' defined in paragraph (a)(1) includes ''the territorial seas, and water which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide.''

The agencies have not changed their interpretation of traditional navigable waters in this final rule, and the agencies are retaining Appendix D to help inform implementation of this provision with additional clarification in this notice in response to comments. As discussed in Section II.E, the definition of navigable-in-fact waters originates with the Supreme Court's decision in *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1870). In that case, the Supreme Court stated:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Id. at 563. As explained by the Supreme Court in 2012, ''[t]he *Daniel Ball* formulation has been invoked in considering the navigability of waters for purposes of assessing federal regulatory authority under the Constitution, and the application of specific federal statutes, as to the waters and their beds.'' *PPL Montana, LLC* v. *Montana,* 565 U.S. 576, 592 (2012). ''With respect to the federal commerce power, the inquiry regarding navigation historically focused on interstate commerce.'' *Id.* at 593. The Supreme Court further explained that, ''of course, the commerce power extends beyond navigation'' and cautioned ''that the test for navigability is not applied the same way'' in all cases. *Id.* at 592–93; *see also Kaiser Aetna* v. *United States,* 444 U.S. 164, 171 (1979) (''[A]ny reliance upon judicial precedent [in this area] must be predicated upon careful appraisal of the *purpose* for which the concept of navigability was invoked in a particular case.'' (internal quotation marks, citation omitted, and emphasis in original)). But generally, navigability for purposes of federal regulatory authority under the federal commerce power encompasses waters that were ''once navigable but are no longer,'' *PPL Montana,* 565 U.S.at 592 (citing *Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 123–24 (1921)), ''waters that only recently have become navigable,'' *id.* (citing *Philadelphia Co.* v. *Stimson,* 223 U.S. 605, 634–35 (1912)), and waters that ''are not navigable and never have been but may become so by reasonable improvements,'' *id.* at 592–93 (citing *United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 407–08 (1940)). The agencies note that this summary articulated by the Supreme Court in 2012 generally reflects the basic structure of the longstanding jurisdictional test for ''traditional navigable waters'' retained in paragraph (a)(1) of the final rule.

Many commenters expressed support for the agencies' decision to retain the existing regulatory text describing traditional navigable waters. These

commenters stated that the existing text is clear, concise, predictable, and well understood by the public. Other commenters expressed concern about implementation of the regulation and guidance and suggested modifications to the regulation. Some commenters suggested clarifying that traditional navigable waters must be used to ''transport commerce,'' as that is the phrase Congress used to describe the waters over which the Corps retains permitting authority when States and Tribes assume CWA section 404 permitting. *See* 33 U.S.C. 1344(g). As discussed in Section II.E, and consistent with a technical advisory committee report submitted to EPA as part of an effort to modernize the section 404(g) assumption process (*see* n.28), section 404(g) refers to RHA section 10 waters. Some commenters recommended that the agencies adopt the RHA section 10 definition and the two-part legal test established by *The Daniel Ball* for ''navigable waters of the United States'' as the test for ''traditional navigable waters'' for purposes of implementing the term ''waters of the United States'' under the CWA. That test requires first that a water be navigable-in-fact, and second that commerce be transported across State or foreign lines on those waters. *The Daniel Ball,* 77 U.S. (10 Wall.) at 563.

The Supreme Court has not spoken directly to the precise meaning of the phrase ''traditional navigable waters'' as that term applies in the CWA context, but it has stated that the statutory ''term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.'' *SWANCC,* 531 U.S. at 172. In the agencies' view, the Supreme Court has therefore signaled an acceptance of the first prong of *The Daniel Ball* test. Whether the second prong applies in full to the administrative definition of ''traditional navigable waters'' is less clear, but the legislative history suggests that Congress had in mind a more expanded notion of interstate commerce when enacting the CWA, including overland links to commercial navigation on navigable-in-fact waters.[40] As described in Section II.E, the Supreme Court has stated that nothing in the legislative history of the Act suggests ''that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 & n.3. The agencies therefore are not modifying the longstanding regulatory text for traditional navigable waters to specifically align it with the RHA test for jurisdiction, as some commenters suggested.

The agencies acknowledge that some commenters suggested that Appendix D as-applied in certain circumstances has led to confusion. For example, some commenters expressed concern that Appendix D could be read to support a conclusion that *any* water that can float a boat, even very shallow draft vessels like canoes and kayaks, is by definition ''susceptible'' to use in interstate commerce and therefore may be deemed a traditional navigable water. The agencies believe that this interpretation is inconsistent with the cases summarized in Appendix D and sweeps too broadly. For example, whether a water is susceptible to use in interstate commerce requires more than simply being able to float a boat to establish jurisdiction over navigable-in-fact waters under paragraph (a)(1); it requires evidence of physical capacity for commercial navigation and that it was, is, or actually could be used for that purpose. *See, e.g.,* Appendix D (citing *The Montello,* 87 U.S. 430, 441–42 (1874); *United States* v. *Holt State Bank,* 270 U.S. 49, 56 (1926); *United States* v. *Utah,* 283 U.S. 64 (1931); *United States* v. *Appalachian Elec. Power Co.,* 311 U.S. 377, 416 (1940)).

Other commenters provided examples of traditional navigable water determinations about which the commenters asserted that the capacity to float a boat in a water that is near an interstate highway was deemed sufficient to make a traditional navigable water determination under the paragraph (a)(1) standard. This interpretation is inconsistent with the applicable case law, including the cases discussed in Appendix D. Simply driving across a State line and using a waterbody, or having the potential to use a waterbody, is similar to the theory of jurisdiction that the Supreme Court specifically rejected in *SWANCC.* One of the arguments raised in support of the ''Migratory Bird Rule'' for CWA jurisdiction was that individuals cross State lines and engage in commercial activity to hunt or observe migratory birds that use isolated waters as habitat. *See SWANCC,* 531 U.S. at 166; *id.* at 195 & n.17 (Stevens, J., dissenting). The *SWANCC* Court rejected this interpretation of CWA jurisdiction because it raised ''significant constitutional questions'' that would require the agencies to ''evaluate the precise object or activity that, in the aggregate, substantially affects interstate commerce.'' *Id.* at 173–74. The ''substantial effects'' test is the most expansive of the three primary bases for exercising congressional authority under the Commerce Clause articulated by the Supreme Court in *United States* v. *Lopez,* 514 U.S. 549, 558–59 (1995). This application of the ''substantial effects'' test to assert CWA jurisdiction over waters beyond those more traditionally understood as navigable was not intended by Appendix D and has been rejected by the *SWANCC* Court because it was inconsistent with Congress' intent to exercise its more traditional ''commerce power over navigation.'' *SWANCC,* 531 U.S. at 173 & n.8. Thus, the legal principles summarized in Appendix D were not intended to endorse, and should not be interpreted as endorsing, the application of the ''substantial effects'' test to CWA jurisdiction, or otherwise suggesting that the mere capacity to float a boat makes a waterbody susceptible to commercial navigation.

The agencies intend to update their guidance materials, if and as necessary, as the agencies begin to implement the revised tests for jurisdiction established by the final rule, both initially and as the agencies gain field experience to address implementation questions that may arise. As part of that process, the agencies will continue to evaluate prior guidance on how to apply established case law principles to traditional navigable water determinations. The agencies will also implement field elevation procedures should difficult legal questions arise, including requiring such interpretations to be reviewed by senior legal staff at each of the agencies' respective headquarters. Implementation of this section of the traditional navigable waters provision of paragraph (a)(1) in the final rule will be case-specific, as it has always been. This case-specific analysis will include relevant portions of EPA and Corps regulations, prior determinations by the Corps and by the federal courts, and case law. Should the agencies determine that additional, more formal guidance on traditional navigable waters is warranted, the agencies will develop any such guidance in compliance with Executive Order 13891, and with any applicable public participation requirements.

C. Interstate Waters

1. What are the agencies finalizing?

Consistent with the proposal, this final rule removes interstate waters, including interstate wetlands, as a separate category of ''waters of the

[40] *See* Section II.E for additional discussion of the complex legislative history on this topic, as well as the detailed discussion of the same in the Albrecht & Nickelsburg article cited in note 25.

United States.'' The agencies are finalizing this aspect of the proposal to more closely align the regulatory definition with the constitutional and statutory authorities reflected in the CWA and judicial interpretations of the term ''navigable waters,'' while balancing the statute's objective to restore and maintain the integrity of the nation's waters and its policy directives to preserve and protect the rights and responsibilities of the States.

Many commenters supported the removal of interstate waters and wetlands as an independent category of ''waters of the United States.'' Those commenters stated that such a category was not authorized by the CWA and that, as proposed by the agencies, waters must be connected to traditional navigable waters to be jurisdictional under the CWA. Commenters also stated that interstate waters and wetlands that actually fall within the scope of CWA jurisdiction would be covered by the other categories of waters as proposed. Other commenters opposed removing interstate waters as an independent jurisdictional category. Those commenters stated that any water that crosses a State line is by definition a ''water of the United States.'' The same is true, some commenters added, for waters that cross tribal boundaries. Additional commenters added that the proposed rule would arbitrarily narrow the scope of CWA jurisdiction over ecologically important waters and recommended that the agencies continue to regulate interstate waters. Other commenters suggested that the exclusion for ephemeral features, if finalized, would help balance the inclusion of interstate waters as a category.

The agencies have considered this diverse range of opinions, and for the reasons discussed below, have concluded that the best interpretation of the CWA and its legislative history is to finalize the regulatory text as proposed, without a separate interstate waters category. Interstate waters and interstate wetlands remain subject to CWA jurisdiction under the final rule if they are waters identified in paragraph (a)(1), (2), (3), or (4) (generally referred to as ''paragraph (a)(1) through (4) waters'' or ''a paragraph (a)(1) through (4) water'' in this notice).

2. Summary of Final Rule Rationale and Public Comment

The agencies have evaluated their earlier legal and policy rationales supporting the inclusion of interstate waters as a separate category of ''waters of the United States'' and comments on the proposed rule and are not including this category in the final rule. The agencies have concluded that the regulation of interstate waters as a standalone category is based on an overly broad reading of the original Water Pollution Control Act (WPCA) of 1948 and lacks foundation in statutory text of the 1972 CWA amendments. The WPCA stated that the ''pollution of interstate waters in or adjacent to any State or States (whether the matter causing or contributing to such pollution is discharged directly into such waters or reaches such waters after discharge into a tributary of such waters), which endangers the health or welfare of persons in a State other than that in which the discharge originates, is hereby declared to be a public nuisance and subject to abatement as herein provided.'' WPCA of 1948, 2(d)(1), (4), 62 Stat. 1155, 1156–57. The statute defined ''interstate waters'' as ''all rivers, lakes, and other waters that flow across, or form a part of, State boundaries.'' *Id.* at 10(e), 62 Stat. 1161.

In 1961, Congress amended the statute to substitute the term ''interstate or navigable waters'' for ''interstate waters'' in the statute's enforcement provision while making minor changes to the definition of ''interstate waters.'' *See* Public Law 87–88, 75 Stat. 208 (1961). In 1965, Congress again amended the statute to require states to develop water quality standards for all ''interstate waters'' within their borders. *See* Public Law 89–234, 79 Stat. 908 (1965). In 1972, Congress amended the statute again and selected the term ''navigable waters'' as the operative term for the major regulatory programs established by the 1972 amendments, dropping the definition of ''interstate waters'' from the statute. *See, e.g.,* 33 U.S.C. 1362(7) (defining ''navigable waters'' as ''waters of the United States''). In doing so, however, Congress allowed States to retain existing water quality standards for interstate waters developed under the pre-1972 statutory program. *See* 33 U.S.C. 1313(a).

The EPA promulgated its first regulatory definition for the term ''waters of the United States'' in 1973. 38 FR 13528 (May 22, 1973). In that regulation, the EPA administratively determined that ''interstate waters'' should be a separate category of ''waters of the United States,'' distinct from the traditional navigable waters category, and until this final rule the agencies had retained it as a separate category.

The agencies previously viewed navigable and interstate waters as having distinct and separate meanings because Congress in 1961 used both terms in the statute. The agencies explained their prior interpretation in part through the doctrine of congressional acquiescence, in that Congress was aware of the EPA's retention of ''interstate waters'' as a separate category when amending the CWA in 1977 (making no amendments to remove the agencies' regulatory inclusion of interstate waters), and therefore acquiesced to its inclusion as a separate category. The agencies have also historically relied on two Supreme Court cases—*Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972) and *City of Milwaukee* v. *Illinois,* 451 U.S. 304 (1981)—addressing interstate water pollution to further support their prior interpretation. In the 1972 case, which was decided prior to the date of the 1972 CWA amendments, the Supreme Court referred to the two categories in the disjunctive, implying that the Court viewed the pre-1972 statutory program as encompassing two separate categories. *See Illinois,* 406 U.S. at 102 (''it is federal, not state, law that in the end controls pollution of *interstate or navigable waters*'') (emphasis added). The 1981 case is described further below. The agencies also have referred to section 303(a) of the CWA as further evidence that Congress intended ''interstate waters'' to be retained as an independent category of jurisdictional waters because that provision authorized water quality standards for ''interstate waters'' developed following the 1965 amendments to remain in effect, subject to revision under the new statutory program. A more complete summary of the agencies' prior legal position with respect to interstate waters was included in a Technical Support Document prepared in support of the 2015 Rule (''2015 Rule TSD'').[41] The agencies now conclude that their prior interpretation is inconsistent with the text and structure of the CWA.

When Congress enacted the 1972 CWA amendments, it selected the term ''navigable waters'' to frame the scope of federal regulatory jurisdiction under the Act. Rather than interpreting those amendments as retaining ''interstate waters'' as a separate and distinct category of ''waters of the United States,'' the agencies now conclude that a more natural interpretation of the 1972 amendments is an express rejection of that independent category, as Congress had before it both options within the scope of the statute it was modifying. Congress specifically did not carry that term forward as the operative phrase for

[41] U.S. EPA and U.S. Department of the Army. Technical Support Document for the Clean Water Rule: Definition of Waters of the United States (May 2015) (Docket ID: EPA–HQ–OW–2011–0880–20869), *available at https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869.*

federal jurisdiction. Under basic canons of statutory construction, the agencies begin with the presumption that Congress did so intentionally. *See, e.g., Stone* v. *INS,* 514 U.S. 386, 397 (1995) (''When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.'').

Congressional acquiescence is a doctrine of limited application and was specifically rejected as a basis for expansive federal jurisdiction in *SWANCC* in the context of analyzing the Corps' 1977 regulations. *SWANCC,* 531 U.S. at 170–71 (''Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care.''). The plurality opinion in *Rapanos* further elaborated, when also rejecting the notion that Congress acquiesced to the Corps' 1977 regulations, that ''Congress takes no governmental action except by legislation. What the dissent refers to as 'Congress' deliberate acquiescence' should more appropriately be called Congress's failure to express any opinion.'' *Rapanos,* 547 U.S. at 750 (Scalia, J., plurality). The plurality explained that we cannot know whether Congress' inaction resulted from their belief that the Corps' regulations were correct, or from other reasons, such as confidence that courts would correct excesses or political considerations. *See SWANCC,* 531 U.S. at 169–70, 178 n.5 (''Absent such overwhelming evidence of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.''). The agencies now conclude, consistent with the admonitions of *SWANCC* and the *Rapanos* plurality, that the doctrine of congressional acquiescence is not a sound basis to guide the agencies' decision regarding the scope of federal jurisdiction over certain waters in this final rule, particularly as it applies to interstate waters divorced from any notion of commercial navigability.

The legislative history of the 1972 amendments, in fact, supports the agencies' conclusion that Congress did not consider interstate waters and navigable waters to be two separate and distinct categories, and instead referred to terms in the pre-1972 statutory regime conjunctively as ''interstate navigable waters.'' S. Rep. No. 92–414, at 2 (1971) (''Each State was required by the 1965 Act to develop standards for water quality within its boundaries. These standards were to be applied to all *interstate navigable waters* flowing through the State; intrastate waters were not included.'') (emphasis added); *id.* at 4 (''The setting of water quality standards for *interstate navigable waters* . . . is the keystone of the present program for control of water pollution.'') (emphasis added); *id.* (''The States have first responsibility for enforcement of their standards. When approved by the [EPA], however, the standards for *interstate navigable waters* become Federal-State standards.'') (emphasis added). In fact, the legislative history suggests that Congress modified the text of the statute in 1972 in part because the States had narrowly interpreted the phrase ''interstate'' to apply only to interstate navigable waters and had failed to establish water quality standards for the intrastate tributaries to such waters. *See, e.g., id.* at 77 (''The control strategy of the Act extends to navigable waters . . . . Through a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited.''); 118 Cong. Rec. 10240 (1972) (the amendment ''expands the coverage of the law to intrastate, as well as *interstate navigable waterways*'') (emphasis added). In 1976, the Supreme Court shared the same view of the pre-1972 statutory scheme: ''Before it was amended in 1972, the Federal Water Pollution Control Act employed ambient water quality standards specifying the acceptable levels of pollution in a State's *interstate navigable waters* as the primary mechanism in its program for the control of water pollution.'' *EPA* v. *California,* 426 U.S. 200, 202 (1976) (emphasis added) (footnote omitted). This history suggests that the section 303(a) provision relating to existing water quality standards for ''interstate waters'' was referring to ''interstate navigable waters,'' not interstate waters more broadly.

Neither Supreme Court case previously relied on by the agencies and discussed in the 2015 Rule TSD addressed the specific question whether ''interstate waters'' and ''navigable waters'' are separate and distinct categories of jurisdictional waters under the CWA. They instead addressed interstate water pollution generally, and the water at issue in those cases was Lake Michigan, an interstate navigable-in-fact water. The 1981 decision, however, did recognize that the 1972 amendments ''were viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation considered in that case.'' *Milwaukee,* 451 U.S. at 317 (citing legislative history of the 1972 CWA amendments). This supports the agencies' conclusion that prior iterations of the statute, referring to both interstate waters and navigable waters, were replaced with a completely new program in 1972, not that certain aspects of that program continued through congressional acquiescence in a later regulatory determination. The final rule therefore eliminates ''interstate waters'' as a separate category of ''waters of the United States.''

By eliminating a separate category for interstate waters, the final rule adheres to the legal principles discussed in Section II.E by including within the definition of ''waters of the United States'' traditional navigable waters, the territorial seas, and waters subject to the ebb and flow of the tide; tributaries to such waters; certain lakes, ponds, and impoundments of otherwise jurisdictional waters; and wetlands adjacent to jurisdictional waters. Because the agencies' authority flows from Congress' use of the term ''navigable waters'' in the CWA, the agencies lack authority to regulate waters untethered from that term. Nothing in the legislative history of the 1972 CWA amendments ''signifies that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3.

Therefore, those interstate waters that would satisfy the definitions in this final rule are jurisdictional; interstate waters without any surface water connection to traditional navigable waters or the territorial seas are not within the agencies' authority under the CWA and are more appropriately regulated by the States and Tribes under their sovereign authorities.

The agencies' rationale is supported by the U.S. District Court for the Southern District of Georgia's remand order. *Georgia* v. *Wheeler,* No. 2:15–cv–00079, 2019 WL 3949922 (S.D. Ga. Aug. 21, 2019). There, the court directly addressed the 2015 Rule's assertion of authority over all interstate waters, including nonnavigable interstate waters. *Id.* at *10–13. The court found that ''the inclusion of all interstate waters in the definition of 'waters of the United States,' regardless of navigability, extends the Agencies' jurisdiction beyond the scope of the CWA because it reads the term navigability out of the CWA.'' *Id.* at *12. The court also found that, because the 2015 Rule would assert jurisdiction over tributaries, adjacent waters, and case-by-case waters based on their relationship to non-navigable isolated interstate waters, it would result in federal jurisdiction over even the most remote and isolated waters that the Supreme Court held in *SWANCC* are beyond the

reach of the CWA. *Id.* at *13. The agencies agree with the court's analysis and conclusion.

This final rule marks a shift away from prior agency positions. The agencies received public comment that the proposal had failed to analyze potential impacts resulting from the removal of ''interstate waters'' as a separate category, but as noted in the preamble to the proposed rule, the agencies are not aware of any database that identifies the jurisdictional status of interstate waters based solely on the fact that they cross state lines, or any other resource that would identify these waters. The agencies therefore lack the ability to perform a comparative analysis with any precision. Some commenters provided examples of interstate waters that may lose jurisdictional status if the separate category is eliminated; however, the Corps' ORM2 database does not contain any jurisdictional determinations based solely on a water's status as an interstate water. Since issuance of the *Rapanos* Guidance, the Corps has not tracked this category separately for approved jurisdictional determinations conducted under the Guidance in ORM2.

The agencies requested comment on the rationales in favor of and opposed to a separate jurisdictional category for ''interstate waters.'' Some commenters supported the proposal to remove ''interstate waters'' as a separate category, noting that there is no statutory or constitutional basis to regulate interstate waters that would not otherwise be jurisdictional and suggesting that the agencies lacked the authority to include a separate ''interstate'' category in earlier versions of the regulations. Other commenters opposed the proposal, asserting that the text and structure of the CWA, legislative history, and prior court cases, including Justice Scalia's discussion in *Rapanos,* demonstrate that the CWA applies to interstate waters regardless of navigability. The agencies considered these comments and, for the reasons explained above, conclude that the final rule most closely aligns with the agencies' constitutional and statutory authorities reflected in the CWA and relevant judicial interpretations of the term ''navigable waters'' and the legislative history of the CWA, while balancing the statute's objective to restore and maintain the integrity of the nation's waters and its policy directives to preserve and protect the rights and responsibilities of the States.

Some commenters stated that the agencies did not provide sufficient rationale for deviating from their prior analysis and interpretation, as provided in the 2015 Rule TSD. The agencies disagree, as the proposal clearly identified independent reasons questioning the validity of the agencies' prior interpretation. The agencies' 2015 Rule TSD, for example, included three primary arguments supporting the prior interpretation: First, the language, structure, and history of the CWA demonstrate that Congress intended to include interstate waters in addition to navigable waters; second, the Supreme Court decisions in *Rapanos* and *SWANCC* did not constrain CWA jurisdiction over isolated, nonnavigable, interstate waters; and third, Supreme Court precedent supports jurisdiction over interstate waters, regardless of navigability. These arguments are addressed in the proposal and in earlier sections of this notice, but the agencies provide additional detail to respond to comments received as follows.

The 2015 Rule TSD analyzed two Supreme Court decisions to support its conclusion that interstate waters should be a separate category of jurisdiction under the CWA. The first decision was issued in 1972, just prior to the 1972 CWA amendments, and concluded that federal common law was appropriate to resolve a cross-border water pollution dispute among states where existing statutes did not address the dispute. *Illinois,* 406 U.S. 91. The Court found that where ''no fixed rules'' govern cross-boundary pollution disputes, ''these will be equity suits in which the informed judgment of the chancellor will largely govern.'' *Id.* at 107–08.

The second decision was issued in 1981, and it analyzed the effect of the 1972 amendments on a federal common law claim concerning the same cross-border water pollution dispute that was presented the 1972 case. *City of Milwaukee,* 451 U.S. 304. In that case, the Court acknowledged the 1972 amendments and noted that ''[t]he establishment of such a self-consciously comprehensive program by Congress, which certainly did not exist when *Illinois* v. *Milwaukee* was decided, *strongly suggests* that there is no room for courts to attempt to improve on that program with federal common law.'' *Id.* at 319 (emphasis added).

Contrary to the assertions in the 2015 Rule TSD, however, the Court did not conclude that the CWA occupies the field with regard to all interstate waters.[42] Instead, the Court considered the facts of the case before it—whether NPDES permits issued by an authorized State in compliance with the CWA could be modified or augmented by federal common law claims brought by a downstream State. Focusing on respondents' claims that discharges from the facilities were causing a public nuisance, the Court observed that, ''the action of Congress in supplanting the federal common law is perhaps clearest when the question of effluent limitations for discharges from the two treatment plants is considered.'' *City of Milwaukee, 451* U.S. at 319–20. The Court identified the numerous provisions of the permits that addressed discharges and overflows from the facilities, and the State-initiated enforcement action contemplated by the CWA, and concluded that ''[t]here is no 'interstice' here to be filled by federal common law: Overflows are covered by the Act and have been addressed by the regulatory regime established by the Act. Although a Federal court may disagree with the regulatory approach taken by the agency . . . such disagreement alone is no basis for the creation of federal common law.'' *Id.* at 323.

The Court also noted that in its 1972 decision, the Court was concerned that the downstream State ''did not have any forum in which to protect its interests unless federal common law were created,'' *City of Milwaukee,* 541 U.S. at 325, but that the NPDES permitting provisions of the 1972 amendments ''provided ample opportunity for a State affected by decisions of a neighboring State's permit-granting agency to seek redress.'' *Id.* at 325–26 (identifying the CWA requirement to provide notice to affected States and opportunity to comment and request public hearings, the Wisconsin law that provides the same, affected States' opportunity under the CWA to petition the EPA to object to a NPDES permit, and noting that respondents did not take advantage of these provisions). The case therefore presented a dispute between States concerning NPDES permits lawfully issued for discharges into an otherwise

[42] *See* U.S. EPA and Department of the Army, Technical Support Document of the EPA-Army Clean Water Rule at 210 (May 20, 2015) (''2015 Rule TSD'') (Docket ID: EPA–HQ–OW–2011–0880–20869) available at *https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20869.* (''In *City of Milwaukee,* the Court found that the CWA was the 'comprehensive regulatory program' that 'occupied the field' (451 U.S. 317) with regard to interstate water pollution, eliminating the basis for an independent common law of nuisance to address interstate water pollution.''). The 2015 Rule TSD also asserts that the Court ''expressly overruled'' its decision in *Illinois;* however, a more precise statement would be that the Court found no federal common law remedy available ''*at least so far as concerns the claims of respondents*'' because Congress occupied the field with a federal regulatory program that establishes effluent limits and other specific requirements that supersede the ''often vague and indeterminate nuisance concepts and maxims of equity jurisprudence.'' *City of Milwaukee,* 451 U.S. at 317 (emphasis added).

navigable water—Lake Michigan. The Supreme Court did not consider disputes outside of the NPDES permit program or those concerning non-navigable interstate waters, and the Court did not broadly conclude that the CWA occupies the field of all interstate water pollution.[43] All it had before it was the CWA, and as discussed in Section II, Congress chose not to exercise its full powers under the Commerce Clause when enacting the 1972 amendments. Congress specifically recognized that there are other land and water resources that are more appropriately regulated by the States and Tribes under their sovereign authorities. Field preemption cannot extend beyond the field. *Hines* v. *Davidowitz,* 312 U.S. 52, 78–79 (1941) (''[e]very Act of Congress occupies some field, but we must know the boundaries of that field before we can say that it has precluded a state from the exercise of any power reserved to it by the Constitution''); *see also Gonzales* v. *Oregon,* 546 U.S. 243, 275 (2006); *Medtronic, Inc.* v. *Lohr,* 518 U.S. 470, 475 (1996); *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U.S. 724, 756 (1985)).

The agencies also requested comment on an alternative approach that would retain ''interstate waters'' as a separate category, reflecting longstanding agency practice, and whether the term ''interstate'' should be interpreted as crossing between States, between States and tribal lands, between States and/or tribal lands and foreign countries, or other formulations. Some commenters opposed this alternative approach, stating that the agencies lacked the authority to codify or implement it. Other commenters supported retaining ''interstate waters'' as a separate category and expressed concern that removing it would eliminate the EPA's role as a co-regulator in cross-boundary disputes over water quality.

The CWA provides two opportunities for the EPA to mediate disputes among States: The section 401(a)(2) neighboring jurisdiction notification provisions for federally permitted projects that may discharge to navigable waters and the section 319(g) provisions allowing the EPA to convene an interstate management conference to address cross-boundary nonpoint pollution in navigable waters. In the past, these provisions have been invoked infrequently by States, and the agencies do not expect a significant increase in cross-boundary disputes as a result of this rulemaking. In addition, the EPA can address concerns of States whose waters may be affected by the issuance of a permit in another State through the permit objection process pursuant to CWA sections 402(b)(5), 402(d)(d), and 40 CFR 123.44(c)(2). As demonstrated in *City of Milwaukee,* if a cross-boundary dispute is one that is contemplated and addressed by the CWA, such as the sufficiency of effluent limits in a NPDES permit, the statute has occupied the field and federal common law does not provide a remedy. 451 U.S. at 317. However, if a State NPDES permit or a section 401 certification is not required, the EPA does not have a role within the CWA permitting framework to address cross-boundary disputes; similarly, if a water is not a ''water of the United States,'' then the EPA's conference convening authorities under section 319(g) would not apply. In addition, and as described in the Section II.B of this notice, the CWA provides the EPA with numerous other authorities to provide technical assistance to States and Tribes to facilitate the management of non-jurisdictional waters.[44]

Under the current framework, the remedies available for cross-boundary water pollution disputes over non-jurisdictional waters depends upon the parties and the issues in the case. As an initial matter, many State programs regulate more waters than are covered by the federal definition of ''waters of the United States'' and may have similar notification provisions in place for States affected by a State-issued NPDES permit. *See e.g.,* Wis. Stat. 281.33 (authorizing Wisconsin to issue NPDES permits for all waters of the State); Wis. Admin. Code. 203.03 (providing notice during the NPDES process to other agencies, including other States potentially affected by the discharge). This important fact supports the agencies' conclusion that all States protect their water resources under State law and many have the ability and expertise to do so in the absence of federal regulation, as discussed in more detail in the Resource and Programmatic Assessment for the final rule. As they do today, remedies for pollution disputes among States that do not implicate CWA sections 319(g), 401, or 402 would likely derive from federal common law under the Supreme Court's original jurisdiction. *See, e.g., Illinois,* 406 U.S. at 98–99. Remedies for disputes between a State and a public or private party would likely derive from State or federal common law and be heard by State or Federal courts. *See id.* at 100, 107–08; *International Paper,* 479 U.S. at 497–500.

D. Tributaries

1. What are the agencies finalizing?

In this final rule, the agencies retain ''tributaries'' as a category of jurisdictional waters subject to CWA jurisdiction. The final rule defines ''tributary'' to mean a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to the territorial seas or traditional navigable waters (paragraph (a)(1) waters) in a typical year either directly or through one or more tributaries (paragraph (a)(2) waters), lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters), or adjacent wetlands (paragraph (a)(4) waters). A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

As discussed in greater detail in Section III.E, the term ''tributary'' includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the ''tributary'' definition. A ditch can also be a traditional navigable water if it meets the

[43] In a footnote, the 2015 Rule TSD identifies two other Supreme Court decisions and concludes that ''[n]othing in either decision limits the applicability of the CWA to interstate water pollution disputes involving navigable interstate waters or interstate waters connected to navigable waters.'' 2015 Rule TSD at 211 n.16 (referencing *International Paper* v. *Ouellette,* 479 U.S. 481 (1987), and *Arkansas* v. *Oklahoma,* 503 U.S. 91 (1992)). Similar to the facts of *City of Milwaukee,* both of these cases addressed disputes that arose in the CWA's NPDES permitting context for waters that would otherwise be jurisdictional—Lake Champlain and the Illinois River. In neither case was the Court asked to consider whether or how the CWA may apply to non-navigable interstate waters, and these cases do not provide useful context or precedent on that issue. The 2015 Rule TSD similarly concluded that neither *SWANCC* nor *Rapanos* addressed or limited CWA jurisdiction over non-navigable interstate waters. *See* Section II.E of this notice for the agencies' detailed analysis of the *SWANCC* and *Rapanos* decisions.

[44] In addition, the notion that categorical federal regulation of interstate waters is necessary to end water pollution disputes between States would call into the question the need for CWA section 103 (''Interstate Cooperation and Uniform Laws''), 33 U.S.C. 1253, which establishes a framework for the Administrator to encourage cooperation between States for the prevention and control of pollution.

conditions of that category. The agencies are excluding all other ditches from the definition of ''waters of the United States,'' other than those identified in paragraph (a)(1) or (2) and ditches any portion of which are constructed in an adjacent wetland that lack perennial or intermittent flow (meaning they do not satisfy the ''tributary'' definition in paragraph (c)(12)) but that develop wetlands in all or portions of the ditch that satisfy the ''adjacent wetlands'' definition in paragraph (c)(1). Excluded ditches may be subject to regulation under State or tribal law and could potentially be conveyances of discharges of pollutants from ''point sources'' subject to CWA permitting (*see* 33 U.S.C. 1362(14)) if they convey pollutants from a discharger to jurisdictional waters.

Regardless of the name they are given locally (*e.g.,* creek, bayou, branch, brook, run), or their size (*e.g.,* discharge volume, width, depth, stream order), waters that meet the definition of ''tributary'' are jurisdictional under this final rule. Surface features that flow only in direct response to precipitation, such as ephemeral streams, swales, gullies and rills, are not tributaries. These features lack the required perennial or intermittent flow to satisfy the ''tributary'' definition and therefore are not jurisdictional. However, such features may convey surface water flow from an upstream jurisdictional water to a downstream jurisdictional water without severing jurisdiction of the tributary.

The regulatory status of tributaries has evolved over the last several decades, resulting in confusion for the regulated community and regulators alike. Some commenters said that all channels on the landscape that convey water, regardless of flow regime, should be subject to CWA regulation, including both natural and artificial channels. Others asserted that Congress intended to regulate only traditional navigable waters, and navigable tributaries to those waters. Some would regulate all ditches, while others would exclude all ditches from CWA jurisdiction. Some stated that all ephemeral washes should be regulated, while others viewed ephemeral features as more like land that is wet after it rains. Some would extend jurisdiction to perennial rivers and streams and cut off jurisdiction for intermittent or seasonal waters. Others would regulate intermittent waters based on a minimum number of days of continuous flow, such as 30, 90, or 185. Even the Supreme Court has struggled with articulating clear principles governing which tributaries to traditional navigable waters should be subject to CWA jurisdiction, as evidenced by the fractured opinion in *Rapanos.* What is clear from that opinion, however, is that a majority of the Court believed the agencies' existing standard for tributaries at that time raised serious questions regarding the scope of the agencies' authority under the CWA. *See* Section II.E.2.

The agencies proposed a definition for ''tributary'' that they believed respected their statutory and constitutional authorities, consistent with principles established in *Riverside Bayview, SWANCC,* and *Rapanos.* Many commenters agreed with the proposal, indicating that it balanced federal authority over the core waters targeted by Congress under the CWA with waters that are more appropriately regulated solely by the States and Tribes. Others argued that the proposed ''tributary'' definition regulated too broadly, preferring instead that the agencies restrict jurisdiction to perennial tributaries only. Others argued that the agencies failed to regulate ecologically important ephemeral reaches and cut off jurisdiction to headwater reaches that are important to the tributary network.

The agencies have considered all comments received and have crafted a final regulatory definition of ''tributary'' designed to adhere to the legal principles articulated in this notice and that provides a predictable, implementable regulatory framework. The agencies are finalizing their proposal to regulate perennial and intermittent tributaries to traditional navigable waters, while excluding ephemeral streams from CWA jurisdiction as those features are more appropriately regulated by States and Tribes under their sovereign authorities. However, the agencies have modified the final rule to reduce the instances in which natural and artificial features and structures sever jurisdiction of upstream waters, as discussed in Section III.A.3 and in more detail below. The agencies conclude that interpreting upstream waters that contribute surface water flow in a typical year to a paragraph (a)(1) water to be part of the regulated tributary network better balances the CWA's objective in section 101(a) with the need to respect State and tribal authority over land and water resources as mandated by Congress in section 101(b).

2. Summary of Final Rule Rationale and Public Comment

The definition of ''tributary'' in the final rule reflects the authority granted by Congress to regulate navigable waters and the interconnected nature of the tributary system, as well as the ordinary meaning of the term ''waters.'' In addition, the agencies are adhering to their constitutional and statutory authority regarding the role of the Federal government and limits on its authority to regulate the use of land and waters within State and tribal boundaries, and their intention to establish a clear and easily implementable definition. The definition of ''tributary'' in the final rule sets a boundary on the scope of the regulation to ensure that it is consistent with the role of the Federal government under the Constitution and the CWA. As the Supreme Court recognizes, States traditionally exercise ''primary power over land and water use,'' *SWANCC,* 531 U.S. at 174. The Federal government should avoid pressing against the outer limits of its authority when doing so would infringe upon the traditional rights and responsibilities of States to manage their own waters. *See id.* at 172–73 and *supra* Section II.E.

Under this final rule, a tributary must be perennial or intermittent, and it must contribute surface water flow in a typical year to a traditional navigable water or territorial sea directly or through one or more waters identified in paragraph (a)(2), (3), or (4) (generally referred to as ''paragraph (a)(2) through (4) waters'' or ''a paragraph (a)(2) through (4) water'' in this notice), or through one or more of the features described in Section III.A.3. The ''tributary'' category includes waters that, due to their relatively permanent flow classifications and their contribution of surface water flow to paragraph (a)(1) waters, are appropriately regulated under the Commerce Clause powers that Congress exercised when enacting the CWA. The agencies have concluded that their regulatory authority under the CWA and Supreme Court precedent is most appropriately interpreted to encompass the perennial and intermittent flow classifications provided in the definition of ''tributary,'' and that this approach also balances the regulation of the Federal government with the authority of States and Tribes to more appropriately regulate certain waters within their jurisdiction, such as ephemeral streams. The agencies have also concluded that this definition effectively furthers both the objective of the Act to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters'' and the ''policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and

use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality). The agencies' approach to defining ''tributary'' is also intended to ensure that federal regulatory jurisdiction does not intrude upon State, tribal, and local control of land and water use decisions. *See Rapanos, 547 U.S.* at 738 (Scalia, J., plurality) (''Regulation of land use, as through the issuance of the development permits . . . is a quintessential state and local power.''). With this final definition, the agencies seek to avoid ''impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.'' 33 U.S.C. 1370.

A clear regulatory line between jurisdictional and excluded waters has the additional benefit of being less complicated than prior regulatory regimes that required a case-specific significant nexus analysis. Ephemeral features, such as dry washes and arroyos, that lack the perennial or intermittent flow necessary to satisfy the ''tributary'' definition under this final rule are excluded from the definition. Although the agencies are not regulating features that flow only in direct response to precipitation, certain ephemeral features can convey surface water flow that is sufficient to maintain the jurisdictional status of the upstream tributary reach, as discussed in Section III.A.3. States and Tribes may also address ephemeral features as ''waters of the State'' or ''waters of the Tribe'' under their own laws to the extent they deem appropriate, as envisioned under section 101(b) of the CWA. In addition, an ephemeral feature may convey a discharge of pollutants from a point source to a water of the United States. *See Rapanos,* 547 U.S. at 743–44 (Scalia, J., plurality).

Some commenters stated that the agencies' proposal for tributaries is not supported by science and is inconsistent with the CWA and judicial precedent. The agencies disagree. As discussed in the preamble to the proposed rule, the agencies relied on the available science to help inform where to draw the line of federal jurisdiction over tributaries, consistent with their statutory authorities. *See* 84 FR 4175 (''This proposed definition [of tributary] is also informed by the science.'') As noted in that preamble, while the SAB found that the draft Connectivity Report ''provides strong scientific support for the conclusion that ephemeral, intermittent, and perennial streams exert a strong influence on the character and functioning of downstream waters and that tributary streams are connected to downstream waters,'' the SAB stressed that ''the EPA should recognize that there is a gradient of connectivity.'' SAB Review at 3. The SAB recommended that ''the interpretation of connectivity be revised to reflect a gradient approach that recognizes variation in the frequency, duration, magnitude, predictability, and *consequences* of physical, chemical, and biological connections.'' *Id.* at 2 (emphasis added). To describe the ''connectivity gradient'' and the probability that impacts occurring along the gradient will be transmitted downstream, the SAB developed a figure as part of its review of the Draft Connectivity Report. *See id.* at 54 figure 3. The figure illustrates the connectivity gradient and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters and depicts a decreased ''probability that changes . . . will be transmitted to downstream waters'' at flow regimes less than perennial and intermittent. *Id.* While the SAB stated that ''at sufficiently large spatial and temporal scales, all waters and wetlands are connected,'' it found that ''[m]ore important are the degree of connection (*e.g.,* frequency, magnitude, timing, duration) and the extent to which those connections affect the chemical, physical, and biological integrity of downstream waters.'' *Id.* at 17.

The SAB, however, recognized that ''[t]he Report is a science, not policy, document that was written to summarize the current understanding of connectivity or isolation of streams and wetlands relative to large water bodies such as rivers, lakes, estuaries, and oceans.'' *id.* at 2. ''The SAB also recommended that the agencies clarify in the preamble to the final rule that 'significant nexus' is a legal term, not a scientific one.'' 80 FR 37065. And in issuing the 2015 Rule, the agencies stated, ''the science does not provide a precise point along the continuum at which waters provide only speculative or insubstantial functions to downstream waters.'' *Id.* at 37090. Thus, the agencies use the Connectivity Report to inform certain aspects of the revised definition of ''waters of the United States,'' such as recognizing the ''connectivity gradient'' and potential consequences between perennial, intermittent, and ephemeral streams and downstream waters within a tributary system. The ''tributary'' definition that the agencies are finalizing, which takes into consideration the connectivity gradient, ''rests upon a reasonable inference of ecological interconnection'' between those tributaries and paragraph (a)(1) waters. 547 U.S. at 780 (Kennedy, J., concurring in the judgment). The agencies acknowledge that science alone cannot dictate where to draw the line between Federal and State waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA.

The agencies also relied on scientific principles, as appropriate and within the agencies' statutory limits, to inform several other aspects of this final rule, including, for example, how the agencies define the flow classifications (perennial, intermittent, ephemeral) used throughout the regulation, the incorporation of inundation and flooding to create surface water connections, and the use of the typical year concept that relies upon a large body of precipitation and other climatic data to inform what may be within a normal range for a particular geographic region. The agencies will also rely on science to implement the final rule, such as with the development of tools and scientific-based approaches to identify flow classification and typical year conditions.

Thus, contrary to the assertions of some commenters, the agencies' decisions in support of this final rule have been informed by science. The agencies therefore agree with other commenters who stated that the agencies appropriately balanced science, policy, and the law when crafting the proposed rule. But to be clear, as discussed in the preamble to the proposed rule, 84 FR 4176, and in Section II.E of this notice, science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA. The definition of ''waters of the United States'' must be grounded in a legal analysis of the limits on CWA jurisdiction reflected in the statute and Supreme Court guidance.

By defining perennial and intermittent tributaries of traditional navigable waters as jurisdictional and ephemeral features as non-jurisdictional, the agencies balance Congress' intent to interpret the term ''navigable waters'' more broadly than the classical understanding of that term, *see Riverside Bayview,* 474 U.S. at 133, with the fact that nothing in the legislative history of the Act ''signifies that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. The final rule's definition of ''tributary'' is also consistent with the *Rapanos* plurality's position that '' 'the

waters of the United States' include only relatively permanent, standing, or flowing bodies of waters . . . as opposed to ordinarily dry channels . . . or ephemeral flows of water.'' *Rapanos,* 547 U.S. at 732–33 *see also id.* at 736 n.7 (''[R]elatively continuous flow is a *necessary* condition for qualification as a 'water,' not an *adequate* condition'' (emphasis in original)). Perennial waters, by definition, are permanent. And while the plurality did note that waters of the United States do not include ''ordinarily dry channels through which water occasionally or intermittently flows,'' *id.* at 733, the plurality would ''not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months.'' *Id.* at 732 n.5 (emphasis in original); *compare id.* at 770 (Kennedy, J., concurring in the judgment) (''an intermittent flow can constitute a stream . . . while it is flowing . . . [i]t follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams''). The agencies note that intermittent waters may occur seasonally, for example, during times when groundwater tables are elevated or when snowpack runoff produces relatively permanent flow, returning on an annual basis in known, fixed geographic locations.

By defining ''tributary'' as perennial or intermittent rivers and streams that contribute surface water flow to traditional navigable waters or the territorial seas in a typical year, the agencies are establishing that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the bodies of water must be ''geographical features'' (*i.e.,* rivers and streams) that are ''relatively permanent'' (*i.e.,* perennial or intermittent) and that contribute surface water flow to a traditional navigable water or the territorial seas in a typical year. *Rapanos,* 547 U.S. at 732. This requirement is informed by *Rapanos,* wherein the plurality determined that the phrase ''the waters of the United States'' ''cannot bear the expansive meaning that the Corps would give it,'' *id.* at 732, and challenged the notion that ''even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.' '' *Id.* at 728. Similarly, Justice Kennedy noted, ''mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85. The agencies believe that the requirement that a tributary be perennial or intermittent and be connected to a traditional navigable water is reasonable and reflects the plurality's description of a '' 'wate[r] of the United States' '' as ''*i.e.,* a relatively permanent body of water connected to traditional interstate navigable waters.'' *Id.* at 742.

Under the proposed definition of ''tributary,'' an artificial or natural ephemeral feature would have severed jurisdiction upstream of the feature, because the waterbody would not contribute surface water to a paragraph (a)(1) water on a perennial or intermittent basis. Several commenters supported this approach, noting that waters above ephemeral breaks are more appropriately subject to State or tribal jurisdiction. Others criticized the approach as too restrictive and raised concerns regarding the importance of those upstream waters to the tributary system. The agencies recognize that the proposed rule's treatment of ephemeral features would have severed jurisdiction for certain relatively permanent bodies of water that are regularly ''connected to'' traditional navigable waters in a typical year via channelized surface water flow through those features. The final rule has been modified to address these concerns regarding ephemeral breaks between two relatively permanent waters while remaining faithful to the text, structure, and legislative history of the CWA and Supreme Court guidance.

As discussed in Section III.A.3, the final rule provides that channelized non-jurisdictional surface water features do not sever jurisdiction of upstream perennial or intermittent waters so long as they convey surface water from such upstream waters to downstream jurisdictional waters in a typical year. The use of ''channelized'' in this context generally indicates features with a defined path or course, such as a ditch or the bed of an ephemeral stream. The flow must be channelized in the sense of being discrete and confined to a channel, as opposed to diffuse, non-channelized flow. Channelized non-jurisdictional surface water features are generally continuously present on the landscape as geomorphic features and may regularly ''connect'' the upstream tributary to the downstream jurisdictional water such that those waters can mix and become indistinguishable in a typical year. This may occur, for example, where managed water systems alter the flow classification of a perennial or intermittent tributary to ephemeral but the perennial or intermittent flow returns farther downstream. It could also occur as a result of natural conditions, such as a tributary that becomes a losing stream for a reach, but then becomes perennial again downstream of the losing reach. The losing reach could occur because of water infiltrating into the ground and recharging groundwater, where the water table is below the bottom of the channel bed.

The final rule also allows for other types of artificial or natural features, such as dams or boulder fields, which may maintain jurisdiction so long as they convey surface water flow from an upstream tributary to a downstream jurisdictional water in a typical year. The agencies have determined in this final rule that such conditions do not sever jurisdiction for the upstream reach of the tributary if a channelized non-jurisdictional surface water feature conveys surface water flow to a downstream jurisdictional water in a typical year. The agencies have concluded that water flowing through features such as dams or boulder fields can sustain a regular and predictable surface water connection between upstream and downstream waters and therefore can maintain jurisdiction between such waters. In all cases, however, the excluded or ephemeral feature remains non-jurisdictional. Certain other excluded features are incapable of providing channelized surface flow (*e.g.,* groundwater, diffuse stormwater run-off, or directional sheet flow over upland) and therefore sever jurisdiction upstream of such excluded features.

The Supreme Court has not spoken directly to the question of whether an ephemeral reach along or downstream of an otherwise jurisdictional tributary severs jurisdiction, and the agencies believe that the final rule appropriately reflects their statutory authority. In particular, the plurality decision in *Rapanos* emphasized that jurisdictional waters themselves must be relatively permanent and connected to traditional navigable waters, 547 U.S. at 742, but did not specify the type of connection necessary between the relatively permanent waters and downstream traditional navigable waters. Justice Kennedy's opinion stated that the Corps could identify by regulation categories of tributaries based on ''their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations,'' *id.* at 780–81, but fails to provide further guidance. The agencies conclude that the final rule appropriately reflects and balances these general guiding principles by exercising jurisdiction over perennial and intermittent tributaries but not ephemeral streams

and dry washes, while under certain circumstances allowing such channelized features to maintain jurisdiction between upstream and downstream more permanent waters.

Some commenters agreed with the agencies' proposal that ephemeral reaches should sever jurisdiction of upstream waters because those waters no longer have a continuous hydrologic surface connection of relatively permanent flow to a downstream jurisdictional water. Other commenters stated that the proposed definition of ''waters of the United States'' was inconsistent in that some forms of natural or artificial features could connect upstream tributaries with downstream jurisdictional waters, whereas ephemeral reaches would have severed jurisdiction of upstream perennial and intermittent streams. In addition, many commenters raised concerns about implementing a definition of ''tributary'' in which an ephemeral feature would sever jurisdiction of upstream reaches, indicating that it may be difficult to apply in the field. Commenters also stated that if ephemeral features severed jurisdiction of perennial and intermittent waters upstream, many waters in certain regions, such as the arid West, would be non-jurisdictional. Some commenters expressed concern that the proposed definition would place a burden on project applicants to identify and anticipate such ephemeral breaks to avoid potential responsibility for compensatory mitigation of upstream losses. The agencies have modified the final rule language in a manner that addresses these concerns. Under the final rule, tributaries that contribute surface water flow to a downstream jurisdictional water in a typical year through certain natural features (such as debris piles or boulder fields) or artificial features (such as culverts or dams) are tributaries, even though these features may result in an interruption in the surface water channel. A perennial or intermittent tributary above the natural or artificial feature does not lose its jurisdictional status as long as the natural or artificial feature continues to convey surface water flow from the upstream reach to a downstream jurisdictional water in a typical year.

Commenters also requested clarification on whether a natural feature through which a tributary flows could be considered a jurisdictional feature as part of the tributary itself, such as a boulder field or subterranean river. Natural or artificial features that do not satisfy the surface water flow conditions of the ''tributary'' definition are not tributaries under this rule, even if they convey surface water flow from upstream relatively permanent waters to downstream jurisdictional waters in a typical year. *See* Section III.A.3 for additional discussion.

Some commenters asked for clarification on whether tributaries are viewed as reaches or as an entire network. The agencies are using the term ''reach'' in this preamble to the final rule to mean a section of a stream or river along which similar hydrologic conditions exist, such as discharge, depth, area, and slope.[45] If a perennial tributary becomes intermittent and then ephemeral and then perennial again, it may be viewed as four separate reaches (*e.g.,* perennial reach, intermittent reach, ephemeral reach, perennial reach), especially if they also share other similarities with respect to depth, slope, or other factors. In general, a reach can be any length of a stream or river, but the agencies are clarifying for implementation purposes that such length is bounded by similar flow characteristics.

Commenters suggested that flow classification and jurisdictional status could be determined based on the flow in the majority of a reach (*i.e.,* whether it is perennial, intermittent, and ephemeral), which they said would be simpler than differentiating various segments from the broader stream reach. The agencies are not determining flow classification using the majority of the reach. Under the *Rapanos* Guidance, a tributary ''reach'' was identified by a stream order classification system where the relevant reach was used for purposes of a significant nexus determination. However, stream order is not directly relevant to stream and river jurisdiction under this final rule, and instead flow classification is a key aspect in determining the jurisdictional status of a tributary. The agencies conclude that such an approach is easier to implement in light of the final rule's ''tributary'' definition and is more consistent with the legal and scientific foundation for the rule. Along the length of a tributary, the flow classification may fluctuate, and the points at which flow classifications change are the points at which a reach is bounded. If a tributary flows through a non-jurisdictional ephemeral reach to downstream jurisdictional waters, the point at which a tributary becomes ephemeral may fluctuate upstream and downstream in a typical year based on climatic conditions, changes in topography and surrounding development, water input, and water withdrawals. When such a transition zone of flow classification occurs, the agencies will use best professional judgment and various tools to identify where the change in flow classification occurs. The agencies have historically implemented comparable approaches at transition zones, for example with the identification of the extent of tidal influence (also referred to as the head of tide). This generally occurs where a river flows into tidal waters and the agencies must identify the farthest point upstream where a tributary is affected by tidal fluctuations in order to determine which lateral extent to apply for the limits of jurisdiction (*i.e.,* high tide line or ordinary high water mark), permitting requirements, and similar factors. There is generally not a hard demarcation distinguishing where a waterbody ceases to be tidal, so the agencies must use best professional judgment utilizing all available information and tools which may assist in making the determination. *See* Section III.B.3 for additional information.

Many commenters recommended that tributaries that were altered or relocated should remain tributaries. The agencies agree with those comments and, consistent with the proposal, have included that provision in the final rule. Many commenters expressed concern about the challenges of implementing a flow-based ''tributary'' definition where many systems have been modified by human actions. Some commenters also stated that the use of ''naturally occurring'' in the proposed ''tributary'' definition was unclear and questioned how it would apply to modified systems. The agencies disagree with the proposition that identifying flow conditions would be challenging in modified systems. An altered tributary is one in which the flow or geomorphic conditions have been modified in some way, for example, by straightening a sinuous tributary, adding concrete or riprap to stabilize the banks of a tributary, reducing flow conditions from perennial to intermittent flow due to water withdrawals, or widening or adding physical features (such as riffle/pool complex restoration or check dams) to the tributary to reduce the velocity of flow. A relocated tributary is one in which an entire portion of the tributary may be moved to a different location, as when a tributary is rerouted around a city center to protect it from flooding or around a mining complex to enable extraction of commercially

[45] *See* Connectivity Report at A–10, defining ''reach'' as ''a length of stream channel with relatively uniform discharge, depth, area, and slope.'' A similar definition is used by the USGS, at *https://www.usgs.gov/faqs/what-a-reach.*

valuable minerals. To be considered a tributary, such features must continue to meet the flow conditions of the ''tributary'' definition. The agencies conclude that identifying flow conditions in these features would be no more challenging than identifying flow conditions in other tributaries, which the agencies have been doing to apply the *Rapanos* Guidance since 2008. In a relocated tributary, the reach that has been relocated may meet the definition of ''ditch'' or may be colloquially called a ditch, which is why, for simplicity and clarity, the agencies have included these ditches in the definition of ''tributary.'' The agencies also believe that retaining jurisdiction over the relocated tributary is consistent with its legal authorities and the agencies' treatment of impoundments of jurisdictional waters (*see* Section III.F), which may alter the course or form of a water of the United States but maintains sufficient surface water connection to a traditional navigable water in a typical year.

Some commenters requested clarification on how water diversions may affect the jurisdictional status of tributaries. A water diversion that completely reroutes a tributary through a tunnel would be considered an artificial feature that would not sever jurisdiction under this final rule. The tunnel itself is not a tributary under the rule, however, because it is not a surface water channel. This final rule clarifies that jurisdiction applies based on current flow classification in a typical year. When completing jurisdictional determinations in managed systems, just as in natural systems, the agencies will consider whether features meet the flow conditions of the ''tributary'' definition in a typical year. Managed systems are jurisdictional as long as they satisfy the definition of ''tributary,'' including the flow conditions. If a stream is ephemeral in a typical year due to managed water withdrawals, the feature is an excluded ephemeral stream. Tributaries that have been altered via water management systems, or whose morphology has been altered in some manner, maintain their tributary status as long as they are perennial or intermittent and contribute surface water flow to the territorial seas or a traditional navigable water in a typical year.

Under the pre-existing regulatory regime (recodified in the 2019 Rule), the agencies conducted a significant nexus analysis for certain types of waters referred to as ''non-relatively permanent waters,'' which includes ephemeral features and some intermittent streams. *See Rapanos* Guidance at 7 (''[R]elatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. However, CWA jurisdiction over these waters will be evaluated under the significant nexus standard[.]''). The definition of ''tributary'' in the final rule replaces existing procedures that utilize a case-specific ''significant nexus'' analyses of the relationship between a particular stream and downstream traditional navigable water. The agencies are eliminating this case-specific ''significant nexus'' analysis by providing a clear definition of ''tributary'' that is easier to implement. Justice Kennedy's ''significant nexus'' test for wetlands adjacent to nonnavigable tributaries was needed only ''absent more specific regulations,'' *Rapanos,* 547 U.S. at 782, because ''the breadth of [the Corps' existing tributary] standard . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it'' and thus ''precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.'' *Id.* at 781. In light of the ''more specific [tributary] regulations'' finalized in this rule, the agencies are eliminating the case-specific significant nexus review through categorical treatment, as ''waters of the United States,'' of all tributaries with perennial or intermittent flow that contribute surface water flow to downstream navigable-in-fact waters in a typical year. *See id.* at 780–81 (Kennedy, J., concurring in the judgment) (''Through regulations or adjudication, the Corps may choose to identify *categories of tributaries* that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'') (emphasis added). In doing so, the agencies believe they avoid interpretations of the CWA that raise significant constitutional questions. *See id.* at 738 (plurality) (''Even if the term 'the waters of the United States' were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity.'').

The agencies recognize that this is a departure from prior positions of the Federal government. The agencies also recognize that prior to the finalization of this rule, some courts applied the significant nexus standard articulated in Justice Kennedy's opinion as the exclusive test of CWA jurisdiction over certain waters. As described in detail in Section II.E, the agencies have analyzed the text, structure, and legislative history of the CWA in light of Supreme Court guidance and conclude that this final rule incorporates important aspects of Justice Kennedy's opinion, together with those of the plurality, to craft a clear and implementable definition that stays within their statutory and constitutional authorities.

The final ''tributary'' definition contains no flow volume requirement, but only a requirement of perennial or intermittent flow and a contribution of surface water flow to a paragraph (a)(1) water in a typical year. The agencies believe that establishing a specific flow volume requirement for all tributaries is inappropriate, given the wide spatial and temporal variability of flow volume in rivers and streams across the country. While the definition may in certain instances assert jurisdiction over bodies of water contributing ''the merest trickle,'' 547 U.S. at 769 (Kennedy, J., concurring in the judgment), to a traditional navigable water during certain times of the year, the agencies conclude that such bodies are '' 'waters' in the ordinary sense of containing a relatively permanent flow'' regardless of flow volume. *Id.* at 757 (Scalia, J., plurality).

Some commenters suggested that using stream flow volumes rather than flow duration classifications for the definition of ''tributary'' would be easier to implement. The agencies disagree with this suggestion based on their experience. In 1977, the Corps proposed to use flow volumes (*i.e.,* five cubic feet per second) to define ''headwaters'' in the definition of ''waters of the United States,'' and instead finalized the use of flow volumes for implementation of their general permit program. 42 FR 37129 (July 19, 1977). Stream flow volume is challenging to measure directly, in particular in an intermittent stream where flow is not always present and may require multiple field-based measurements that can make implementation inefficient and result in delays in making a jurisdictional determination. While flow duration classifications may also require field measurements, in certain instances

remote tools, such as remote sensing and aerial photography, can be used to observe presence or absence of flow and identify flow duration classifications, but cannot also assess flow volumes. In addition, the agencies have not identified a reasonable or appropriate rationale or justification for specific flow volumes that should establish jurisdiction given the broad nationwide applicability of the final rule.

A few commenters requested a flow duration metric (*e.g.,* 30, 90, or 185 days) to determine a jurisdictional tributary. Several commenters recommended the agencies adopt a definition of ''intermittent'' that contains the requirement of continuous flow for a specific duration, such as ''at least one month of the calendar year'' to provide certainty for determining flow classification. *See e.g.,* 30 CFR 710.5 (definition of ''intermittent'' used in a U.S. Department of Interior regulation). Several commenters also recommended a regionalized approach to flow classification. The agencies have finalized an approach that considers streamflow duration in the flow classification definitions generally (*e.g.,* ''flowing continuously year-round,'' ''flowing continuously during certain times of the year and more than in direct response to precipitation,'' and ''flowing . . . only in response to precipitation'') but without specifying an exact number of days of flow. The agencies are not providing a specific duration (*e.g.,* the number of days, weeks, or months) of surface flow that constitutes intermittent flow, as the time period that encompasses intermittent flow can vary widely across the country based upon climate, hydrology, topography, soils, and other conditions. The ''typical year'' construct captures that variability, however, and provides for regional and local variations in the actual application of a uniform nationwide definition. The agencies acknowledge that an approach utilizing a specific duration would provide for enhanced national consistency, but it would also undermine the regionalized implementation of intermittent tributaries as provided for under this final rule. Some commenters cautioned the agencies against treating intermittent streams similarly across the country based on a prescriptive flow duration metric, as intermittent streams in the arid West are fundamentally different from intermittent streams in the Southeast, for example. A specific duration requirement would also be challenging to implement—even landowners familiar with their properties may not know the number of days a stream flows per year.

Other commenters recommended the use of physical indicators of flow, such as ordinary high water mark and bed and banks, which could be regionalized for a field-based approach. These commenters stated that physical indicators can be more readily observable and can indicate flows of sufficient magnitude and duration to qualify as a tributary. The agencies disagree with these comments and conclude that physical indicators of flow, absent verification of the actual occurrence of flow, may not accurately represent the flow classifications required for tributaries under this rule. *See, e.g.,* 547 U.S at 781 (Kennedy, J., concurring in the judgment) (expressing concerns that a the Corps' existing tributary standard based, in part, on the ''possess[ing]'' of ''an ordinary high water mark, defined as a 'line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,' . . . seems to leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it''). For example, ephemeral streams can have an ordinary high water mark and bed and banks, which would not allow for the agencies or the public to distinguish between a non-jurisdictional ephemeral stream and a jurisdictional intermittent or perennial tributary using those physical indicators. Ephemeral streams in the arid West, for example, may have ordinary high water marks that were incised years ago following a single large storm. It makes more practical sense for a feature to be first assessed as a tributary, after which the lateral extent of that tributary can be identified using the ordinary high water mark.

Physical indicators, however, may be one line of evidence the agencies could use to evaluate whether a stream meets the flow requirements to be a tributary under this definition. These indicators could be regionalized to obtain a practical field-based approach for identifying the flow classification of a stream which is a required component of identifying a tributary. Such physical indicators are further discussed in Section III.D.3 of this notice. In addition, the agencies cannot always rely on field-based physical indicator methods—for example, when evaluating a site at a time that does not meet the definition of ''typical year.'' In some instances, completing a desktop determination with remote tools may supplement or substitute for field-based indicators.

3. How will the agencies implement the final rule?

The agencies will employ many different methods and tools to identify and determine whether a feature meets the definition of ''tributary'' under this final rule. A few commenters recommended that the agencies identify a variety of methods which may be employed to identify flow classifications, and that such methods involve tools readily available to a typical landowner. Methods and tools used by the agencies are generally available for the public to use so that they can make an informed decision about how to proceed with requests for jurisdictional determinations or authorization for activities under the CWA. The agencies believe that there are numerous cases where an informed decision can save valuable time and money by avoiding unnecessary jurisdictional determination requests. This can be done, for example, where landowners are familiar with the water features on their property and know that they only flow in response to a rain event, or that an isolated wetland in the middle of a ranch is not flooded by a nearby perennial river in a typical year. However, in cases where a member of the general public makes an informed decision to not request a jurisdictional determination and discharges pollutants into a waterbody that is, in fact, jurisdictional without required permits, the individual could be subject to the agencies' enforcement authorities under the CWA.

One of the first steps in determining whether a feature is a tributary is to identify relevant features on the landscape, such as rivers, streams, or similar naturally occurring surface water channels, as well as ditches. Field work to include direct observation and other reliable methods can indicate the existence of a tributary, such as stream gage data, elevation data, historic or current water flow records, flood predictions, statistical evidence, aerial imagery, and USGS maps.

Another step in determining whether a feature is a tributary is to identify whether the feature contributes surface water flow to a paragraph (a)(1) water either directly or through one or more paragraph (a)(2) through (4) waters in a typical year. The agencies intend to use several sources to identify the flow path of a potential tributary to determine whether surface water flow is being contributed eventually to a paragraph (a)(1) water. The agencies can use USGS maps, State and local knowledge or maps, aerial photography, or other remote sensing information so long as

the tools the agencies use have been verified to be reliable (*see, e.g.,* Section IV of this notice regarding limitations of existing aquatic resource mapping datasets) to assess a feature's flow path. The agencies can also use available models, including models developed by Federal, State, tribal and local governments, academia, and the regulated community. One such model includes the ''Flow (Raindrop) Path'' GIS tool which allows the user to click a point on a map to signify a falling raindrop on that point, after which a flow path is drawn to estimate where the raindrop may flow, eventually making its way to the ocean if the tributary network allows for it (*https://streamstats.usgs.gov/ss/*). The StreamStats tool may potentially be used to identify the flow path from the subject water to the downstream paragraph (a)(1) water using the ''Flow (Raindrop) Path'' component of the tool. These tools could be used in conjunction with field observations, data, and other desktop tools to evaluate whether a specific point on a potential tributary may have a surface water connection to a downstream paragraph (a)(1) water in a typical year.

In addition to identifying the presence of rivers, streams, or similar naturally occurring surface water channels which contribute surface water flow to a downstream paragraph (a)(1) water, the agencies must assess the feature's flow classification. The agencies have substantial experience using visual hydrologic observations, field data and indicators, and remote tools to determine flow classification. Commenters expressed several key concerns about the flow classification concept. Some commenters noted that there is no established or universally accepted methodology to identify flow classification. The agencies agree that there is no universally accepted methodology; however, scientists, environmental consultants, and other water resource professionals, including agency staff, have used the terms ''perennial,'' ''intermittent,'' and ''ephemeral'' for decades in the field. Indeed, the agencies have used these terms to evaluate the jurisdictional status of waters for more than a decade, in accordance with the 2008 *Rapanos* Guidance.[46] More recently, the Corps has applied these terms in its Nationwide Permit Program (NWP). *See* 82 FR 1860, 2005 (January 6, 2017). The terms are used in the NWP in a manner similar to the definitions in this final rule, but in the NWP the terms adhere more closely to the generally-accepted scientific definitions that focus on groundwater rising above the bed of the stream channel as differentiating between ephemeral features and perennial and intermittent waters. *See id.* at 2006. For the reasons explained in Section III.A.2, however, the agencies have finalized definitions for the three flow classification terms in this rule that better align with the scope of CWA jurisdiction, while improving clarity of the rule and transparency of the agencies' implementation. These flow classification terms can be implemented using readily available resources in addition to visual assessments.

Some commenters expressed concern that the information needed to determine flow classification would require a high burden of proof and would result in significantly longer processing times for jurisdictional determinations. The agencies will continue to bear the burden of proof for determinations and, as noted above, have already implemented a version of the flow classification concept under the *Rapanos* Guidance and the Corps' NWP. The agencies disagree with the suggestion that the use of these flow classifications will result in a lengthier process for jurisdictional determinations. With the clear and categorical definition as to the scope of CWA jurisdiction included in this final rule, the elimination of the significant nexus determination requirement for tributaries, the use of existing tools, and the development of new tools, jurisdictional determinations for tributaries should be more efficient under this final rule than under prior regulatory regimes.

Some commenters also noted that the data and resources identified in the preamble to the proposed rule to evaluate flow classification have limited availability. The agencies agree that some data and resources have significant limitations and other national-level tools and methods may not be readily available or accurate for use in many areas of the country, including in rural or remote areas and in heavily modified systems. The agencies will continue to rely on local knowledge, information provided by the landowner, and local, State, and tribal agencies, and a variety of additional tools and resources to evaluate flow classification in such systems. The final rule language on flow classifications allows for consistent implementation approaches for modified systems and more natural systems.

Visual observations of surface hydrology are a useful primary method to identify flow classifications. The agencies expect that landowners will often have sufficient knowledge to understand how water moves through their properties, although visual observations could be conducted by Federal, State, tribal and local agencies, and other public or private organizations, as appropriate. The agencies also recognize that a single visual observation may not always be sufficient to accurately determine flow classification, and visual observations should generally be combined with precipitation and other climate data and expected flow seasonality to accurately determine flow classification. For example, observing flow directly after a large rainfall or observing no flow during a dry season may not be good indicators of a stream's typical flow classification.

In addition to visual observations of surface hydrology, the agencies may use field-based indicators and tools as another line of evidence to determine flow classification. Some commenters recommended using local flow data collected by government agencies, where available, and the agencies acknowledge that this could be a useful source of data. The agencies have also used methods such as trapezoidal flumes and pressure transducers for measuring surface flow. During the public comment period, many commenters mentioned the availability of existing rapid, field-based, streamflow duration assessment methods that have been developed for use across various States or geographic regions and suggested that these existing methods could be used to distinguish between streams with perennial, intermittent, and ephemeral flow classifications. Many commenters also recommended that the agencies develop

[46] Under the *Rapanos* Guidance, the agencies applied a different jurisdictional test based upon a tributary's flow regime. ''The agencies will assert jurisdiction over relatively permanent non-navigable tributaries of traditional navigable waters without a legal obligation to make a significant nexus finding.'' *Rapanos* Guidance at 7. Relatively permanent tributaries were described in the guidance as tributaries that ''typically flow year-round or have continuous flow at least seasonally (*e.g.,* typically three months)[.]'' *Id.* at 1. At the same time, the guidance established that '' 'relatively permanent' waters do not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. . . . CWA jurisdiction over these waters will be evaluated under the significant nexus [test.]'' *Id.* at 7. The agencies also note that in June 2009, the Corps added a classification code ''R6,'' entitled ''Riverine Ephemeral,'' to identify ephemeral aquatic resources. The Corps created the ''R6'' code to provide clarity to field staff when identifying ephemeral waters for entry into the ORM2 database. *See https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Bulk%20Upload/Bulk%20Data%20Cowardin.pdf.*

similar methods for use across the United States, with input from the public and the scientific community.

The agencies recognize that some States have developed streamflow duration assessment methods (SDAMs) that use physical and biological field indicators, such as the presence of hydrophytic vegetation and benthic macroinvertebrates, to determine the flow duration class of a stream reach as perennial, intermittent, or ephemeral (*e.g.,* the Streamflow Methodology for Identification of Intermittent and Perennial Streams and Their Origins, developed by the North Carolina Division of Water Quality, available at *http://portal.ncdenr.org/c/document_library/get_file?uuid=0ddc6ea1-d736-4b55-8e50-169a4476de96&groupId=38364*). The EPA, the Corps, and the State of Oregon also previously developed a regionalized SDAM that has been validated for use throughout the Pacific Northwest since 2015 (available at *http://www.epa.gov/measurements/streamflow-duration-assessment-method-pacific-northwest*).

Because SDAMs use indicators that are robust to seasonal and short-term climatic variability, these methods can be applied in a single site visit to distinguish streamflow duration when a channel is flowing or in the absence of flow. The agencies agree with commenters that these methods are useful and practical tools that could be used to help inform timely and predictable jurisdictional determinations, for implementation of the final ''tributary'' definition, in the States and regions where previously developed SDAMs are available. The agencies also agree with commenters that developing similar methods for use across the United States would promote consistent implementation of the final tributary definition and note that the agencies are currently working to develop regionally-specific SDAMs for nationwide coverage. The agencies believe that developing regionally-specific SDAMs is important to account for the differences in climate, geology, and topography that can influence relationships between physical and biological indicators and streamflow permanence.

A variety of remote, desktop tools could be used to determine flow classification of potential tributaries, particularly when coupled with site specific information. In meetings with stakeholders, some local government officials recommended using local maps developed by government agencies, where available, as opposed to national maps, noting for example that the National Hydrography Dataset (NHD) has been shown to overestimate flow in certain areas. The agencies will assess flow classification using a compilation of the best available mapping sources, which may include the NHD [47] or local maps, as well as other remote tools such as photographs, StreamStats by the USGS (available at *https://streamstats.usgs.gov/ss/*), Probability of Streamflow Permanence (PROSPER) by the USGS (available at *https://www.usgs.gov/centers/wy-mt-water/science/probability-streamflow-permanence-prosper*), Natural Resources Conservation Service (NRCS) hydrologic tools and soil maps, desktop tools that provide for the hydrologic estimation of a discharge sufficient to generate intermittent or perennial flow (*e.g.,* a regional regression analysis or hydrologic modeling), USGS topographic data, or modeling tools using drainage area, precipitation data, climate, topography, land use, vegetation cover, geology, and/or other publicly available information. The agencies will continue to rely on field observations and field data to verify desktop assessments as appropriate, and will also consider data and tools developed by academia, the regulated community, and other stakeholders.

Ultimately, multiple data points and multiple sources of information should be used to determine flow classification. For example, a ''blue line stream'' on a USGS topographic map and/or mapped in the NHD may indicate a potential tributary. Combining this information with stream order can further inform determinations of flow classification, as higher order streams may be more likely to exhibit perennial or intermittent flow compared to lower order streams, though some headwater streams are perennial or intermittent. The agencies could further determine whether flow data, field indicators, or visual observations of surface hydrology are available to confirm a stream's flow classification. Field-based and remote information may vary in availability and accuracy in different parts of the country, so care will be taken to evaluate additional information prior to reasonably determining the presence or absence of a tributary. Also, the agencies will continue to use the specific, validated tools developed by States to identify stream flow classifications.

As noted previously, the agencies will use best professional judgment and various tools to identify where the change in flow classification occurs (*e.g.,* from intermittent to ephemeral and vice-versa). The tools described above can assist in the identification of that transition in flow classification and therefore the delineation of a reach as used in this final rule. The primary distinction necessary under this rule is the identification of when a perennial or intermittent reach transitions to an ephemeral reach and vice-versa. The agencies acknowledge that there are spatial and temporal variations in stream attributes such that there may not always be a distinct point demarcating the flow classification changes. For example, a single distinct point may occur at the confluence of two ephemeral streams, which become intermittent at the confluence. However, in some situations between stream confluences, there may be a transition zone where the flow classification change fluctuates within that zone throughout a typical year. The agencies will gather information from upstream and downstream of the transition zone as far as needed to get an accurate assessment of the conditions on the ground when it may be necessary for a decision point. This transition zone where the change in flow classification occurs will be evaluated by the agencies using the tools described above, as well as best professional judgment, to identify the most appropriate point at which to distinguish flow classifications.

In addition to determining the flow classification of a potential tributary, the agencies will also determine whether climatic conditions are typical to determine whether the water feature meets the definition of ''tributary'' under the final rule. As discussed in Section III.A.1, the final rule defines the term ''typical year'' to mean ''when precipitation and other climatic variables are within the normal periodic range (*e.g.,* seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.'' The agencies will use readily available climatic data and tools to evaluate normal precipitation and climatic conditions for the region at issue and will ensure that the time period of evaluation is representative of the normal characteristics of the subject waterbody (*i.e.,* it is neither too wet nor too dry). A detailed discussed of how the agencies intend to implement this definition is provided in Section III.A.1.

In utilizing the data sources described above and determining the flow classifications of tributaries under typical climatic conditions, the agencies recognize the need to consider seasonality and timing of tributary

[47] As described in the RPA for the final rule, the agencies note that NHD at High Resolution does not distinguish intermittent from ephemeral features in most parts of the country and may not accurately identify on-the-ground flow conditions.

flows. For instance, in some geographic areas, intermittent streams may typically flow only at certain times, such as during seasonally wet conditions. Thus, the agencies would not expect to observe streamflow in seasonally dry conditions, even if precipitation during those dry conditions is considered typical for the dates of interest. The agencies may need to use the multiple tools described above to determine the flow classification for a tributary that is not flowing because of seasonally dry conditions, including remote- and field-based hydrologic and non-hydrologic indicators of the flow classification that would occur during seasonally wet conditions. For example, remote indicators might include a series of aerial and satellite images, spanning multiple years and taken under normal climatic conditions, the majority of which depict water flowing in the channel.

In the field, evidence of recent flow can be observed through the presence of multiple or abundant signs of certain ordinary high water mark indicators for the region, such as the presence of point bars, concentrations of drift deposits, or the destruction of terrestrial vegetation. Furthermore, certain wetland hydrology indicators can help clarify whether water is present in the area only immediately following precipitation events, or whether longer-term saturation has likely occurred. An example of an indicator is the presence of oxidized rhizospheres along living root channels, which can take four to eight weeks of continuous saturation to form. This indicator alone cannot be conclusive of water flowing above the surface, but multiple positive indicators could provide an increased degree of confidence in these situations. Conversely, the agencies may observe flow during wetter than normal precipitation conditions. In this case, the agencies can use other lines of evidence, including remote- and field-based hydrologic and non-hydrologic indicators of flow classification as appropriate. Streams that contain flowing water during wetter than normal climatic conditions, but which lack an ordinary high water mark or hydrology indicators may be less likely to flow during normal climatic conditions. This assessment is further supported if the majority of wet season aerial and satellite images taken during normal climatic conditions depict a dry channel. In addition, a landowner's specific information indicating whether a water feature meets the definition of a ''tributary'' under ''typical year'' conditions may also aid in determining flow classification.

In addition to requesting clarification about when a surface water feature meets the definition of ''tributary,'' some commenters also stated that it would be helpful to incorporate the lateral limits of jurisdiction directly into the ''tributary'' definition and questioned how such limits would be determined. In addition, some commenters expressed concern regarding the status of braided rivers that migrate and have multiple channels where the jurisdictional limits would be identified. The lateral limits of jurisdiction for tributaries extends to the ordinary high water mark, as indicated by the physical characteristics provided in the definition. Consistent with existing practice, the agencies intend to continue to use the Corps' ordinary high water mark manuals, as well as Regulatory Guidance Letter 05–05, when making ordinary high water mark determinations.[48] The outer limits of a braided channel may be used to identify the lateral extent when appropriate, which may encompass multiple low-flow channels and the migratory islands that separate them. Adding the ordinary high water mark concept to the definition of ''tributary'' is unnecessary because it is already located in the Corps' regulations at 33 CFR 328.4 to identify the lateral extent of jurisdiction. The agencies are finalizing the rule with the definition of ''ordinary high water mark'' as proposed, however, to improve consistency between the corresponding regulations and also because the term ''ordinary high water mark'' is used in the final rule's definition of ''upland.''

E. Ditches

1. What are the agencies finalizing?

The regulatory status of ditches has long created confusion for farmers, ranchers, irrigation districts, municipalities, water supply and stormwater management agencies, and the transportation sector, among others. To address this confusion, the agencies proposed to add a new category to the definition of ''waters of the United States'' for jurisdictional ditches and similar artificial features. The agencies proposed to include in that category: (1) Ditches that are traditional navigable waters or that are subject to the ebb and flow of the tide (*e.g.,* paragraph (a)(1) waters); (2) ditches that are constructed in tributaries or that relocate or alter tributaries as long as the ditch satisfies the flow conditions of the tributary definition; and (3) ditches constructed in adjacent wetlands as long as the ditch likewise satisfies the conditions of the tributary definition. 84 FR 4203. All other ditches were excluded from CWA jurisdiction under the proposal.

Many commenters did not find that the separate jurisdictional category of ''ditches'' provided the regulatory clarity and predictability that the agencies had sought. They instead stated that the separate category created confusion. Other commenters said that the proposed separate category provided additional clarity, while others argued that all ditches should be excluded. Other commenters stated that the proposal was too limiting and should include more ditches as jurisdictional, including any ditch that contributes perennial, intermittent, or ephemeral flow to other ''waters of the United States.''

In response to these diverse comments, the final rule does not include the separate category of ''ditches'' under paragraph (a)(3) as proposed and instead incorporates the elements of the proposal into the ''tributary'' category, with some additional clarifying edits. Ditches that are paragraph (a)(1) waters do not need to be identified in another jurisdictional category, so that aspect of the proposal has been eliminated as unnecessary and redundant. Ditches that are constructed in or that relocate a tributary are included in the final rule as tributaries, as long as the ditch satisfies the flow conditions of the ''tributary'' definition. The same is true for ditches that are constructed in adjacent wetlands.

The agencies did not retain the term ''alter'' from the proposed rule given the potential confusion associated with the use of that term. As some commenters noted, most, if not all, ditches may have some effect on and therefore may ''alter'' a tributary or some portion of the tributary system. As described throughout this notice, the CWA does not authorize the agencies to regulate all waters, nor does it authorize the agencies to regulate all ditches that exist across the landscape to assist in water management activities. The agencies conclude that ditches that are ''constructed in'' or that ''relocate'' a tributary, and that satisfy the flow conditions of the ''tributary'' definition, are appropriately within the authority granted to the agencies under the CWA, consistent with the legal principles outlined in Section II.E. The regulation

[48] The Corps' ordinary high water mark manuals are available at: *https://www.erdc.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/486085/ordinary-high-water-mark-ohwm-research-development-and-training/.* Regulatory Guidance Letter 05–05 is available at: *https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll9/id/1253.*

and management of all other ditches is appropriately left to States and Tribes as part of their primary authority over land and water resources within their border. *See* 33 U.S.C. 1251(b), 1370.

The agencies consider it to be clearer to include in the definition of ''tributary'' that the alteration of a tributary does not modify its jurisdictional status as a tributary as long as it continues to meet the flow conditions of the definition, rather than to classify the alteration of a tributary as a ditch. This is also consistent with longstanding agency practice. The agencies have modified the exclusion for ditches in paragraph (b)(5) to reflect these changes. The agencies also recognize that in certain circumstances, ditches that are constructed in adjacent wetlands that lack sufficient flow to be considered tributaries under this final rule may develop wetland characteristics if not maintained. As discussed below, in limited circumstances, those wetlands may be treated as adjacent wetlands, subject to the permitting exemptions in 33 U.S.C. 1344(f). All other ditches are excluded under the final rule.

The agencies believe that this approach to ditches best addresses the comments received and provides clarity and regulatory certainty to determine when a ditch may be a jurisdictional water and when a ditch may be excluded, consistent with the agencies' authority under the CWA. Finally, as discussed in Section III.A.3, non-jurisdictional ditches under this final rule may be capable of conveying channelized surface water flow between upstream relatively permanent jurisdictional waters and downstream jurisdictional waters in a typical year. In this example, the ditch itself, however, would remain non-jurisdictional.

2. Summary of Final Rule Rationale and Public Comment

During the 1970s, the Corps interpreted its authorities under the CWA as excluding drainage and irrigation ditches from the definition of ''waters of the United States.'' *See, e.g.,* 40 FR 31320, 31321 (July 25, 1975) (''Drainage and irrigation ditches have been excluded.''). The ditch exclusion was expressly stated in regulatory text in the Corps' 1977 regulations. 33 CFR 323.2(a)(3); 42 FR 37122, 37144 (July 19, 1977) (''manmade nontidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States under this definition''). As the Corps explained in 1977: ''nontidal drainage and irrigation ditches that feed into navigable waters will not be considered 'waters of the United States' under this definition. To the extent that these activities cause water quality problems, they will be handled under other programs of the FWPCA, including Section 208 and 402.'' 42 FR at 37127 (July 19, 1977). Similar statements in preambles to the proposed rules from the early 1980s confirmed this interpretation: ''man-made, non-tidal drainage and irrigation ditches excavated on dry land are not considered waters of the United States.'' 45 FR 62732, 62747 (September 19, 1980); *see also* 48 FR 21466, 21474 (May 12, 1983) (''Waters of the United States do not include the following man-made waters: (1) Non-tidal drainage and irrigation ditches excavated on dry land, (2) Irrigated areas which would revert to upland if the irrigation ceased.'').

The general exclusion for non-tidal drainage and irrigation ditches excavated in dry land continued through 1986, although the Corps modified its earlier statements that year by noting in preamble text that ''we generally do not consider'' such features to be ''waters of the United States,'' and indicating that the agency would evaluate certain ditches on a case-by-case basis. 51 FR 41206, 41217 (November 13, 1986).[49] The EPA also included similar language in a **Federal Register** notice in 1988. 53 FR 20764 (June 6, 1988). The Corps further clarified the regulation of ditches in its nationwide permit regulation in March 2000, stating that ''non-tidal drainage ditches are waters of the United States if they extend the [ordinary high water mark] of an existing water of the United States.'' 65 FR 12818, 12823 (March 9, 2000). In other words, if flow or flooding from a jurisdictional non-tidal river or stream inundated an upland ditch, the agencies would assert jurisdiction over that upland ditch because the ordinary high water mark of the river or stream extends into the ditch, and the agencies would then assert jurisdiction over the entire reach of that ditch.

This final rule clarifies the regulatory status of ditches in a manner that is more consistent with the Corps' regulations following the 1972 and 1977 CWA amendments, with some modifications to provide a clear definition that also falls within the scope of the agencies' authority under the CWA. When Congress enacted the 1972 amendments, it specifically included ditches and related artificial features as ''point sources,'' declaring them to be ''discernible, confined, and discrete conveyances . . . from which pollutants are or may be discharged.'' Public Law 92–500, 86 Stat. 816, 887 (1972) codified at 33 U.S.C. 1362(14). Congress envisioned protecting the quality of the navigable waters, defined as ''waters of the United States'' at that time, by regulating the discharge of pollutants from conveyances like pipes, ditches, channels, tunnels and similar features into waters of the United States. *Id.* at 1362(12) (defining ''discharge of pollutant'' as ''any addition of any pollutant to navigable waters from any point source'').

The agencies evaluated the treatment of ditches in the CWA and its legislative history to discern whether Congress intended ditches to be point sources, navigable waters, or both. For example, Congress exempted the discharge of dredged or fill material into waters of the United States when that discharge occurs as a result of the construction or maintenance of irrigation ditches, the maintenance of drainage ditches, or minor drainage associated with normal farming activities. 33 U.S.C. 1344(f)(1)(A), (C) (exempting such activities from sections 301, 402, and 404 of the Act). One possible interpretation of these exemptions is that they function as an implicit acknowledgement that there may be some irrigation or drainage ditches that are waters of the United States, thus the need to exempt common agricultural and related practices in those waters from CWA section 404 permitting. Another interpretation is that dredged or fill material or other pollutant discharges arising from such activities are not subject to federal permitting if those materials get washed down the ditch into a connected water of the United States.

For irrigation ditches, which typically are constructed in upland but frequently must connect to a water of the United States to either capture or return flow, Congress exempted both the construction and maintenance of such facilities. 33 U.S.C. 1344(f)(1)(C); *see also* 33 U.S.C. 1362(14) (excluding agricultural stormwater discharges and irrigation return flows from the definition of ''point source'').[50] The

[49] The Corps also moved the ditch exclusion from rule text to preamble language in 1986 but stated that this was not a substantive change and that jurisdiction was not expanded. 51 FR 41206, 41216–17 (November 13, 1986).

[50] The agencies also note that Congress exempted the discharge of irrigation return flows into waters of the United States from the section 402 permit program. 33 U.S.C. 1342(l). This exemption potentially would not be needed if agricultural drainage ditches carrying irrigation return flow were themselves waters of the United States, as the entry point of the irrigation return flow into the drainage ditch might then lack the requisite point source discharging mechanism given the diffuse overland flow entry point from the field to ditch in most circumstances.

construction activities performed in upland areas are beyond the reach of the CWA, but the permitting exemption applies to the diversion structures, weirs, headgates, and other related facilities that connect the irrigation ditches to jurisdictional waters. *See, e.g.,* Corps, *Regulatory Guidance Letter No. 07–02,* at 1–2 (July 4, 2007).

For drainage ditches, by contrast, the permitting exemption is limited to only maintenance of such ditches. 33 U.S.C. 1344(f)(1)(C). That is because a parallel exemption for construction would allow the drainage of wetlands subject to CWA jurisdiction without a permit. Congress' intent to prevent such a result is evident in the ''recapture'' provision of 33 U.S.C. 1344(f)(2). *See, e.g.,* Sen. Rpt. 95–370, 95th Cong. 1st Sess., at 76–77 (July 19, 1977) (noting that exempted ''activities should have no serious adverse impact on water quality if performed in a manner that will not impair the flow and circulation patterns and the chemical and biological characteristics of the affected waterbody'' and noting that the ''exemption for minor drainage does not apply to the drainage of swampland or other wetlands'').

In summary, Congress may have envisioned the interconnection between the irrigation and drainage ditches and down-gradient waters of the United States as creating the need for the section 404(f) permitting exemptions, not necessarily that those ditches themselves are waters of the United States. Or Congress could have envisioned that some drainage ditches constructed in jurisdictional wetlands become waters of the United States themselves and thus require section 404(f) permitting exemptions for maintenance work performed in them. The agencies have not been able to identify any legislative history that signals the clear intent of Congress on this complex topic, and commenters provided a diverse range of viewpoints that failed to provide a clarifying position. To resolve the ambiguity, the agencies are interpreting the statutory text in section 404(f) and its legislative history as an indication that Congress may have intended, in certain limited circumstances, that ditches constructed in jurisdictional wetlands could become jurisdictional waters themselves. The agencies believe that the final rule formulation adheres more closely to the language of the statute and the positions articulated by the plurality opinion in *Rapanos. See, e.g.,* 547 U.S. at 735–36 and n.7.

Many commenters requested the agencies clarify that a water of the United States and point source are mutually exclusive. Some commenters expressed concern about features which may be considered point sources rather than waters of the United States under the proposed rule, and whether such features would require section 402 permits to convey pollutants downstream. Other commenters stated that permit requirements may need to be modified by sampling at the downstream end of the ditch to demonstrate that pollutants are being added to a water of the United States. The final rule does not make any changes to the agencies' interpretation of the definition of ''point source'' in CWA section 502(14). The agencies believe that this final rule will help clarify whether a ditch is a water of the United States or a point source. Either it is a water of the United States that subjects a discharger to sections 402 and 404 permitting requirements for direct discharges into the ditch, or, if it is non-jurisdictional but conveys pollutants to downstream jurisdictional waters, it may be a point source that subjects a discharger into a ditch to section 402 permitting requirements. Both scenarios could also be subject to statutory exemptions that would obviate the need for a permit. In addition, if the ditch is a non-jurisdictional water that does not convey pollutants, it would not require a permit.

The agencies recognize that a change in jurisdiction resulting from this rule may change the scope of application of the CWA regulatory programs to a particular water, but the longstanding approach that the agencies have taken to implementing and enforcing those programs would remain the same. If a CWA section 402 permit is not currently required for a discharge to a water, it is unlikely that this final rule will create a requirement for a new CWA permit. If a section 402 permit is currently required for a discharge to a water that is no longer jurisdictional under this final rule, that permit may no longer be required; it may still be required if the non-jurisdictional feature conveys a discharge of pollutants from a point source to a water of the United States; or it may still be required but the conditions associated with the permit may need to be modified, subject to applicable anti-backsliding permit requirements.

This final rule includes the agencies' longstanding interpretation that ditches that satisfy any of the conditions of a paragraph (a)(1) water are waters of the United States as paragraph (a)(1) waters. This also includes tidal ditches and ditches that transport goods and services in interstate and foreign commerce, as those ditches—more commonly referred to as ''canals''—provide important commercial navigation services to the nation and operate more like natural waters traditionally understood as navigable. *See, e.g., id.* at 736 n.7 (Scalia, J., plurality) (''a permanently flooded man-made ditch used for navigation is normally described, not as a 'ditch,' but a 'canal' ''). The Los Angeles River, for example, is a water of the United States (having been determined to be a traditional navigable water) and is not excluded under paragraph (b) even where it has been channelized or concreted. Other examples include the St. Lawrence Seaway, the Sturgeon Bay Ship Canal, and the Chesapeake and Delaware Canal.

Under the final rule, the agencies limit the term ''waters of the United States'' to apply to clearly defined ditches and related features that meet the flow conditions of the ''tributary'' definition and are not otherwise excluded. The agencies include ditches in the ''tributary'' category that were constructed in or relocated a tributary and that continue to meet the flow conditions of the ''tributary'' definition. The final rule retains the agencies' longstanding position that the alteration or relocation of a tributary does not modify the jurisdictional status of that water. Accordingly, ditches that relocate a tributary or are constructed in a tributary would be jurisdictional as tributaries. This provision is also consistent with the agencies' longstanding, historic position that non-tidal ditches excavated in upland (and historically described as ''dry land'') are not jurisdictional.

The agencies also include ditches in the ''tributary'' category that were constructed in a wetland that meets the definition of ''adjacent wetland,'' as long as the ditch also satisfies the flow conditions of the ''tributary'' definition. As discussed above, this approach aligns the rule with the CWA section 404(f) permitting exemption for the maintenance but not construction of drainage ditches, and the associated concern expressed during the legislative process for the 1977 CWA amendments related to draining swamps and wetlands. The provision is restricted to ditches that satisfy the flow conditions of the definition of ''tributary,'' which aligns the treatment of jurisdictional ditches with natural tributaries. *See* Section III.D for a broader discussion of the ''tributary'' category.

Ditches used to drain surface and shallow subsurface water from cropland are a quintessential example of the interconnected relationship between land and water resource management, as

is the case for managing water resources in the Western United States, conveying irrigation water to and from fields, and managing surface water runoff from lands and roads following precipitation events—all activities that rely on ditches. *See, e.g., FERC* v. *Mississippi,* 456 U.S. 742, 767 n.30 (1982) (characterizing ''regulation of land use [as] perhaps the quintessential state activity''). The majority of these ditches will not be jurisdictional under the final rule. This final rule therefore effectuates the clear policy directive from Congress to preserve and protect the primary authority of States over land and water resources within their borders. *See* 33 U.S.C. 1251(b), 1370.

Commenters had differing views on the jurisdictional status of ditches. Many commenters supported the agencies' proposed approach to exclude many types of ditches, in particular those ditches constructed in upland which do not relocate a tributary. Some commenters stated that ditches should be jurisdictional even if constructed in upland if they have perennial flow. Some commenters recommended the agencies use the function of the ditch as the basis for an exclusion, such as all agricultural ditches, regardless of flow. The agencies disagree with the inclusion of upland ditches as jurisdictional waters aside from ditches that relocate a tributary or that meet the conditions of paragraph (a)(1). Such ditches are not part of the naturally occurring tributary system and are not something the agencies consider to be within their authority to regulate under the CWA. Upland ditches (other than those ditches that relocate a tributary or that meet the conditions of paragraph (a)(1)) do not fall under the ordinary meaning of the term ''waters'' within the scope of the CWA. In general, upland ditches were not jurisdictional for decades under the agencies' previous definitions of ''waters of the United States,'' and they are not jurisdictional under this final rule (with the exceptions noted above). The agencies considered identifying and excluding ditches based on the function or purpose of the ditch but concluded that such an approach could result in the regulation of ditches with ephemeral flow and the exclusion of ditches which are essentially relocated tributaries. Both outcomes would be contrary to the agencies' interpretation of the scope of CWA jurisdiction described throughout this notice.

The agencies recognize that there have been questions over time about the jurisdictional status of ditches that are not maintained. Under this final rule, a ditch constructed in an adjacent wetland that contributes less than perennial or intermittent flow to a paragraph (a)(1) water in a typical year and that, due to lack of maintenance, gains wetland characteristics may be viewed as an adjacent wetland if it meets the definition of both ''wetlands'' under paragraph (c)(16) and ''adjacent wetlands'' under paragraph (c)(1). For example, a ditch constructed in an adjacent wetland that abuts a tributary may have portions that could be considered an adjacent wetland if the portions meet the definition of ''wetland.'' Only the portion or portions of the ditch that meets the definition of ''adjacent wetland'' are jurisdictional under this final rule. Other ditches not constructed in adjacent wetlands, or not otherwise covered by paragraph (a)(1) or (2), are excluded from jurisdiction under paragraph (b)(5). Such an approach aligns the treatment of ditches as tributaries and adjacent wetlands in this final rule with the section 404(f) permitting exemption for the maintenance but not construction of drainage ditches, and the associated concern expressed during the legislative process for the 1977 amendments related to draining swamps and wetlands.

The agencies also note that the maintenance of certain jurisdictional ditches may occur without permitting under the section 404(f) exemptions of the CWA. Congress expressly excluded the construction and maintenance of irrigation ditches and the maintenance of drainage ditches (such as farm or roadside drainage ditches, many of which are also excluded from jurisdiction under this rule) from the permitting requirements of sections 301, 402, and 404. Discharges of dredged or fill material associated with those exempt activities into a ditch constructed in an adjacent wetland are therefore exempt from CWA permitting, even if those materials are transported down the ditch to other jurisdictional waters. The agencies note that section 404(f) has a recapture provision that is designed to override the permitting exemptions in section 404(f) if the otherwise exempt activity alters the previous use of a jurisdictional water through impairment of the circulation or flow of such waters or a reduction in the reach of such waters. 33 U.S.C. 1344(f)(2). The agencies are aware that in some circumstances, questions about the applicability of this recapture provision to ditches that develop wetland characteristics have created confusion. Some question whether the development of wetland characteristics in a ditch establishes a new use for the water feature such that the recapture provision overrides the ditch maintenance exemption. This interpretation would eliminate the maintenance exemption from performing the very purpose Congress intended—allowing the dredging of the bottom of the ditch to eliminate obstructions to flow, including vegetation, without the need for a permit.

Many commenters noted that under the proposed rule, ditches must meet the definition of ''tributary'' to be jurisdictional, but because a ''ditch'' was defined as an artificial channel and a tributary was ''naturally occurring,'' a ditch could never meet the definition of ''tributary.'' The phrase ''naturally occurring'' does not exclude modified natural tributaries. The final rule clarifies that the ''alteration'' or ''relocation'' of a tributary does not modify its jurisdictional status as long as it originally occurred naturally and continues to satisfy the flow conditions of the definition. In addition, the agencies have clarified in the final rule that the definition of ''tributary'' includes ditches that are constructed in or relocate tributaries so long as the ditch satisfies the flow conditions of the definition. A ''naturally occurring'' tributary may be altered in such a manner that it no longer appears ''natural'' and instead has been constructed to become a channel that conveys water. One such example is the Los Angeles River. Such a feature may satisfy the definition of ''ditch'' in this rule, but it also satisfies the definition of ''tributary,'' which overrides the general exclusion for ditches in paragraph (b)(5) as clarified in that exclusion. A ditch that straightens a tributary is considered to be ''constructed in'' a tributary, and the ditch would be jurisdictional as a tributary so long as it continues to meet the flow conditions of the ''tributary'' definition.

The proposed rule required ditches to satisfy the ''conditions'' of the ''tributary'' definition to be jurisdictional as tributaries; however, the agencies have clarified in the final rule that the ditches must satisfy the *flow conditions* of the ''tributary'' definition to be jurisdictional as a tributary. This requirement allows for such ditches to be artificial (as in not ''naturally occurring'') and still be considered tributaries. The agencies' longstanding interpretation of the CWA is that tributaries that are altered or relocated tributaries are jurisdictional, and the agencies are not changing this interpretation. If a tributary is channelized, its bed and/or banks are

altered in some way, it is re-routed and entirely relocated, or its flow is modified through water diversions or through other means, then it remains jurisdictional under the final rule as long as it continues to satisfy the flow conditions in the definition of ''tributary.''

Finally, the agencies note that starting in the early 2000s, certain ditches (such as roadside and agricultural ditches) have been regarded by the Corps as jurisdictional if water from another jurisdictional water, such as a perennial river, overflows into a ditch and extends the ordinary high water mark of the contributing water into the ditch. The Corps has then asserted jurisdiction over the entire ''reach'' of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch. Under this final rule, the agencies will continue the existing practice of regulating portions of otherwise non-jurisdictional ditches as waters of the United States based on the ordinary high water mark of the contributing water, *but only up to* the location of the ordinary high water mark, as mandated by existing Corps regulations. The agencies will not, however, assert jurisdiction over the entire ''reach'' of the ditch regardless of the location of the ordinary high water mark in that portion of the ditch. Those regulations establish the limits of jurisdiction of non-tidal waters of the United States as extending to the ordinary high water mark and not beyond. *See* 33 CFR 328.4(c). The agencies note that continuing the practice of regulating portions of otherwise non-jurisdictional ditches based on the ordinary high water mark of contributing down-gradient waters will maintain better alignment with the rule's treatment of ditches subject to the ebb and flow of the tide as jurisdictional up to the tidal influence. It also provides some jurisdictional commonality with the treatment of certain lakes, ponds, and impoundments and adjacent wetlands as jurisdictional based on inundation by flooding from other jurisdictional waters.

3. How will the agencies implement the final rule?

The agencies have determined that in order to be jurisdictional under this final rule, a ditch or other similar artificial feature would first need to meet the definition of ''ditch'' (*i.e.,* a constructed or excavated channel used to convey water). Once a feature has been determined to meet the definition of ''ditch,'' a ditch would be considered a tributary where the ditch relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of the ''tributary'' definition. The phrase ''constructed in an adjacent wetland'' refers to ditches originating in or constructed entirely within an adjacent wetland. The phrase also includes ditches that are constructed through adjacent wetlands, but jurisdiction over those ditches only includes those portions in adjacent wetlands and downstream to other jurisdictional waters, as long as those portions satisfy the flow conditions of paragraph (c)(12). Jurisdiction does not extend to upland portions of the ditch prior to entry into an adjacent wetland. Consistent with the exclusion in paragraph (b)(5), a ditch or portions thereof may also be considered an adjacent wetland where it was constructed in an adjacent wetland and the portion in that wetland meets the conditions of paragraph (c)(1).

If ditches were tributaries prior to their construction and continue to meet the flow conditions of the ''tributary'' definition after construction, they are jurisdictional as tributaries under the final rule. The burden of proof lies with the agencies to demonstrate that a ditch relocated a tributary or was constructed in a tributary or an adjacent wetland. For example, if the agencies are not sure whether a ditch was constructed in a tributary given the physical appearance and functionality of the current ditch, the agencies will review the available evidence to attempt to discern when the ditch was constructed and the nature of the landscape before and after construction. If the evidence does not demonstrate that the ditch was located in a natural waterway, the ditch will be non-jurisdictional under this rule. If the evidence suggests that the ditch may have been constructed in a natural waterway, the agencies will review the available evidence to attempt to discern whether that natural waterway would qualify as a tributary under this final rule. Absent such evidence, the agencies will conclude that the ditch is non-jurisdictional. The same methods above for ditches constructed in a tributary apply when determining the jurisdictional status of a ditch constructed in an adjacent wetland. Note that under this final rule, a ditch cannot render an otherwise isolated wetland an ''adjacent wetland'' and thus jurisdictional on that basis, unless the ditch itself is a tributary. *See* Section III.G for further discussion regarding the jurisdictional status of wetlands under this final rule.

Many commenters noted that historic conditions at the time of ditch construction could be difficult to identify, and some commenters requested more specific guidance and standards of evidence which would be used by the agencies. Along with field data and current information on the subject water, historic tools and resources may be used to determine the presence of a tributary or adjacent wetland at the time of ditch construction, and several sources of information may be required to make such determination. Information sources may include historic and current topographic maps, historic and recent aerial photographs, local and state records and surface water management plans, agricultural records, street maintenance data, precipitation records, historic permitting and jurisdictional determination records, certain hydrogeomorphological or soil indicators, wetlands and conservation programs and plans, and functional assessments and monitoring efforts. For example, when a USGS topographic map displays a tributary located upstream and downstream of a ditch, this may indicate that the ditch was constructed in or relocated a tributary. As another example, an NRCS soil survey displaying the presence of specific soil series which are linear in nature and generally parallel to a potential ditch may be indicative of alluvial deposits formed by a tributary in which the ditch was constructed.

In addition, high-resolution aerial photographs may be used to identify whether there are or were characteristics of a tributary upstream or downstream of a ditch, indicating that a ditch may have been constructed in or relocated a tributary. In some cases, stream channel morphology is visible on the aerial photograph along with visible persistent water (*e.g.,* multiple dates of aerial photography showing visible water) providing evidence of the flow classification necessary to identify a tributary under this rule at the time of ditch construction. However, characteristics of tributaries may not be visible in aerial photographs taken in areas with high shrub or tree cover, in which case aerial photographs or satellite imagery taken during ''leaf off'' may provide the most beneficial information. The burden of proof is on the agencies to determine the historic status of the ditch construction, and if evidence does not show that the ditch relocated a tributary, was constructed in a tributary, or was constructed in an adjacent wetland, then a determination would be made that the ditch is not jurisdictional under this final rule.

F. Lakes and Ponds, and Impoundments of Jurisdictional Waters

1. What are the agencies finalizing?

The final rule includes a category of ''waters of the United States'' that combines lakes, ponds, and impoundments of jurisdictional waters into a single category. A lake, pond, or impoundment of a jurisdictional water meets the definition of ''waters of the United States'' if it (1) satisfies any of the conditions in paragraph (a)(1), *i.e.,* it is a traditional navigable water like Lake Michigan or Lake Mead; (2) contributes surface water flow to the territorial seas or a traditional navigable water in a typical year either directly or through one or more jurisdictional waters; or (3) is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. A lake, pond, or impoundment of jurisdictional waters does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature.

The agencies had proposed to include two separate categories for lakes, ponds, and impoundments of jurisdictional waters, one for jurisdictional lakes and ponds and another for jurisdictional impoundments. The proposal followed the historic treatment of jurisdictional impoundments in treating them separately as ''waters of the United States.'' For lakes and ponds, the agencies proposed including them as a separate waterbody-specific category for the first time, more clearly tethering jurisdiction over those features to the text of the statute and applicable Supreme Court guidance.

The agencies received a wide range of public comments on the proposed approach. Many commenters expressed support for including lakes and ponds as a separate category, while others also supported retaining separate treatment for impoundments of jurisdictional waters. Other commenters suggested that because lakes, ponds, and impoundments of jurisdictional waters are functionally similar they should be treated as a combined category. Some commenters stated that the proposal excluded too many lakes and ponds and said that the CWA should apply to such features regardless of their hydrologic surface connection to traditional navigable waters. Others argued that the proposal asserted jurisdiction over too many lakes and ponds. Some commenters stated that the agencies should adopt their longstanding treatment of jurisdictional impoundments, retaining jurisdiction over them even if they are completely disconnected from the tributary system. Others stated that the agencies should regulate impoundments of jurisdictional waters only if they continue to contribute flow to other jurisdictional waters, arguing for different flow regimes (*i.e.,* perennial only, perennial and intermittent, any hydrologic connection). The agencies have considered the full range of comments and have finalized a rule that balances these diverse viewpoints, as discussed below, while streamlining and improving the clarity and applicability of the rule and remaining faithful to the agencies' statutory authorities as discussed in Section II.B.

2. Summary of Final Rule Rationale and Public Comment

Historically, the Corps' regulations specifically defined ''lakes,'' ''ponds,'' and ''impoundments.'' In 1975, for example, the Corps published an interim final regulation, 40 FR 31320 (July 25, 1975), that administratively defined ''lakes'' as ''natural bodies of water greater than five acres in surface area and all bodies of standing water created by the impounding of [waters of the United States]. Stock watering ponds and settling basins that are not created by such impoundments are not included.'' 40 FR 31325. In response to the 1975 regulation, the Corps received a number of comments and criticisms regarding the definition of ''lake.'' Some stated that the size limitation was too small, while others stated that it was too large. Others questioned the legality of imposing any size limitation on natural lakes, arguing that a lake fewer than five acres in size is as much a ''water of the United States'' as one that is more than five acres in size. In response, the Corps established two new definitions in 1977, one for ''natural lake'' and one for ''impoundment.'' 42 FR 37129–30 (July 19, 1977). The Corps believed the two definitions would help alleviate confusion over the broad definition of ''lake'' provided in 1975. In the 1977 regulation, ''natural lake'' was defined as ''a natural depression fed by one or more streams and from which a stream may flow, that occurs due to the widening or natural blockage of river or stream, or that occurs in an isolated natural depression that is not part of a surface river or stream.'' 42 FR 37144. The Corps believed that definition reflected the three types of situations in which a natural lake may exist. The 1977 regulation defined ''impoundment'' as a ''standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.'' 42 FR 37144. No size limitation was placed on the 1977 definitions, and instead, the size limitations were used as a distinguishing element of the CWA section 404 nationwide permit program.

In 1982, the Corps again published an interim final rule which combined ''natural lake'' and ''impoundment'' into one term, ''lake.'' 47 FR 31794–95 (July 22, 1982). Commenters stated that impoundments should not be given the same status in the review process as natural lakes; however, the Corps believed that the evaluation of the public interest should be based on what the impacts are, and not on whether the area in question is natural or manmade. In the 1982 regulations, the Corps defined ''lake'' as

> a standing body of open water that occurs in a natural depression fed by one or more streams from which a stream may flow, that occurs due to the widening or natural blockage or cutoff of a river or stream, or that occurs in an isolated natural depression that is not a part of a surface river or stream. The term also includes a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area. As used in this regulation, the term does not include artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.

47 FR 31811. This same definition was retained when the Corps issued its consolidated set of regulations in 1986 (51 FR 41206, November 13, 1986); however, the term ''lake'' was only retained in the part of the regulations related to ''Permits for Discharges of Dredged or Fill Material into Waters of the United States'' (33 CFR 323) and was not included in the new part specifically related to the definition of ''waters of the United States'' (33 CFR 328). The definition of ''lake'' remains in the Corps' current regulation at 33 CFR 323.2(b), and includes, ''a standing body of open water created by artificially blocking or restricting the flow of a river, stream, or tidal area'' but excludes, ''artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water for such purposes as stock watering, irrigation, settling basins, cooling, or rice growing.''

Until this final rule, the definition of ''waters of the United States'' has not included a separate category for lakes and ponds. To date, the agencies viewed non-isolated ''lakes and ponds'' as traditional navigable waters or as part of the tributary system where they met the tributary standard. For example, if a tributary enters a standing body of open water in a natural depression, such as a lake, which then outlets into a downstream tributary, the lake was considered part of the tributary system and the limits of jurisdiction were defined by the ordinary high water mark unless adjacent wetlands were present. Starting in the 1982 regulation, impoundments of waters otherwise defined as ''waters of the United States'' were included as a separate category of ''waters of the United States.'' *See* 40 CFR 323.2(a)(4) (1983); 47 FR 31810 (July 22, 1982). In implementing its regulations, the Corps deemed impoundments ''waters of the United States'' when they were created from a water of the United States, still met another category of ''waters of the United States'' after creation, or were isolated with a nexus to interstate or foreign commerce.[51]

In this rulemaking, the agencies proposed to maintain the ''impoundments'' category of ''waters of the United States'' as it existed in the 1980s regulation and proposed to create a new category for certain lakes and ponds. The agencies requested comment as to whether a separate category was needed for impoundments of jurisdictional waters or whether those features could be captured in other categories of ''waters of the United States,'' such as the proposed ''lakes and ponds'' category. The agencies received comments in support of maintaining a separate category for impoundments, which stated that doing so would provide clarity because it is consistent with the agencies' longstanding practice. Commenters supporting a separate category for impoundments also stated that impoundments are fundamentally different from lakes and ponds and therefore should be regulated differently. Other commenters supported combining the two categories and stated that lakes, ponds, and impoundments function similarly on the landscape and therefore should be regulated consistently. These commenters also stated that the agencies do not have legal authority to regulate impounded features that do not otherwise satisfy the jurisdictional requirements of the CWA. Other commenters generally found the term ''impoundment'' to be unclear and requested that the agencies include a definition of the term in the final rule. The agencies also requested comment on whether existing jurisdictional impoundments could become non-jurisdictional if they were no longer regulated as a separate category of ''waters of the United States.'' In response, some commenters raised a concern that, if impoundments are combined into a single category with lakes and ponds, adjacent wetlands that are impounded could lose their jurisdictional status.

The agencies received comments stating that lakes and ponds should not constitute a separate category of jurisdictional waters because these features do not have a universally-accepted definition. Some commenters stated that the category of lakes and ponds may be redundant with other categories of waters, such as impoundments, and that the extent of wetland vegetation within a shallow pond can change over time, making it difficult to distinguish between wetland and pond boundaries in some cases. Other commenters agreed that lakes and ponds should comprise a separate category of jurisdictional waters to distinguish them from other features such as tributaries and impoundments. Commenters noted that a separate category could increase regulatory certainty, as jurisdictional requirements may be different for lakes and ponds as compared to other categories of waters.

The agencies have considered these competing public comments and for the reasons provided below are finalizing the rule with a single category for lakes, ponds, and impoundments of jurisdictional waters. The agencies agree with the commenters that stated lakes, ponds, and impoundments function similarly on the landscape. The final rule is consistent with the Corps' existing definition of ''lakes'' that includes impoundments, although its ''lakes'' definition is not for purposes of defining ''waters of the United States.'' *See* 33 CFR 323.2(b). Like lakes and ponds, many impoundments are lentic systems (*i.e.,* still waters) as opposed to tributaries, which are typically lotic systems (*i.e.,* flowing waters). In many areas of the country, lakes and ponds exist only because rivers and other flowing features or wetlands have been impounded. Impounded features often provide similar commercial opportunities, water quality benefits, and wildlife habitat as compared with natural features. Similarly, both naturally occurring (but modified) and impounded waters and wetlands may have structures, such as culverts, weirs, or pumps, that are designed to manage the movement of water upstream and downstream of the structure. The agencies conclude that because lakes, ponds, and impoundments of jurisdictional waters generally function similarly across the landscape, they should be regulated consistently.

In the final rule, certain lakes, ponds, and impoundments of jurisdictional waters are waters of the United States because these features are waters within the ordinary meaning of the term. As discussed in Section II.E, the plurality opinion in *Rapanos* stated that the term ''the waters'' is most commonly understood to refer to '' 'streams and bodies forming geographical features such as oceans, rivers, [and] *lakes,*' or 'the flowing or moving masses, as of waves or floods, making up such streams or bodies.' '' 547 U.S. at 732 (quoting *Webster's New International Dictionary* 2882 (2d ed. 1954) (emphasis added). The plurality also noted that its reference to ''relatively permanent'' waters did ''not necessarily exclude streams, rivers, or *lakes* that might dry up in extraordinary circumstances, such as drought.'' *Id.* at 732 n.5 (emphasis added).

Under the final rule, lakes, ponds, and impoundments that meet the conditions to be a traditional navigable water are waters of the United States under paragraph (a)(1) of this final rule. These waters are discussed in more detail in Section III.B. It would be redundant to include additional regulatory text in the lakes, ponds, and impoundments category that declares such water features to be jurisdictional if they satisfy the paragraph (a)(1) standard, as the agencies had proposed for lakes and ponds. For clarity and simplicity, the agencies are not including that cross reference in the final rule.

The final rule focuses in large part on the lake's, pond's, or impoundment's surface water connection to traditional navigable waters or the territorial seas so as to remain consistent with the overall structure and function of the CWA. *See, e.g., SWANCC,* 531 U.S. at 168 n.3. This final rule presents a unifying legal theory for federal jurisdiction over waters and wetlands adjacent thereto that maintain a sufficient surface water connection to traditional navigable waters or the territorial seas and is supported by the legal precedent and principles articulated in this notice. As discussed in Section II, the agencies' authority to regulate ''the waters of the United

[51] *See* the U.S. Army Corps of Engineers Jurisdictional Determination Form Instructional Guidebook p. 58 at: *https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2310.*

States'' is grounded in Congress' commerce power over navigation. Given the broad purposes of the CWA, the agencies can choose to regulate beyond waters more traditionally understood as navigable but must provide a reasonable basis for doing so. Lakes, ponds, and impoundments of jurisdictional waters that contribute surface water flow to traditional navigable waters or the territorial seas in a typical year fall within the statutory authorities delegated to the agencies by Congress. Federally regulating these features effectuates the objective, goals, and policies of the CWA. By contrast, the agencies conclude that when lakes, ponds, and impoundments of jurisdictional waters do not contribute surface water flow to a traditional navigable water or the territorial seas in a typical year, such lakes, ponds, and impoundments have an insufficient connection to jurisdictional waters to warrant federal jurisdiction, unless they are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Regulating these features would push the outer limits of the agencies' delegated authorities and infringe on the powers of States to regulate their own land and water resources and therefore are not jurisdictional under this final rule. Through this combined category, the agencies are incorporating common principles from the *Rapanos* plurality and concurring opinions and respecting both the objective and the policy in CWA sections 101(a) and 101(b), respectively.

Some commenters stated that only perennial lakes, ponds, and impoundments conveying perennial flow to a downstream paragraph (a)(1) water should be considered ''waters of the United States.'' Other commenters maintained that lakes, ponds, and impoundments conveying ephemeral flow to a downstream paragraph (a)(1) water should also be considered jurisdictional. The agencies proposed that perennial or intermittent flow from a lake or pond to a paragraph (a)(1) water either directly or indirectly through another jurisdictional water could establish jurisdiction. Some commenters expressed concern that it would be too difficult to determine the flow regime of features connecting lakes and ponds to waters of the United States. The agencies disagree that it would be too difficult to determine flow regime to establish jurisdiction for lakes and ponds as proposed, as the agencies have been using flow classifications to make jurisdictional determinations since the 2008 *Rapanos* Guidance was issued. However, upon further consideration, the agencies conclude that the proposed rule's requirement for perennial or intermittent flow from a lake or pond to a downstream paragraph (a)(1) water would have severed jurisdiction for certain relatively permanent lakes and ponds that are regularly ''connected to'' traditional navigable waters via surface water flow. Such regular surface water flows allow such waters to connect and become indistinguishable when flowing (*i.e.,* they look like one water). In the final rule, the agencies have eliminated the flow classification requirement and instead have clarified the types of features that can provide a sufficient surface water connection between the lake, pond, or impoundment of a jurisdictional water and a downstream jurisdictional water in a typical year to warrant federal jurisdiction consistent with the CWA. This will simplify implementation of this category.

As discussed in Section III.A.3, the agencies have determined that channelized non-jurisdictional ephemeral features are capable of providing a sufficient surface water connection and that they do not sever jurisdiction if they convey surface water flow between an upstream relatively permanent jurisdictional water and a downstream jurisdictional water in a typical year. In other words, an ephemeral feature between an upstream lake and a downstream jurisdictional water would not sever jurisdiction upstream if the ephemeral feature conveys channelized surface water flow sufficient to allow the upstream and downstream waters to mix in a typical year. By contrast, the agencies conclude that diffuse stormwater run-off and directional sheet flow over upland (non-jurisdictional features under paragraph (b)(4)) do not provide a sufficient surface water connection to downstream jurisdictional waters. Therefore, upstream lakes, ponds, and impoundments that are connected to downstream jurisdictional waters only by such flows are not jurisdictional. These types of connections do not satisfy the limiting principles articulated in *SWANCC* and the plurality and concurring opinions in *Rapanos.*

Lakes, ponds, and impoundments of jurisdictional waters often contribute surface water flow to other waters in a manner similar to a tributary. The agencies conclude that if these features contribute surface water flow to traditional navigable waters or the territorial seas in a typical year, they are jurisdictional for the same reasons that a tributary is jurisdictional. Lakes, ponds, and impoundments of jurisdictional waters that do not contribute surface water flow to a paragraph (a)(1) water in a typical year are not jurisdictional for the same reasons that streams are excluded if they do not contribute surface water flow to a paragraph (a)(1) water in a typical year. *See* Section III.D of this notice for additional discussion on tributaries. The agencies do not explicitly define ''lakes and ponds, and impoundments of jurisdictional waters'' in paragraph (c)(6) of the final rule to require those waters to be perennial and intermittent, as the agencies have required for tributaries in paragraph (c)(12). Nonetheless, ephemeral lakes, ponds, and impoundments are categorically excluded from jurisdiction under paragraph (b)(3) of the final rule. The key test for jurisdiction is that lakes, ponds, and impoundments of jurisdictional waters must contribute surface water flow to a paragraph (a)(1) water in a typical year. Waters that flow only in direct response to precipitation do not satisfy the permanence element of the phrase ''relatively permanent bodies of water'' and are not jurisdictional under this final rule.

The agencies conclude that the category of lakes, ponds, and impoundments of jurisdictional waters in this final rule reflects the limits of the agencies' authority that the plurality and concurring opinions recognized in *Rapanos.* By requiring a contribution of surface water flow from a lake, a pond, or an impoundment of jurisdictional waters to a paragraph (a)(1) water in a typical year, the agencies are establishing that a mere hydrologic connection cannot provide the basis for CWA jurisdiction; the connection must be a surface water connection that occurs in a typical year. Such connection to a paragraph (a)(1) water is sufficiently frequent to warrant federal jurisdiction. This requirement reflects the *Rapanos* plurality's description of a ''wate[r] of the United States'' as ''*i.e.,* a relatively permanent body of water *connected to* traditional interstate navigable waters.'' *Id.* at 742 (emphasis added). It is also informed by the *Rapanos* plurality's rejection of the overly broad hydrologic connection theory that the Federal government had advanced in that case. The plurality concluded that the phrase ''the waters of the United States'' ''cannot bear the expansive meaning that the Corps would give it,'' *id.* at 732, and rejected the notion that ''even the most insubstantial hydrologic connection may be held to constitute a 'significant nexus.' '' *Id.* at 728. Justice Kennedy

further established that ''mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85.

An impoundment may lose its surface water connection to a downstream jurisdictional water due to any number of reasons, including consumptive use or evaporation or due to the structure that was constructed to impound the water. In the proposed rule, all impoundments of jurisdictional waters would be jurisdictional, regardless of any surface water connection to a downstream (a)(1) water. The agencies supported the proposed rule in part by citing the Supreme Court's decision in *S.D. Warren Co.* v. *Maine Board of Environmental Protection,* 547 U.S. 370 (2006), for the proposition that impounding a jurisdictional water does not change its status as a ''water of the United States.'' 84 FR 4154, 4172 (Feb. 14, 2019), citing *S.D. Warren Co.,* 547 U.S. at 379 n.5. The agencies solicited comment on the category of ''impoundments'' in the proposed rule, including whether impoundments that release water downstream, but do so less than intermittently, should remain jurisdictional. Some commenters agreed that *S.D. Warren Co.* would authorize disconnected and isolated impounded waters to remain jurisdictional and supported the agencies' longstanding position that such impoundments of waters of the United States remain jurisdictional. Other commenters stated that impoundments that lack a surface connection to a downstream jurisdictional water should not be waters of the United States. The agencies conclude that an impounded water that lacks a sufficient surface water connection to a downstream paragraph (a)(1) water in a typical year is not a water of the United States. This interpretation of federal regulatory authority over impoundments is most consistent with the scope of authority granted by Congress and the legal principles articulated in Section II.E of this notice. On further review and consideration, the agencies observe that *S.D. Warren Co.* analyzes the definition of ''discharge'' in CWA section 502(16) but does not grapple with or address the subject of this rulemaking—the definition of ''waters of the United States.'' The cited footnote in that case merely states that exerting private control over water flow (an everyday occurrence in many parts of this country) does not ''denationalize'' otherwise national waters. *S.D. Warren Co.,* 547 U.S. at 379 n.5 (''[W]e [cannot] agree that one can denationalize national waters by exerting private control over them.''). The case did not address what happens when a water of the United States is so altered as to significantly modify its connection to traditional navigable waters, nor did the cases cited in that opinion. For example, waters of the United States are regularly defederalized under the section 404 permitting program—in some instances by transforming portions of traditional navigable waters for harbor development, and jurisdictional wetlands or small tributaries to fast land for communities and energy development, and in other instances by cutting off or separating part of jurisdictional waters that nonetheless remain waters, as is the case with certain causeway construction or application of the waste treatment exclusion for natural resource development projects. Furthermore, the agencies are aware of no decision of the Supreme Court that has ruled that the indelibly navigable principle applies to all waters of the United States, although the principle does apply to certain traditional navigable waters or any decision that would prohibit the United States from consenting to defederalization of a water by a lawfully issued section 404 permit. In this final rule, the agencies have defined ''waters of the United States'' not to include a water—including an impoundment of a jurisdictional water—that lacks a sufficient surface water connection to a downstream traditional navigable water, consistent with the principles articulated in *SWANCC. See SWANCC,* 531 U.S. at 168 n.3. Impoundments of traditional navigable waters that continue to meet the criteria in paragraph (a)(1) of this final rule would remain jurisdictional under the CWA. *S.D. Warren* is not to the contrary.

The agencies recognize that many lakes, ponds, and impoundments of jurisdictional waters may be connected to other jurisdictional waters by a variety of natural and artificial non-jurisdictional features. The agencies have specified under this final rule that lakes, ponds, and impoundments of jurisdictional waters do not lose their jurisdictional status if they contribute surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The agencies describe in Section III.A.3 of this notice that such non-jurisdictional features do not sever jurisdiction when surface water flow is conveyed in a typical year, and that such flow leads to mixing between an upstream relatively permanent jurisdictional water and a downstream jurisdictional water. Consistent with this discussion, a non-jurisdictional feature remains non-jurisdictional even if it provides a channelized surface water connection between jurisdictional waters in a typical year.

Lakes, ponds, and impoundments of jurisdictional waters that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are also waters of the United States under this final rule. *See Rapanos,* 474 U.S. at 732 (Scalia, J., plurality) (recognizing that the term ''the waters'' within ''the waters of the United States'' includes ''the flowing or moving masses, as of waves or *floods,* making up . . . streams or bodies'') (emphasis added) (internal quotations omitted); *id.* at 770 (Kennedy, J., concurring in the judgment) (''the term 'waters' may mean '*flood* or inundation' events that are impermanent by definition'') (emphasis added) (internal citations omitted). During times of inundation by flooding from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters in a typical year, such a water is indistinguishable from the jurisdictional water from which the flooding originates.

Inundation sufficient to establish jurisdiction occurs only in one direction, from the paragraph (a)(1) through (3) water to the lake, pond or impoundment of jurisdictional waters, rendering the feature ''itself a part of those waters'' ''that are 'waters of the United States' in their own right.'' *Rapanos,* 547 U.S. at 740, 742 (Scalia, J., plurality). The agencies received a comment that the inundation requirement should create jurisdiction if it occurs in either or both directions, rather than just *from* a jurisdictional water *to* a lake, pond or impoundment. For the reasons discussed above, the agencies have concluded that in order to be considered part of the tributary system, the surface water flow from a lake, pond, or impoundment of jurisdictional waters to a paragraph (a)(1) through (3) water needs to occur with sufficient frequency that the flow is channelized in a typical year. Non-channelized diffuse overland flow from an otherwise isolated waterbody lacks the indicia of permanence and sufficiency necessary to establish jurisdiction, as described in more detail in Section III.A.3. Mere hydrologic surface connection is not enough. *Id.* at 784 (Kennedy, J., concurring in the

judgment). Flooding in a typical year from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters (that is not otherwise jurisdictional under the tests described above) is sufficient to establish jurisdiction. That is because inundation by flooding in a typical year makes the lake, pond or impoundment of jurisdictional waters ''part of'' the jurisdictional water, as may occur, for example, when an oxbow lake is located in a former channel of a meandering river. The agencies note, however, that oxbow lakes are not categorically jurisdictional under the final rule; to be jurisdictional, they must satisfy one or more of the conditions of paragraph (c)(6).

Some commenters expressed concern that, as proposed, lakes and ponds may be considered jurisdictional due to a single flood event in a typical year and suggested incorporating a flood duration requirement so that brief, infrequent floods from a paragraph (a)(1) through (3) water would not cause a lake or pond to become jurisdictional. Under the final rule, inundation by flooding from a paragraph (a)(1) through (3) water to a lake, pond, or impoundment of jurisdictional waters can occur as a result of seasonal or permanent flooding, for example, so long as flood waters connect such waters to a paragraph (a)(1) through (3) water in a typical year and have as their source a paragraph (a)(1) through (3) water. The agencies are not including a minimum number of flood events or duration of flooding that must take place in the course of a typical year, due to the need to accommodate regional hydrological differences. However, a mere hydrologic connection between a non-navigable, isolated lake, pond, or impoundment and a jurisdictional water is insufficient to establish jurisdiction under this rule. For instance, a lake that may be connected to a water of the United States by flooding, on average, once every 100 years is not jurisdictional. To be jurisdictional, a lake, pond, or impoundment of jurisdictional waters that is otherwise physically separated from a water of the United States must be inundated by flooding from a paragraph (a)(1) through (3) water at least once during a typical year. Oxbow lakes, for example, may be jurisdictional under this category via inundation where they otherwise may not satisfy the flow contribution elements of paragraph (c)(6) of the final rule.

The agencies have determined that an ecological connection between physically separated lakes, ponds, and impoundments of jurisdictional waters and other paragraph (a)(1) through (3) waters is insufficient to assert jurisdiction over such waters. *See Rapanos,* 547 U.S. at 741–42 (Scalia, J., plurality) (''*SWANCC* found such ecological consideration irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.''). Some commenters requested that the agencies eliminate a case-specific ''significant nexus'' analysis for lakes and ponds, while other commenters supported maintaining a ''significant nexus'' analysis and identifying jurisdictional lakes and ponds based on ecological connections to water features such as traditional navigable waters and the territorial seas. The agencies have concluded that the lakes, ponds, and impoundments of jurisdictional waters category should replace existing procedures that may depend on a case-specific ''significant nexus'' analysis of the relationship between a particular water feature and downstream traditional navigable waters. Lakes, ponds, and impoundments of jurisdictional waters constitute a category of ''waters of the United States'' that is more consistent and predictable for members of the public and regulatory agencies to implement than a case-specific ''significant nexus'' analysis.

The approach to lakes, ponds, and impoundments of jurisdictional waters in this final rule is also intended to avoid ''impairing or in any manner affecting any right or jurisdiction of the States with respect to waters (including boundary waters) of such States.'' 33 U.S.C. 1370. For example, lakes, ponds, and impoundments of jurisdictional waters are not waters of the United States if they do not contribute surface water flow to a traditional navigable water in a typical year or are not inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Rather, they are water resources of the States (or Tribes), and therefore States have an inherent interest in managing such features pursuant to the powers reserved to the States under the Constitution (and Tribes have analogous interests as well). *See., e.g., North Dakota,* 127 F. Supp. 3d at 1059. States and Tribes may therefore address such features under their own laws to the extent they deem appropriate.

To address comments that combining the lakes and ponds category with impoundments could result in impounded adjacent wetlands losing jurisdiction, the agencies have made minor modifications to the final regulatory text from the proposal. Under the final rule, impoundments of wetlands are jurisdictional as ''impoundments of jurisdictional waters'' if the wetlands being impounded first meet the definition of ''adjacent wetlands'' and then meet the conditions of the lakes, ponds, and impoundments of jurisdictional waters category. For example, under the final rule, impounded adjacent wetlands are jurisdictional as ''impoundments of jurisdictional waters'' if they form a feature that meets the conditions of the lakes, ponds, and impoundments of jurisdictional waters category. That is, adjacent wetlands that are impounded frequently become ponds and may lose their jurisdictional status as adjacent wetlands because they no longer satisfy all three factors of the ''wetlands'' definition. The final rule would ensure that these waters remain jurisdictional if they satisfy the elements of paragraph (c)(6). If those impounded wetlands, however, continue to satisfy the definition of ''adjacent wetlands,'' they would remain jurisdictional as adjacent wetlands. In the uncommon circumstance where an impoundment completely severs the surface water connection between an adjacent wetland and a jurisdictional water in a typical year, such that the feature no longer satisfies the definition of ''adjacent wetlands,'' the wetland would no longer be jurisdictional under this final rule. Section III.G of this notice provides additional discussion on adjacent wetlands.

The agencies acknowledge that this final rule represents a change from the agencies' longstanding practice concerning impoundments of jurisdictional waters. Under the 2019 Rule, notwithstanding the principles of *SWANCC,* impoundments of jurisdictional waters would be jurisdictional under the separate impoundments category regardless of any surface water connection to a downstream jurisdictional water. The agencies now conclude that this prior interpretation is not supported by the text, structure, or legislative history of the CWA, Supreme Court precedent, or the foundational legal principles of this final rule. *See* Section II.E. Justice Kennedy's concurring opinion also indicates that completely isolated waters are too remote to be regulated under the Commerce Clause powers. *See* 547 U.S. at 779 (Kennedy, J., concurring in the judgment) (''Nevertheless, the word 'navigable' in the Act must be given some effect. Thus, in *SWANCC* the Court rejected the Corps' assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters.'' (internal citation omitted)). The

agencies conclude that this principle should be applied to all waters, whether they are impoundments or not. The final rule is also consistent with the agencies' longstanding practice that a jurisdictional water may be altered and made non-jurisdictional by obtaining a CWA section 404 permit to place fill material in a wetland or other water, thereby converting that water to fast land.

Some commenters requested the agencies define the terms ''lake'' and ''pond,'' but other commenters stated that there were deficiencies in the proposed alternatives for defining ''lakes'' and ''ponds'' such as the definitions based on size, depth, or the Cowardin classification system developed by the U.S. Fish and Wildlife Service. Although regional naming conventions may vary, the agencies conclude that the terms ''lake'' and ''pond'' are well-understood and that additional regulatory definitions beyond what is included in the final rule are not necessary. Rather than defining ''lakes'' and ''ponds'' based on their geomorphology or artificial or natural status, the agencies have instead defined surface water characteristics and conditions in paragraph (c)(6) for purposes of establishing jurisdiction over lakes and ponds (*i.e.,* standing bodies of open water that contribute surface water flow to traditional navigable waters or are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year). The same is true for the term ''impoundment,'' which some commenters suggested is unclear. The agencies intend the term ''impoundment,'' as it is used in this rule and as it is used in common parlance, to mean a standing body of open water that is formed by blocking or restricting the flow of a pre-existing river, stream, or tidal area or by blocking or restricting the water of a pre-existing wetland, lake, or pond. *Compare* Webster's II, New Riverside University Dictionary (1994) (defining ''impound'' to mean to ''confine in'' or to ''accumulate (water) in a reservoir''). This is generally consistent with the Corps' current definition in 33 CFR 323.2(b) and should provide sufficient guidance for the public to understand the regulation. An impoundment that holds back, blocks, or restricts the flow of a water of the United States is considered ''constructed in'' that water for purposes of this final rule, even if portions of the impounded water also cover areas that were originally upland or non-jurisdictional waters.

3. How will the agencies implement the final rule?

Lakes and ponds are naturally formed through a variety of events, including glacial, tectonic, and volcanic activity. Natural lakes and ponds can also be subsequently modified to change surface elevation, depth, and size. In some parts of the country these modified lakes and ponds are referred to as impoundments, whether they impound or enlarge an existing water of the United States or modify a non-jurisdictional water; in other areas, these may retain lake or pond nomenclature. Lakes, ponds, and impoundments can be man-made features constructed for industrial and agricultural uses, power generation, domestic water supply, or for aesthetic or recreational purposes. Many lakes, ponds, and impoundments have at least one outflow in the form of a river, stream, or drain which maintain a feature's surface water level or stage by allowing excess water to discharge. Some lakes, ponds, and impoundments do not have an outflow and lose water solely by evaporation, underground seepage, or consumptive use. Individual lakes, ponds and impoundments range in size. Ponds are generally smaller in size than lakes, but regional naming conventions vary. Lakes are also generally deeper than ponds. Like lakes and ponds, impoundments can be large or small, deep or shallow. Some of these waters are jurisdictional under paragraph (a)(3) of the final rule, as discussed above, while others are non-jurisdictional, particularly many artificial lakes and ponds pursuant to paragraph (b), as discussed in Section III.H.

Lakes, ponds, and impoundments are familiar types of waters that can be easily identified by landowners; the agencies; local, State, and tribal governments; consultants; and others. The tools discussed in Section III.D of this notice to identify the presence of a potential tributary can also be helpful to establish the presence of a lake, pond, or impoundment. For example, indication of an enclosed body of water on a USGS topographic map or certain waterbody types in the NHD data may show that a lake, pond, or impoundment is present. USGS topographic maps often include different symbols to indicate perennial and intermittent lakes and ponds where such features are mapped. *See* ''Topographic Map Symbols,'' available at *https://pubs.usgs.gov/gip/TopographicMapSymbols/topomapsymbols.pdf.* Waterbodies such as perennial and intermittent lakes and ponds, and reservoirs are also represented in NHDWaterbody, where such features are mapped.[52] The NHD portrays the spatial geometry and the attributes of the features. However, as the agencies recognize in Section IV, these tools were not designed to indicate the jurisdictional status of waters of the United States, and limitations associated with these maps and data sets may require field-verification for accuracy.

After identifying a lake, pond, or impoundment, the next step is to determine whether the lake, pond, or impoundment meets the conditions of a paragraph (a)(1) water under the final rule and would therefore be regulated under that category. Consistent with the agencies' longstanding regulation and practice, paragraph (a)(3) waters do not include impoundments of non-jurisdictional waters. If an impoundment does not meet the conditions of a paragraph (a)(1) water, then the agencies must establish whether the feature is an impoundment of a jurisdictional water. The agencies may use historical and current sources of information such as construction plans, permit records, aerial photography, maps, and remote sensing data, as well as topographic information or relevant field data from site visits, to determine whether an impoundment was created by impounding a jurisdictional water such as a tributary or adjacent wetland. In making a jurisdictional determination under this rule, the agencies would evaluate the open body of water or wetland.[53]

If a lake, pond, or impoundment of a jurisdictional water does not meet the conditions of a paragraph (a)(1) water, then the agencies would determine whether the water directly or indirectly contributes surface water flow to a paragraph (a)(1) water in a typical year, or is inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. The agencies could use similar sources of information indicating the existence of a lake, pond, or impoundment to determine whether the water feature contributes surface water flow to a paragraph (a)(1) water in

[52] *See* ''Complete FCode list for NHD Hydrography Features,'' available at *https://nhd.usgs.gov/userGuide/Robohelpfiles/NHD_User_Guide/Feature_Catalog/Hydrography_Dataset/Complete_FCode_List.htm.*

[53] The agencies note that the construction of a physical structure that impounds a body of water (*e.g.,* a dam, berm, or weir) may require a CWA section 404 permit (*e.g.,* when a discharge of dredged or fill material into a jurisdictional water occurs during construction of the impounding structure), in addition to other authorizations which may be required, such as a RHA section 9 or section 10 permit.

a typical year. Many commenters requested that the agencies identify specific sources of information that would be used to determine whether lakes, ponds, and impoundments contribute surface water flow to a water of the United States. A combination of the tools and other resources described in Section III.D.3 may be used to establish jurisdiction of a lake, pond, or impoundment. For instance, if utilizing the NHD, waterbodies that are classified as a lake/pond or a reservoir in the dataset may have NHDFlowline artificial paths represented as flowing through them to complete a stream network and as a surrogate for general water flow direction. Combining this information with site visits, climate data, and surrounding hydrology data can yield greater certainty as to the presence of a lake, pond, or impoundment, and as to whether the feature contributes surface water flow to a downstream paragraph (a)(1) water in typical year. These tools may also be helpful in indicating whether a lake, pond, or impoundment of a jurisdictional water is part of the tributary network of a paragraph (a)(1) water. For example, the presence of a ''blue line stream'' on USGS topographic or NHD maps which extends from the feature may indicate that the lake, pond, or impoundment contributes surface water flow, directly or indirectly through a paragraph (a)(2) through (4) water, to a paragraph (a)(1) water in a typical year, which may indicate that the feature is jurisdictional. Other complementary data sources that can be used in conjunction with maps to determine the potential jurisdictional status of a lake, pond, or impoundment of a jurisdictional water include gage data, bathymetry data, elevation data, spillway height, historic water flow records, flood predictions, statistical evidence, aerial photographs, remote sensing data, and hydrologic and non-hydrologic field observations.

A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature; through a culvert, dike, spillway, or similar artificial feature; or through a debris pile, boulder field, or similar natural feature. Under the final rule, the agencies have determined that lakes, ponds, and impoundments of jurisdictional waters may be jurisdictional if they have a channelized surface water connection to a paragraph (a)(1) water in a typical year. To determine the existence of channelized non-jurisdictional surface water features (*e.g.,* ephemeral streams or non-jurisdictional ditches), culverts, dikes, spillways, or similar artificial features, or debris piles, boulder field, or similar natural features, the agencies may use remote sensing data, aerial photography, and field observations. The agencies may also rely on elevation data, aerial photography, remote sensing data, hydrologic models, flow data, field indicators, operation records, and visual observations to determine whether flow likely occurs through these non-jurisdictional water features in a typical year.

Lakes, ponds, and impoundments of jurisdictional waters that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are also waters of the United States under this rule. Commenters noted that field observations, sometimes based on multiple site visits, may be necessary to determine that a surface water connection exists for lakes and ponds as a result of flooding from a traditional navigable water, tributary, or other jurisdictional lake or pond, or jurisdictional impoundment. Many commenters also stated that establishing a surface water connection based on inundation from a paragraph (a)(1) through (3) water to a lake or pond in a typical year may be difficult to implement. The agencies disagree with this suggestion as they are frequently asked to complete jurisdictional determinations when surface water connections are not present. In these cases, the agencies have used a variety of data sources that do not depend on visual observations of inundation, including but not limited to flood records, precipitation data, elevation data, aerial photography, remote sensing data, and hydrologic models. The agencies will complement remote tools with hydrologic and non-hydrologic field observations when necessary to determine the presence of a jurisdictional lake, pond, or impoundment due to inundation by flooding from a paragraph (a)(1) through (3) water.

The agencies recognize that artificial features such as a dike or berm could prevent a lake or pond from releasing surface water downstream to a water of the United States in a typical year. Similarly, a dam could prevent an impounded water from releasing surface water downstream to a water of the United States in a typical year. Under the final rule, lakes, ponds, and impoundments of jurisdictional waters are jurisdictional if they meet the conditions of paragraph (c)(6), including contributing surface water flow to a downstream jurisdictional water in a typical year. Such contribution could occur through pumps, flood gates, reservoir releases, or other mechanisms. The agencies do not distinguish between natural and artificially-manipulated surface water flow that connects a lake, pond, or impoundment with another water of the United States in a typical year. Furthermore, if an artificial feature such as a dike or dam causes a channelized downstream perennial or intermittent feature to become ephemeral, that channelized ephemeral feature would be non-jurisdictional under paragraph (b)(3) but would not sever jurisdiction of upstream features as long as it conveys surface water flow in a typical year to a downstream paragraph (a)(1) water.

In Section III.A.1 of this notice, the agencies describe a variety of methods and data sources that could be used to determine whether conditions meet the definition of ''typical year.'' For instance, the agencies have developed and utilized a method for determining normal precipitation conditions. The agencies currently use professional judgment and a weight of evidence approach as they consider precipitation normalcy along with other available data sources. The agencies recognize the need to consider seasonality and timing of surface water connections in utilizing the data sources described above and determining whether lakes, ponds, and impoundments meet the conditions of paragraph (c)(6) in the final rule. For example, a lake, pond, or impoundment of a jurisdictional water may be inundated by flooding from a paragraph (a)(1) through (3) water only during seasonally wet conditions. If the agencies complete a jurisdictional determination during seasonally dry conditions and do not visually observe inundation, they may use the multiple tools described above, including remote- and field-based hydrologic and non-hydrologic indicators, to determine whether inundation from flooding would typically occur during seasonally wet conditions.

A few commenters discouraged the agencies from relying solely on one source of data and recommended that mapping sources should be paired with remote sensing and field verification data. As described above, the agencies encourage the use of multiple complementary data sources to establish the presence of lakes, ponds, and impoundments and to determine their jurisdictional status. For example, waterbody and flowline features in the NHD could be used to determine the

likelihood of an existing lake, pond, or impoundment that has a direct or indirect surface water connection to a paragraph (a)(1) water. A site visit could then confirm the existence of the lake, pond, or impoundment, and aerial photography and physical field indicators or local knowledge could establish the likelihood of recent inundation. Finally, the agencies could determine whether climatic conditions meet the definition of ''typical year'' using, for example, the method for determining normal precipitation conditions described in Section III.A.1 of this notice, combined with other relevant sources of information such as the Palmer Drought Severity Index. Many commenters noted that the availability of data records and tools may vary across the country. The agencies have determined that the information provided by the tools described herein and other available information will vary in availability and accuracy in different parts of the country, and will take that into account when utilizing their expert judgment in evaluating the information prior to determining the jurisdictional status of a lake, pond, or impoundment of a jurisdictional water.

Some commenters asked whether features could simultaneously be excluded from regulation as artificial lakes and ponds, but also meet the definition of jurisdictional impoundments. As discussed in Section III.H of this notice, paragraph (b)(8) of the final rule specifies that the artificial lakes and ponds exclusion does not apply to jurisdictional impoundments. An artificial lake or pond will be excluded even if it satisfies the definition in paragraph (c)(6), so long as it was constructed or excavated in upland or in non-jurisdictional waters and is not a jurisdictional impoundment. In other words, paragraph (b)(8) is designed to exclude artificial lakes and ponds that are constructed in upland or non-jurisdictional waters, even where they may have a surface water connection to a downstream jurisdictional water in a typical year.

G. Adjacent Wetlands

1. What are the agencies finalizing?

The agencies are finalizing a category of ''waters of the United States'' to include all adjacent wetlands to: The territorial seas and traditional navigable waters (paragraph (a)(1) waters); tributaries to those waters (paragraph (a)(2) waters); and lakes, ponds, and impoundments of jurisdictional waters (paragraph (a)(3) waters). In this final rule, the agencies define the term ''adjacent wetlands'' to mean wetlands that: (1) Abut a paragraph (a)(1) through (3) water; (2) are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year; (3) are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature; or (4) are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. Under the final rule, an adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure (*i.e.,* not naturally occurring) divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

By retaining the term ''adjacent'' in the definition from the longstanding regulations, the agencies are continuing to use terminology that is familiar to the agencies and the regulated public. As proposed, however, the agencies are not including the terms ''bordering, contiguous, or neighboring'' from the previous regulations to reduce the potential confusion associated with using three seemingly similar terms in the same definition. *See, e.g.,* U.S. General Accounting Office, *Waters and Wetlands,* GAO–04–297, at 10 (Feb. 2004) (''The regulations specify that adjacent means 'bordering, contiguous, or neighboring'. . . . This definition of adjacency leaves some degree of interpretation to the Corps districts.''); *see also id.* at 3 (''Districts apply different approaches to identify wetlands that are adjacent to other waters of the United States and are subject to federal regulation.''). Instead, the agencies use the term ''abut'' to clearly identify those waters that are inseparably bound up with other jurisdictional waters, in addition to the other clear tests for adjacency in this final rule.

The final rule adopts categorical tests for adjacency that are like those included in the proposal, but upon consideration of the public comments received, the agencies have enhanced the final definition to improve its clarity and ease of implementation, and to include additional wetlands that, upon further consideration, the agencies conclude should be subject to federal jurisdiction. Like the proposal, adjacent wetlands are those that abut or otherwise have a direct hydrologic surface connection to other covered waters in a typical year. But the agencies have modified the test to maintain jurisdiction over wetlands separated from other jurisdictional waters only by natural berms, banks, or dunes as those natural separations are evidence of a dynamic and regular direct hydrologic surface connection between the resources based on the agencies' technical expertise and experience. The agencies have also simplified and expanded the type of surface water connections that are not jurisdictional themselves but can nevertheless maintain jurisdictional connectivity between wetlands and other waters of the United States that are separated only by artificial dikes and other barriers. The agencies have also expanded jurisdiction, as compared to the proposal, over wetland complexes that are crossed by roads and similar structures if those structures allow for a surface water connection between the segregated wetland portions (such as through a culvert through a roadway) in a typical year.

Many commenters supported the proposal as establishing an appropriate balance between Federal and State jurisdiction over wetlands. Others stated that the proposal regulated too broadly. Still others asserted that the proposal too narrowly interpreted the agencies' CWA authorities and restricted jurisdiction over many ecologically important wetlands. The agencies have considered the diverse range of comments and are finalizing a rule that results in a balance of these competing views while adhering to the agencies' delegated authorities under the CWA and avoiding the outer limits of such authority.

Like the proposed rule, this final rule maintains the longstanding regulatory definition of ''wetlands'' in paragraph (c)(16) to mean ''those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.'' This is a well-established definition that is familiar to regulators, environmental consultants, and the scientific community. The agencies received many public comments urging them to maintain this definition, while certain other commenters suggested the agencies adopt different formulations. In this final rule, the agencies have retained the longstanding definition unchanged, as proposed.

Consistent with the proposal, the agencies are finalizing a definition of ''upland'' to mean any land area above the ordinary high water mark or high tide line that does not satisfy all three wetland factors (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils [54]) under normal circumstances, as described in the Corps' 1987 Wetlands Delineation Manual. Features that were once wetlands but have been naturally transformed or lawfully converted to upland (*e.g.,* in compliance with a CWA section 404 permit) are considered upland under the final rule. For convenience, the agencies are including the existing Corps definitions for ''ordinary high water mark'' and ''high tide line'' from 33 CFR 328.3 in the EPA's regulations, as those terms are used in the final definition of ''upland.''

2. Summary of Final Rule Rationale and Public Comments

Under the final rule, the ''adjacent wetlands'' definition is based on the text, structure, and legislative history of the CWA and on the core principles and concepts set forth in the three Supreme Court cases addressing the scope of the phrase ''the waters of the United States,'' as discussed at length in Section II.E.2. Adjacent wetlands form part of the waters of the United States if they are ''inseparably bound up with the 'waters' of the United States.'' *Riverside Bayview,* 474 U.S. at 134. Non-adjacent wetlands, on the other hand, are isolated from waters of the United States and are non-jurisdictional for the reasons discussed below and in Section III.A of this notice. This rule's categorical treatment of adjacent wetlands balances the objective in CWA section 101(a) to ''restore and maintain the chemical, physical, and biological integrity of the nation's waters,'' 33 U.S.C. 1251(a), and the clear policy direction in CWA section 101(b) to ''recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan for the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'' 33 U.S.C. 1251(b); *see also Rapanos,* 547 U.S. at 737 (Scalia, J., plurality). Under this final rule, wetlands that do not abut a paragraph (a)(1) through (3) water, are not inundated in a typical year by a paragraph (a)(1) through (3) water, or are physically separated from a paragraph (a)(1) through (3) water by more than a natural barrier and lack a direct hydrologic surface connection to a paragraph (a)(1) through (3) water in a typical year, as described in paragraph (c)(1), are not inseparably bound up with the ''waters of the United States.'' Such non-adjacent wetlands are more appropriately regulated by States and Tribes pursuant to their own authorities. This final rule establishes a clear, predictable regulatory framework that can be implemented in the field.

Some commenters supported the agencies' proposed definition of ''adjacent wetlands'' and stated that it adheres to the key Supreme Court decisions, the CWA, and the Constitution. Other commenters stated that the proposal struck an appropriate balance between retaining federal jurisdiction over wetlands that are truly adjacent to, and therefore inseparably bound up with, jurisdictional waters and leaving isolated and disconnected wetlands subject to the laws of States and Tribes. Other commenters opposed the agencies' proposed definition because it included wetlands that abut more than traditional navigable waters, wetlands that may not physically touch other jurisdictional waters, and wetlands that lack a continuous hydrologic surface connection to such waters. Several commenters, for example, interpreted the plurality opinion in *Rapanos* as requiring a constant surface water connection to reach beyond the water's edge.

Some commenters recommended that all wetlands be deemed jurisdictional. Other commenters stated that the agencies' proposal was arbitrary and capricious, was inconsistent with the CWA, and that narrowing CWA jurisdiction over adjacent wetlands should be based more on scientific considerations than on legal ones. Other commenters stated that the agencies' proposed definition was inconsistent with the *Riverside Bayview* and *Rapanos* decisions, particularly Justice Kennedy's concurring opinion in *Rapanos.* Some commenters stated that the direct hydrologic surface connection requirement in the proposed rule would not sufficiently protect certain wetlands with hydrological, chemical, and biological connections that the commenters believed are important to restoring and maintaining the chemical, physical, and biological integrity of the nation's waters and was therefore incompatible with section 101(a) of the CWA.

The agencies do not view the scope of their authority as limited to wetlands that abut traditional navigable waters, nor do they view their authorities as limited to wetlands that physically touch other jurisdictional waters. The agencies also do not view the *Rapanos* plurality opinion as narrowly as some commenters suggest. However, classifying all wetlands as jurisdictional is clearly inconsistent with the CWA and Supreme Court guidance, and such expansive federal jurisdiction would not allow for the appropriate delineation between federally-regulated waters and State and tribal land and water resources. The same is true for asserting federal authority over isolated wetlands that lack hydrological surface connection to other jurisdictional waters, or that connect hydrologically only infrequently. The agencies agree with commenters who said that the revised definition should be based on the law and science; however, the agencies recognize that science cannot dictate where to draw the line between Federal and State or tribal waters, as those are legal distinctions that have been established within the overall framework and construct of the CWA.

In short, the agencies recognize that the scope of CWA jurisdiction over wetlands has confounded courts, members of the regulated community, regulators, and the public for decades. There are widely varying views as to which wetlands should be covered, and why. The different views in *Rapanos* and of *Rapanos* highlight the complexity of the issue. In this final rule, the agencies have considered the law, the science, and the multiple perspectives that have been offered over the years and in response to the agencies' proposal. The agencies believe that the proposal was a lawful and appropriate interpretation of agency authority under the CWA, but as described further below, the agencies have made some modifications in the final rule to better incorporate common principles from the *Rapanos* plurality and concurring opinions and to strike a better balance that furthers both the objective and the policy in CWA sections 101(a) and 101(b), respectively. The agencies also recognize that the definition of ''adjacent wetlands'' in the final rule differs from the regulatory definition that the Supreme Court addressed in *Riverside Bayview,* but as

[54] *See* Corps' 1987 Wetlands Delineation Manual at 9–10 (''Wetlands have the following general diagnostic environmental characteristics: (1) Vegetation. The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions . . . Hydrophytic species, due to morphological, physiological, and/or reproductive adaptation(s), have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions. . . . (2) Soil. Soils are present and have been classified as hydric, or they possess characteristics that are associated with reducing soil conditions. . . . (3) Hydrology. The area is inundated either permanently or periodically at mean water depths ≤6.6 ft. or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation.'').

discussed in Section II.E.2.a of this notice, a court's deference to an agency's interpretation of a statute does not foreclose an agency from adopting alternative interpretations. This final rule adopts an alternative interpretation, but it is based on the text, structure, and legislative history of the CWA, additional Supreme Court instruction developed since *Riverside Bayview,* the reasoned policy choices of the executive branch agencies authorized by Congress to implement the Act, and the agencies' technical and scientific expertise administering the CWA over nearly five decades.

''In determining the limits of [their] power to regulate discharges under the Act,'' the agencies according to the Supreme Court in *Riverside Bayview,* ''must necessarily choose some point at which water ends and land begins.'' 474 U.S. at 132. ''Where on this continuum to find the limit of 'waters' is far from obvious[,]'' but the Court has subsequently identified some additional limiting principles to help guide the agencies. In *SWANCC,* the Supreme Court held that the agencies do not have authority to regulate nonnavigable, isolated, intrastate waters that lack a sufficient connection to a traditional navigable water, as regulation of those waters would raise constitutional questions regarding the scope of CWA authority. 531 U.S. at 172. The plurality opinion in *Rapanos* added that it did not consider certain wetlands to be jurisdictional under the Act, specifically, wetlands with only an ''intermittent, physically remote hydrologic connection to 'waters of the United States,' '' as those ''do not implicate the boundary-drawing problem of *Riverside Bayview.*'' 547 U.S. at 742. Justice Kennedy's concurring opinion in *Rapanos* adds that in some instances, as exemplified by the ''ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act,'' ''there may be little or no connection'' ''between a nonnavigable water or wetland and a navigable water,'' and jurisdiction under the Act may be lacking. *Id.* at 766–67.

The final rule is consistent with *SWANCC* and the *Rapanos* plurality and concurring opinions in that it would exclude isolated wetlands with only physically remote hydrologic connections to jurisdictional waters. Ecological connections likewise do not provide an independent basis for including physically isolated wetlands within the phrase ''the waters of the United States.'' *See, e.g., id.* at 741–42 (Scalia, J., plurality) (''*SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today . . . [–] provided an *independent* basis for including entities like 'wetlands' (or 'ephemeral streams') within the phrase 'the waters of the United States.' *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps' jurisdiction.'' (emphasis in original)); *see also, e.g., id.* at 778 (Kennedy, J., concurring in the judgment) (''[E]nvironmental concerns provide no reason to disregard limits in the statutory text.'').

In this rule, wetlands adjacent to paragraph (a)(1) through (3) waters are categorically jurisdictional. The agencies adopt this position based on the rationale that an adjacent wetland is ''inseparably bound up with'' the jurisdictional water; if the water is jurisdictional, so is the adjacent wetland. *Riverside Bayview,* 474 U.S. at 134; *Rapanos,* 547 U.S. at 740 (Scalia, J., plurality) (' 'Faced with such a problem of defining the bounds of its regulatory authority,' we held, the agency could reasonably conclude that a wetland that 'adjoin[ed]' waters of the United States is itself a part of those waters.'') (quoting *Riverside Bayview,* 474 U.S. at 132, 135 & n.9). The *Riverside Bayview* Court also acknowledged ''that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the [agencies have] jurisdiction is a permissible interpretation of the Act,'' 474 U.S. at 135, and Justice Kennedy added in *Rapanos* that ''the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone.'' 547 U.S. at 780. The balance of this subsection describes the four ways in which the agencies will assert categorical jurisdiction over adjacent wetlands under this final rule.

Consistent with the proposal, under this final rule, wetlands are considered indistinguishable from other jurisdictional waters, and therefore are adjacent, when they abut such waters. The agencies clarify in the final rule that the term ''abut'' means ''to touch at least at one point or side.'' *See Webster's II, New Riverside University Dictionary* (1994) (defining ''abut'' to mean ''to touch at one end or side of something''). ''Abut'' as used in this final rule is also consistent with the common understanding of the term ''adjacent,'' which means ''next to,'' ''adjoining,'' ''to lie near,'' or ''close to.'' *See id.* The term ''abut'' is therefore intended to provide members of the regulated community with clear, predictable and understandable guidance as to which wetlands lie in such close proximity to jurisdictional waters that they are considered categorically jurisdictional under the CWA.

As discussed in Section II.E.2, the plurality in *Rapanos* characterized the scope of CWA jurisdiction over wetlands as encompassing wetlands, like those at issue in *Riverside Bayview,* with a ''continuous surface connection'' or a ''continuous physical connection'' to a navigable water. *Rapanos,* 547 U.S. at 742, 751 n.13 (Scalia, J., plurality). Justice Kennedy's concurrence recognized that ''the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a 'navigable water' under the Act.'' *Id.* at 767 (Kennedy, J., concurring in the judgment). Wetlands that abut another jurisdictional water have a continuous surface or physical connection to those waters and are therefore inseparably bound up with them. *See, e.g., id.* at 740 (Scalia, J., plurality).

Wetlands that abut other jurisdictional waters are adjacent under this final rule even absent evidence of a hydrologic surface connection occurring between the two, as not all abutting wetlands display surface water as the wetland hydrology factor but rather may have saturated soils, a high water table, or other indicators of hydrology. In this final rule, an abutting wetland is ''adjacent'' regardless of where ''the moisture creating the wetlands . . . find[s] its source.'' *Rapanos,* 547 U.S. at 772 (Kennedy, J., concurring in the judgment) (citing *Riverside Bayview,* 474 U.S. at 135), so long as the wetland touches the jurisdictional water at one point or side. In other words, while a surface water exchange between a wetland and a paragraph (a)(1) through (3) water under this final rule is evidence that the wetland is abutting, such an exchange is not required under the definition for wetlands that abut. The inclusion of abutting wetlands without a surface water exchange with a paragraph (a)(1) through (3) water adheres to Justice Kennedy's statement that ''[g]iven the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of a hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.'' *Id.* at 786.

The agencies recognize that the categorical inclusion of adjacent wetlands beyond wetlands that ''actually abut[ ]'' navigable-in-fact waters, like those addressed in *Riverside*

Bayview, 474 U.S. at 135, is dependent on the relationship between the other categories of ''waters of the United States'' and waters more traditionally understood as navigable. The agencies believe that the definition of ''tributary'' in this final rule, as described in Section III.D, appropriately limits federal jurisdiction to those rivers and streams that due to their relatively permanent flow regime and contribution of surface water flow to navigable waters in a typical year are ''significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.'' *Rapanos,* 547 U.S. at 781 (Kennedy, J., concurring in the judgment). Because the ''tributary'' definition as finalized ''rests upon a reasonable inference of ecological interconnection'' with navigable waters, and adjacent wetlands must abut, be inundated by flooding from, or be physically separated from tributaries only by certain natural features or by artificial structures that allow for a direct hydrologic surface connection and are thus ''inseparably bound up with'' tributaries, the agencies conclude that the assertion of jurisdiction over wetlands adjacent to tributaries ''is sustainable under the Act by showing adjacency alone.'' *Id.* at 780 (citing *Riverside Bayview,* 474 U.S. at 134). The ''tributary'' definition in this final rule—which is appropriately limited to address the ''breadth of [the] standard'' about which Justice Kennedy was concerned in *Rapanos, id.* at 781, is consistent with and finds support in the Court's conclusion in *Riverside Bayview* ''that a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.'' 474 U.S. at 135.

In assessing the appropriate ''limits of 'waters' '' on the continuum between open waters and dry land, this rule's definition balances the inclusion of certain wetlands beyond those that merely abut jurisdictional waters with the fact that ''mere hydrologic connection should not suffice in all cases.'' *Rapanos,* 547 U.S. at 784 (Kennedy, J., concurring in the judgment). The *Rapanos* plurality questioned the Corps' broad interpretation of its regulatory authority to ''conclude that wetlands are 'adjacent' to covered waters if they are hydrologically connected through directional sheet flow during storm events or if they lie within the 100-year floodplain of a body of water.'' *Id.* at 728 (plurality opinion) (internal citations and quotations omitted). The plurality also declared that ''[w]etlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview,* and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC.*'' *Id.* at 742. Similarly, Justice Kennedy stated that ''the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood.'' *Id.* at 784–85 (Kennedy, J., concurring in the judgment). Justice Kennedy also believed that ''possible flooding'' could be an unduly speculative basis for a jurisdictional connection between wetlands and other jurisdictional waters. *Id.* at 786.

In this final rule, wetlands are not adjacent simply because a hydrologic connection between jurisdictional waters and wetlands is possible or if, for example, wetlands are connected by flooding once every 100 years or by directional sheet flow during or following storm events. Instead, wetlands are considered ''adjacent'' if they are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. The typical year requirement, described further in Section III.A.1, ensures that a sufficient surface water connection occurs and that the connection is not merely ''possible'' or ''speculative.'' *Riverside Bayview* held that flooding was not necessary to assert jurisdiction over wetlands that abut jurisdictional waters, but it also indicated that wetlands created by flooding from a jurisdictional water could be jurisdictional. *See Rapanos,* 547 U.S. at 773–74 (Kennedy, J., concurring in the judgment) (characterizing *Riverside Bayview* to find that jurisdiction may be appropriate ''even for wetlands that are not the result of flooding or permeation''). The agencies conclude in this final rule that wetlands that are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year are inseparably bound up with and are part of the jurisdictional water. That is because flooding in a typical year creates a continuous surface connection with another jurisdictional water during the flood event, or, in the terminology of the agencies' proposal, a direct hydrologic surface connection.

Wetlands can be inundated by flooding from a paragraph (a)(1) through (3) water in a typical year when, for example, a tributary's flow overtops its banks. Inundation sufficient to establish adjacency occurs only in one direction, from the paragraph (a)(1) through (3) water to the wetland, which provides a direct hydrologic surface connection from a jurisdictional water to a wetland, thereby rendering the wetland ''itself a part of those waters'' ''that are 'waters of the United States' in their own right.'' *Rapanos,* 547 U.S. at 740, 742 (Scalia, J., plurality). Inundation can occur as a result of infrequent, seasonal, or permanent flooding, for example, so long as inundation occurs in a typical year and has as its source a paragraph (a)(1) through (3) water. The typical year requirement ensures that the hydrologic surface connection occurs regularly and is not ''unduly speculative.'' Although ''flood or inundation events . . . are impermanent by definition,'' *id.* at 770 (Kennedy, J., concurring in the judgment), when a jurisdictional water inundates a wetland by flooding on a regular basis, those waterbodies are part of the same aquatic system.

The agencies received comments that the inundation requirement should create jurisdiction over a wetland if it occurs in either or both directions, rather than only *from* a jurisdictional water *to* the wetland as proposed. The agencies disagree and conclude in this final rule that it is the inundation of water from the paragraph (a)(1) through (3) water to a wetland, and not vice versa, that indicates the wetland is inseparably bound up with the paragraph (a)(1) through (3) water. Flooding from a nearby wetland to a paragraph (a)(1) through (3) water is more like diffuse stormwater run-off and directional sheet flow over upland, which the agencies have concluded are not sufficient to create or maintain federal jurisdiction. *See* Section III.A.3 for more information on this topic. Wetlands connected to jurisdictional waters by only such means are more appropriately regulated by the States and Tribes under their sovereign authorities. If the surface water communication from a wetland to a jurisdictional water is more frequent, for example as regular groundwater elevation rise expressed through the wetland similar to groundwater intersecting the bed of perennial or intermittent stream), then that flow from the wetland will likely channelize and form a jurisdictional tributary to a downstream water which the wetland would then abut (because it would be touching the tributary at a single point where the tributary left the wetland). If the flow is not channelized, it suggests a more attenuated connection. Alternatively, if the overland flow frequently reaches a jurisdictional water

but does not channelize, it likely will form wetland characteristics in the flow path that could meet the definition of wetland that abuts the jurisdictional water.

Some commenters requested clarification on the frequency and amount of inundation required to establish adjacency. The agencies have clarified in the final rule that inundation occurs via flooding. Inundation need only occur at least once in a typical year to establish adjacency for wetlands with no particular requirement for the volume or duration of inundation. *See* Section III.A.1 for additional discussion of the ''typical year,'' which allows for flexibility in determining when the precipitation and other climatic variables are within the normal periodic range. Others commented that bankfull flow, which describes the flow that just fills the channel, most commonly occurs every 1.5 years, and therefore higher magnitude flows which cause inundation from a river or stream to a riverine wetland may not occur in every calendar year or in every ''typical year.'' The agencies note that an event that may occur under ''typical year'' conditions does not necessarily occur in every calendar year. This is because the typical year is based on a rolling 30-year period of record, which necessarily includes variability from year to year over that 30-year period. One method for calculating ''normal precipitation'' requires comparing precipitation totals for a given period to the 30th to 70th percentiles of precipitation totals from the same dates over the 30-year period, as described in Section III.D.3. This range could correspond to a variety of flood recurrence intervals and flow magnitudes depending on the geographic area, time of year, climate, and other factors. Some typical years will be more wet, and others will be more dry, but the ''typical year'' definition in this final rule is intended to reflect the characteristics of a waterbody at times that are not abnormally wet or dry based on the specific historical characteristics of the water or wetland. The agencies expect that bankfull discharge flows will occur in a typical year in many riverine systems such that those flooded wetlands will be jurisdictional under the final rule. Additionally, the bankfull discharge flow conditions—and sediments carried in those flood waters and deposited landward—commonly create a natural river berm between the active channel and nearby wetlands. As described below, wetlands separated from paragraph (a)(1) through (3) waters only by a natural berm, bank, dune, or similar natural feature are jurisdictional without regard to a specific hydrologic surface connection in a typical year.

In this final rule, wetlands are categorically adjacent if they are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune or similar natural feature. Such wetlands do not require a hydrologic surface connection to a paragraph (a)(1) through (3) water to be ''adjacent wetlands'' in the final rule, nor is this provision of the ''adjacent wetlands'' definition tied to the ''typical year'' construct. This is a change from the proposal that reflects the agencies' further consideration and conclusion that certain wetlands that were excluded from jurisdiction by the proposed rule are in fact regularly connected to jurisdictional waters such that they are inseparably bound up with such waters, as many commenters noted. In this final rule, the agencies conclude that the presence of a natural berm, bank, dune, or similar natural feature indicates that a sufficient surface water connection occurs between the jurisdictional water and the wetland. For example, a natural river berm can be created by repeated flooding and sedimentation events when a river overtops its banks and deposits sediment between the river and a wetland.[55] The wetland could have been formed at the same time as or after the formation of the natural river berm due to repeated flooding and the impeded return flow created by the berm. Adjacent wetlands separated only by a bank from a paragraph (a)(1) through (3) water can also occur when there is an elevation difference between the wetland and the paragraph (a)(1) through (3) water (*e.g.,* when the stream is incised). The surface water flow of the tributary over time can erode a channel to contain the tributary which separates itself from the adjacent wetland by a bank. As with berms, these banks are indicators of a regular surface water connection and being inseparably bound up with the tributary's aquatic system. The agencies clarify that while natural barriers may at times occur within a floodplain, the existence of a floodplain generally (and other land masses similar to a floodplain, such as a riparian area or fluvial terrace) is not sufficient to indicate a direct hydrological surface connection. The agencies also clarify that wetlands separated from jurisdictional waters by cliffs, bluffs, or canyon walls are not adjacent on the basis of being separated from a jurisdictional water only by a natural barrier because such features prohibit regular surface water communication between jurisdictional waters and such wetlands.

Some commenters said that a wetland must immediately abut a jurisdictional water to be adjacent. Other commenters recommended that wetlands perched atop the riverbank of an incised stream be considered adjacent. The agencies have modified the final rule to include wetlands as ''adjacent'' when they are separated only by a natural berm, bank, dune, or similar feature. Some commenters recommended that natural berms not sever adjacency because such features form naturally in undisturbed rivers as a result of sediment deposits associated with routine flooding. The agencies agree that natural berms and similar natural features are indicators of a direct hydrologic surface connection as they are formed through repeated hydrologic events. It follows that wetlands separated from paragraph (a)(1) through (3) waters only by such berms and similar natural features should not sever adjacency. The formation of dunes between wetlands and connected waters often occurs, for example, in interdunal wetlands in coastal areas or around parts of the Great Lakes. These wetlands are often formed through wind erosion which results in the sand surface interacting with the water table, providing enough hydrology to create wetlands. They may also be formed when water levels drop in lakes or from historic glacial retreat. Many interdunal wetlands have seasonally variable hydroperiods where they may be dry during periods of low rainfall. These processes and the resulting natural berm, bank, dune or similar natural feature indicate that the wetlands are integrated and ''inseparably bound up'' with the paragraph (a)(1) through (3) waters to which they are adjacent. Accordingly, the agencies conclude in this final rule that wetlands are adjacent wetlands if they are physically separated from a paragraph (a)(1) through (3) water only by a natural berm, bank, dune, or similar natural feature. While this category of ''adjacent wetlands'' differs from the proposed rule, these types of adjacent wetlands have been included in prior regulations defining ''waters of the United States,'' and their inclusion

[55] See, for example, Connectivity of Stream and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence, p. A–7, defining a ''levee (natural)'' as a ''broad, low ridge or embankment of coarse silt and sand that is deposited by a stream on its floodplain and along either bank of its channel. Natural levees are formed by reduced velocity of flood flows as they spill onto floodplain surfaces and can no longer transport the coarse fraction of the suspended sediment load.''

in the final rule is consistent with the agencies' longstanding practice. *See* 42 FR 37129; *see also* 51 FR 41251 (''Wetlands separated from other waters of the United States by man-made dikes or barriers, *natural river berms, beach dunes* and the like are 'adjacent wetlands.' '') (emphasis added).

Under the final rule, wetlands may be separated from a paragraph (a)(1) through (3) water by only one natural feature, such as a single river berm or dune, in order to be considered adjacent. The agencies intend for wetlands separated by several natural features, such as a series of natural berms or a foredune and a backdune, from the paragraph (a)(1) through (3) water to be too remote from the jurisdictional water and therefore non-adjacent. In another example, where there is a paragraph (a)(1) water, then a dune landward of the paragraph (a)(1) water, followed by a wetland, followed by another dune and then another wetland, the first wetland is an ''adjacent wetland'' but the second distant wetland is not.

Wetlands are not ''adjacent wetlands'' if they are adjacent merely to another wetland; rather under the final rule, wetlands are jurisdictional only if they are adjacent to paragraph (a)(1) through (3) waters. This position is consistent with the agencies' longstanding regulations. *See* 51 FR 41206, 41250 (Nov. 13, 1986) (defining ''waters of the United States as including ''wetlands adjacent to'' other jurisdictional ''waters (other than waters that are themselves adjacent)''). For example, if there is an intervening wetland between the subject wetland and a tributary, and the intervening wetland is adjacent to the tributary but is not part of the same wetland as the subject wetland (*e.g.,* they are separated by upland), the subject wetland is not adjacent to the tributary unless it satisfies the conditions of paragraph (c)(1) in its own right (*e.g.,* if it is inundated by flooding from the tributary in a typical year). In addition, this final rule does not allow for a ''chain'' of wetlands which may be connected hydrologically via groundwater, shallow subsurface flow, overland sheet flow, or non-wetland swales to be considered adjacent to each other or to a paragraph (a)(1) through (3) water simply because one of the wetlands in the chain is adjacent to the paragraph (a)(1) through (3) water. Wetlands that exhibit this type of ''fill and spill'' scenario are not ''adjacent wetlands'' under this final rule if the wetlands can be delineated separately from each other, with upland or non-jurisdictional waters or wetlands between them.

Under this final rule, the definition of ''adjacent wetlands'' also encompasses wetlands that are physically separated from a paragraph (a)(1) through (3) water only by an artificial dike, barrier, or similar artificial structure, so long as that structure allows for a direct hydrologic surface connection between the wetlands and the paragraph (a)(1) through (3) water in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. Although this final rule differs from the proposal in this respect, these types of adjacent wetlands have been defined as ''waters of the United States'' in prior regulations (although those prior regulations did not require the direct hydrologic surface connection that this final rule requires to occur in a typical year). *See* 42 FR 37129 (July 19, 1977). Some commenters recommended that tide gates, as well as pumps in managed aquatic systems, be allowed to maintain sufficient surface water connections for purposes of determining adjacency. The agencies agree and have modified the final rule to include wetlands with a direct hydrologic surface connection through or over such structures to a paragraph (a)(1) through (3) water in a typical year. A flood gate may be designed to restrict water flow other than in times of high water. Under the final rule, a flood gate, culvert, pump, or similar structure that allows for and is used to maintain a direct hydrologic surface connection between a jurisdictional water and a wetland at any point in a typical year satisfies the definition of ''adjacent wetlands.''

Some artificial structures may allow for frequent direct hydrologic surface connections between the wetland and the paragraph (a)(1) through (3) water, while others may not. Under the final rule, a direct hydrologic surface connection through an artificial structure must occur at least once in a typical year to establish adjacency. When an artificial structure separating a wetland from a paragraph (a)(1) through (3) water does not allow for a direct hydrologic surface connection in a typical year, the wetland is not adjacent. For example, although some artificial structures (*e.g.,* a levee) may have subsurface connections through porous soils, this final rule requires the structure to allow for direct hydrologic *surface* connection between a paragraph (a)(1) through (3) water and a wetland in a typical year for the wetland to be adjacent. Similarly, if a culvert or a pump conveys water from a wetland to a jurisdictional water only during a 100-year storm, such features would not allow for a direct hydrologic surface connection between the wetland and jurisdictional water in a typical year, and those wetlands would not be adjacent.

In this section of the final rule, the agencies retained the concept of direct hydrologic surface connection from the proposed rule, but modified it for ease of implementation. The proposed rule would have required that for such wetlands, a direct hydrologic surface connection occurs as a result of inundation from a jurisdictional water to a wetland or via perennial or intermittent flow between a wetland and a jurisdictional water in a typical year. Some commenters supported the use of perennial or intermittent flow classifications to establish a direct hydrologic surface connection from a wetland to a jurisdictional water in a typical year. Other commenters stated that the concept was confusing and that the requirement to identify a perennial or intermittent connection could create implementation challenges. The agencies have been using flow classifications to make jurisdictional determinations since the 2008 *Rapanos* Guidance was issued, and are familiar with and can manage existing implementation challenges. However, to provide additional clarity and to improve and streamline implementation, the agencies have simplified the proposal's approach to establishing adjacency and have eliminated the requirement that a wetland maintain a perennial or intermittent connection to the jurisdictional water in a typical year. In the final rule, a direct hydrologic surface connection in a typical year, regardless of the flow classification, is sufficient to demonstrate that the wetland and jurisdictional water are inseparably bound up.

By not including a flow classification requirement for direct hydrologic surface connections in paragraph (c)(1), the agencies anticipate that more wetlands will be regulated as ''adjacent wetlands'' under the final rule as compared to the proposal. The final rule will also be easier to implement, as landowners and regulators can easily discern if an artificial structure exists and whether that structure likely allows for a direct hydrologic surface connection to occur in a typical year. *See* Section III.G.3 for additional discussion on implementation.

Under this final rule, an adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

This aspect of the final rule was modified from the proposal but is consistent with establishing jurisdiction over wetlands physically separated by artificial structures that provide a direct hydrologic surface connection in a typical year. A road that divides one wetland into two parts (or multiple roads that divide one wetland into multiple parts) does not change the jurisdictional status of an ''adjacent wetland'' under this final rule so long as a direct hydrologic surface connection is maintained through a culvert or similar feature or over the structure (*e.g.,* water overtopping the road at an engineered low point) which enables a direct hydrologic surface connection in a typical year between the otherwise separated portions of the adjacent wetland. With a direct hydrologic surface connection, the bisected wetland is still functioning as one wetland and is jurisdictional as one adjacent wetland. But for the road, the wetland portions would be one intact adjacent wetland, and thus the agencies have determined that it is appropriate to treat the separated portions as one adjacent wetland, so long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. Where more than one road crosses a wetland, and the first allows for continued direct hydrologic surface water connection to a jurisdictional water but the second does not, the wetlands on the far side of the second road are not part of the adjacent wetland. This modification to the final rule addresses comments that stated that prior road construction activities may not have fully mitigated for the loss of jurisdictional wetlands.

Commenters raised questions about the jurisdictional status of wetland complexes under the proposed rule. Consistent with the proposal, the final rule establishes that if a wetland can be delineated from another wetland by upland or other separation (other than a road or similar artificial structure dividing a wetland that allows for a direct hydrologic surface connection through or over that structure in a typical year) then each wetland will be considered separately for purposes of determining adjacency. These separate wetlands are not adjacent to each other even if a hydrologic surface connection is present between them. Where wetlands in a complex of wetlands have a continuous physical surface connection to one another such that upland boundaries or dikes, barriers, or other structures cannot distinguish or delineate them as physically separated, the entire area is viewed as one wetland for consideration as to whether the wetland meets the terms of adjacency. If any portion of a wetland, including these physically interconnected wetlands, is adjacent to a paragraph (a)(1) through (3) water, the entire wetland is adjacent. *See Riverside Bayview,* 474 U.S. at 135 (''Because respondent's property is *part* of a wetland that actually abuts on a navigable waterway, respondent was required to have a permit in this case.'') (emphasis added). Physically remote isolated wetlands are not adjacent wetlands under this rule.

Some commenters expressed concern that allowing artificial barriers to sever jurisdiction of a wetland that would otherwise be adjacent to a jurisdictional water would create incentives for the illegal construction of such barriers. The agencies note that construction of an artificial barrier such as a berm may not sever jurisdiction under the final rule, depending on the circumstances. For example, if the barrier allows for a direct hydrologic surface connection in a typical year, jurisdiction is not severed. Alternatively, a CWA section 404 permit may be issued with applicable mitigation requirements for a structure that does not allow for a direct hydrologic surface connection in a typical year and therefore severs jurisdiction of the wetland. In addition, although the agencies recognize that relevant factual issues bear on the legality of construction at any particular site, the agencies do not intend this rule to allow artificial barriers illegally constructed under the CWA to sever jurisdiction of a wetland that would otherwise be adjacent to a jurisdictional water. To be clear, this final rule does not modify the CWA prohibition on unauthorized discharges, such as the unlawful construction of a barrier in a jurisdictional wetland. Construction that is unlawful under the CWA remains subject to the agencies' enforcement authorities. *See* Section III.A.3 of this notice for further discussion of what does or does not sever jurisdiction.

Some commenters stated that adjacent wetlands should include constructed and restored wetlands. The agencies agree and do not view a wetland's status as constructed, restored, rehabilitated, modified, or natural as affecting its jurisdictional status if it meets the definitions of both ''wetlands'' and ''adjacent wetlands'' under the final rule.

Several commenters stated that groundwater and subsurface connections between a wetland and a paragraph (a)(1) through (3) water should be sufficient to establish adjacency. Other commenters stated that the proposal appropriately required a regular *surface* water connection to create jurisdictional ''adjacent wetlands.'' Given that the focus of this rule's definition of ''adjacent wetlands'' is on the ordinary meaning of the term ''waters,'' common principles from Supreme Court guidance, and balancing the policy in CWA section 101(a) with the limitations on federal authority embodied in CWA section 101(b), the agencies are finalizing the definition of ''adjacent wetlands'' that does not include subsurface hydrologic connectivity as a basis for determining adjacency, consistent with the proposed rule. The agencies believe that implementation of subsurface connections as a basis for CWA jurisdiction would be overinclusive and would encroach on State and tribal authority over land and water resources. *See* Section II.E.2.a. for further discussion of the legal principles underlying the agencies' interpretation of the surface connection requirement. A groundwater or subsurface connection could also be confusing and difficult to implement, including in the determination of whether a subsurface connection exists and to what extent. The categorical inclusion of ''adjacent wetlands'' as defined in the final rule will include some wetlands that connect to other jurisdictional waters through subsurface flow, such as some that abut or are separated by natural berms and related features. However, these wetlands must meet one of the four criteria established in paragraph (c)(1) to be ''adjacent wetlands'' and are not adjacent based simply on a subsurface hydrologic connection to jurisdictional waters. Physically remote wetlands and other wetlands that do not meet the final rule's definition of ''adjacent wetlands'' are reserved to regulation by States and Tribes as land and water resources of those States and Tribes.

A few commenters recommended that the agencies establish an administrative boundary for adjacency, such as a linear distance from a jurisdictional water to provide clarity. Other commenters stated that establishing distance thresholds or limits would be inappropriate and arbitrary. After considering these comments, the agencies are not including any distance thresholds or limits to determine adjacency in the final rule, consistent with the proposal. Indeed, the agencies believe that it would be difficult to select a boundary that is not arbitrary for a rule that applies to so many diverse situations nationwide. In addition, it can be difficult to identify a starting point from which to measure

an administrative boundary. While distance thresholds for establishing CWA jurisdiction over wetlands may be too arbitrary and difficult to establish, however, the same is likely not true for determining lead permitting responsibility when States or Tribes assume section 404 permitting authority under 33 U.S.C. 1344(g). In assumed programs, the question for adjacent wetlands is which regulatory authority is responsible for permitting, not whether the wetlands themselves are waters of the United States.

Some members of the public commented that adjacent wetlands should include all wetlands within the 100-year floodplain. Other commenters disagreed and stated that wetlands with a one percent annual chance of flooding should not be considered waters of the United States. Under the final rule, although not all wetlands in the 100-year floodplain are jurisdictional, many adjacent wetlands will be located within the 100-year floodplain of a jurisdictional water. In addition to the other tests for adjacency, flooding in a typical year may occur in portions of the 100-year floodplain. For example, wetlands which are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year may be floodplain wetlands, or wetlands which are physically separated from a paragraph (a)(1) through (3) water only by a natural berm or dune may be floodplain wetlands. The agencies also recognize that it can be difficult to measure a floodplain's extent as floodplains are not mapped everywhere in the country. In any event, the agencies believe that including wetlands as adjacent due solely to their presence in the 100-year floodplain goes beyond the scope of the agencies' legal authority under the CWA and contravenes Supreme Court guidance. *See, e.g., Rapanos,* 547 U.S. at 746 (Scalia, J., plurality) (''the Corps' definition of 'adjacent,' . . . has been extended beyond reason to include, *inter alia,* the 100-year floodplain of covered waters''). Consistent with the proposal, the agencies are not including a floodplain criterion (*e.g.,* a general floodplain requirement or a specific floodplain interval requirement) to determine adjacency in the final rule.

Some commenters recommended that the agencies include wetlands with a significant nexus to navigable waters as jurisdictional while others supported the agencies' proposed approach to remove the case-specific significant nexus analysis from the determination of jurisdiction. This final rule ends the agencies' practice of conducting case-specific significant nexus evaluations for determining whether wetlands are jurisdictional as adjacent. Under the agencies' *Rapanos* Guidance, this evaluation required individual analyses of the relationship between a particular wetland (or group of wetlands aggregated together with its nearest tributary) with traditional navigable waters. Importantly, Justice Kennedy's ''significant nexus'' test for wetlands adjacent to non-navigable tributaries was only needed ''absent more specific regulations,'' *id.* at 782 (Kennedy, J., concurring in the judgment), because ''the breadth of [the then-existing tributary] standard . . . seems to leave wide room for regulations of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes towards it'' and thus ''precludes its adoption as a determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood.'' *Id.* at 781. In light of the ''more specific [tributary] regulations'' in this final rule, the agencies are eliminating the case-specific significant nexus analysis through categorical treatment of all adjacent wetlands, as defined by this rule, as ''waters of the United States.'' The agencies recognize that this is a new position and modifies prior agency positions on Justice Kennedy's concurring opinion in *Rapanos.* The agencies also recognize that several courts have adopted the significant nexus standard as a test for jurisdiction for both adjacent wetlands and tributaries. For all the reasons described in Section II.E, the agencies are finalizing a rule that is more consistent with the body of Supreme Court guidance, including the origins of the significant nexus standard, and their authority under the Act, than were previous regulations. The agencies believe that this final rule achieves the goals of the Act and provides better clarity for the regulators and the regulated community alike, while adhering to the basic principles articulated in *Rapanos, SWANCC,* and *Riverside Bayview.*

Some commenters recommended including as waters of the United States specific waters based solely on ecological importance, such as prairie potholes. Other commenters urged the agencies to finalize a rule consistent with Supreme Court guidance which directs that ecological considerations do not provide an independent basis for federal jurisdiction. As noted above, under the final rule's definition, ecological connections alone are not a basis for including physically isolated wetlands within the phrase ''the waters of the United States.'' *See, e.g., Rapanos,* 547 U.S. at 741–42 (Scalia, J., plurality); *see also id.* at 778 (Kennedy, J., concurring in the judgment).

Some commenters recommended the agencies incorporate more scientific analysis in their interpretation of the proper scope of ''adjacent wetlands''. The definition of ''adjacent wetlands'' and the categorical treatment of jurisdiction over wetlands adjacent to other jurisdictional waters is informed by science, though it is not dictated by science alone. For example, the EPA's SAB noted when reviewing the Draft Connectivity Report in 2014, that ''[s]patial proximity is one important determinant of the magnitude, frequency and duration of connections between wetlands and streams that will ultimately influence the fluxes of water, materials and biota between wetlands and downstream waters.'' SAB Review at 60. ''Wetlands that are situated *alongside* rivers and their tributaries are likely to be connected to those waters through the exchange of water, biota and chemicals. As the distance between a wetland and a flowing water system increases, these connections become less obvious.'' *Id.* at 55 (emphasis added). The Connectivity Report also recognizes that ''areas that are closer to rivers and streams have a higher probability of being connected than areas farther away.'' Connectivity Report at ES–4. The agencies considered these and other scientific principles described above in crafting this final rule; however, as discussed in Section II.E of this notice, the line between Federal and State waters is a legal distinction, not a scientific one, that reflects the overall framework and construct of the CWA. This rule's definition draws the legal limit of federal jurisdiction in a clear and implementable way that adheres to established legal principles, while being informed by the policy choices and scientific expertise of the executive branch agencies charged with administering the CWA.

Consistent with the proposal, the agencies are retaining the longstanding definition of ''wetlands'' in this final rule. Some commenters expressed support for this approach. Some commenters requested that the agencies clarify that a wetland must satisfy all three wetland delineation factors to be considered a wetland under the rule. Other commenters requested that the agencies clarify the term ''normal circumstances'' as used in the definition of ''wetlands,'' and suggested that the term should not apply when higher than normal rainfall conditions are present.

Commenters also requested clarification on whether human alteration affects ''normal circumstances.''

The agencies have clarified that the presence and boundaries of wetlands are determined based upon an area satisfying all three of the definition's factors (*i.e.,* hydrology, hydrophytic vegetation, and hydric soils) under normal circumstances. This is evident in the final definition of ''upland'' in paragraph (c)(14). The agencies have also clarified that certain elements of the ''adjacent wetlands'' definition include a ''typical year'' requirement to ensure that the jurisdictional status of wetlands is being assessed under conditions that are not too wet and not too dry. In addition, the agencies consider climatic conditions when delineating wetlands, for example, whether there are drought conditions or conditions of unusually high rainfall. The term ''typical year'' is not intended to modify the agencies' current implementation of normal circumstances.

The agencies recognize that there have been questions over time about the jurisdictional status of ditches that are not maintained. Under this final rule, as discussed in more detail in Section III.E, when a ditch constructed in an adjacent wetland contributes less than perennial or intermittent flow to a paragraph (a)(1) water in a typical year and yet, due to lack of maintenance, gains wetland characteristics, that ditch may be viewed as an adjacent wetland if it meets the definition of both ''wetlands'' under paragraph (c)(16) and ''adjacent wetlands'' under paragraph (c)(1).

3. How will the agencies implement the final rule?

If a wetland satisfies this rule's definition of ''wetlands'' and ''adjacent wetlands'' it is considered a water of the United States without need for further analysis. This categorical inclusion, however, does not alleviate the need for site-specific verification of jurisdiction, such as confirmation of wetland characteristics, whether the wetlands meet the final rule's definition of ''adjacent wetlands,'' and other issues typically addressed during a jurisdictional determination process.

This rule provides a definition of ''adjacent wetlands'' that includes wetlands that abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3). Such abutting wetlands need not abut the paragraph (a)(1) through (3) water along the entire length of a delineated wetland boundary to be considered adjacent. Rather, the wetlands need only touch the paragraph (a)(1) through (3) water at one point. In addition, and consistent with the proposal and *Riverside Bayview,* the final rule does not require surface water exchange between wetlands and the jurisdictional waters they abut to create the jurisdictional link. 474 U.S. at 134.

Abutting occurs when the wetland delineated boundary touches the delineated boundary of the paragraph (a)(1) through (3) water, which does not require a direct hydrologic surface connection because not all wetlands have standing or flowing surface water as their wetland hydrology factor. For example, some wetlands may have saturated soils or a high water table, and these are also indicators of wetland hydrology. Abutting occurs at the interface between the adjacent wetland and the paragraph (a)(1) through (3) water. In the field, the agencies would identify the presence of a paragraph (a)(1) through (3) water and delineate the boundary of such water at the lateral extent identified by the ordinary high water mark or high tide line, depending on which is appropriate. *See* 33 CFR 328.4. The agencies would then delineate the wetlands within the review area to determine whether the wetland boundary touches the paragraph (a)(1) through (3) water boundary at any point or side. The wetlands need not abut for a specific duration in order to be considered abutting. For example, wetlands that abut a tributary only during the wet or rainy season remain adjacent under this final rule. Similarly, if a wetland abuts an intermittent tributary it remains abutting even when water is not present in the tributary. Wetlands abutting an ephemeral stream or other non-jurisdictional feature are non-jurisdictional even if the non-jurisdictional feature maintains jurisdiction between upstream and downstream waters.

Some commenters stated that surface connections may not be present or identifiable year-round. Many commenters questioned whether the use of remote tools could identify the necessary connections and stated that field indicators and site-specific verification for wetland connections may be needed. In addition, commenters requested clarification on systems with modifications, such as dikes, levees, and other man-made structures.

The agencies modified the final rule language from the proposal in response to many of these comments to provide additional clarity and ease of implementation, while remaining faithful to the overall text, structure, and legislative history of the CWA and the legal principles outlined in Section II.E. Culverts or other structures conveying water through an artificial barrier, such as a levee or a road, can maintain jurisdiction in the final rule if they provide a direct hydrological surface connection between a wetland and a jurisdictional water in a typical year. Where a wetland is physically separated from a tributary by a manmade levee and such artificial structure has a culvert connection through the levee, the culvert is visibly apparent and can be easily observed for efficiency in identifying it as potentially providing a direct hydrologic surface connection. In other locations, pumps may be used to control water levels. In some scenarios, the pumps are continually operating to maintain flow conditions, and in other scenarios, they are turned on only when flood conditions are present. Pumps can move water through the artificial structure or over it. A pump can create a direct hydrologic surface connection in a typical year between paragraph (a)(1) through (3) waters and their adjacent wetlands. Tide gates can also allow for a direct hydrologic surface connection in a typical year between wetlands and the paragraph (a)(1) through (3) water to which they are adjacent under the final rule. As long as a feature present within the artificial structure allows for a direct hydrologic surface connection between the wetland and a paragraph (a)(1) through (3) water in a typical year, the wetland is an adjacent wetland even if flow is not present at the time of observation. The agencies may not assume the presence of such artificial features; rather they may identify such artificial features via on-site observations or remotely using construction design plans, permitting data, state and local information, or levee or drainage district information. As is the case with jurisdictional determinations made under any regulatory regime, site-specific verification may be required in certain instances where remote tools may not be readily available or accurate or in other, often more complex site scenarios.

A wetland flooded by a navigable water, on average, once every 100 years would not satisfy the final rule's ''adjacent wetlands'' definition. Such inundation via flooding must occur from a paragraph (a)(1) through (3) water at least once in a typical year for purposes of adjacency. The agencies may determine that inundation by flooding or a direct hydrologic surface connection exists during a typical year using, for example, USGS stream gage records, recurrence intervals of peak flows, wetland surface water level

records, visual observation, aerial imagery, flood records, inundation modeling techniques and tools (*e.g.,* Hydrologic Engineering Centers River System Analysis System, or HEC–RAS, or tools available from USGS through their Flood Inundation Mapping program), or engineering design records. The agencies may also need to complete one or more site visits to collect field indicators of inundation. For example, the presence of water marks, sediment and drift deposits, water-stained leaves, or algal mats may indicate that an inundation event has recently occurred. The agencies believe that it is also important to consider weather and climatic conditions, *i.e.,* to review recent precipitation and climate records, to ensure the feature is not being assessed during a period of drought or after a major precipitation or infrequent flood event. Tools for determining whether climatic conditions meet the definition of ''typical year'' are described in Section III.A.1 of this notice.

In addition, under this final rule an adjacent wetland divided by an artificial structure, such as a road or railroad line, is treated as a single wetland and is jurisdictional in its entirety as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year. The direct hydrologic surface connection can occur through or over the artificial structure, such as through a culvert, or as is present in some areas, over roads designed to overtop during certain conditions. Without a direct hydrologic surface connection in a typical year, only that wetland (*i.e.,* that portion of the original wetland) which meets the terms of the definition of ''adjacent wetlands'' under paragraph (c)(1) would be an adjacent wetland, even if there is a subsurface hydrologic connection (*e.g.,* shallow subsurface flow or aquifer) between the wetlands present on either side of the road or other artificial structure. To identify the direct hydrologic surface connection through or over a road or other artificial structure, the agencies may use tools similar to those that are used to identify a direct hydrologic surface connection through an artificial structure, such as a dike.

To implement this aspect of the rule as applied to a particular wetland, the agencies will first need to determine whether the wetland is adjacent to a paragraph (a)(1) through (3) water. The agencies will then need to consider the conditions on the ground in order to determine whether the divided parts of the wetland should be considered one adjacent wetland, where it otherwise meets the terms of the definition. For example, if a wetland is present on either side of a road which has a direct hydrologic surface connection via a culvert connecting both parts of the wetland in a typical year, the agencies need not recreate the history of the road construction and what the conditions on the ground were at time of road construction. Rather, the agencies will observe the artificial structure and will note whether the artificial structure allows for a direct hydrologic surface connection such that the wetlands on both sides of the road can connect via surface hydrology in a typical year. If so, then the wetlands are considered one wetland.

As a general matter and consistent with longstanding practice, the agencies take a physical separation as they find it. The physical separation will be evaluated in its current form (unless normal circumstances are not present or where there is evidence of unlawful activity or efforts to circumvent jurisdiction, in which case, the separation will be evaluated using other tools to approximate normal circumstances). If a dike is originally designed not to allow for a direct hydrologic surface connection between a paragraph (a)(1) through (3) water and wetlands on the other side of the dike, but later a culvert is added to provide adequate drainage in a typical year or a pump is added to provide flood protection in a typical year, these features create a direct hydrologic surface connection between the jurisdictional water and the wetlands. In this scenario, the wetlands become adjacent wetlands. If a natural feature is modified or changes over time (as when a berm develops over time separating a wetland from a paragraph (a)(1) water) the agencies intend to take the feature as they find it, determine whether it is a natural physical separation, and then consider whether the wetland is adjacent. Pumps are considered to be the ''normal'' circumstances of the hydrology when they are permanently present and are serviceable. Pumps create adjacency under the final rule when they are permanent features which allow for a direct hydrologic surface connection in a typical year through an artificial structure between a wetland and the paragraph (a)(1) through (3) water.

Temporary structures are not subject to the ''take it as they find it'' principle. Their presence is intended to modify the relationship between the paragraph (a)(1) through (3) water and a wetland for only a limited duration of time. For example, a temporary culvert in place for three months during construction would not allow for a wetland to become adjacent under this rule. Such temporary structures are not considered normal circumstances when considering whether a wetland may be adjacent.

For purposes of adjacency under the rule, the entire wetland is considered adjacent if any portion of the wetland meets the terms of the definition under paragraph (c)(1), regardless of the size and extent of the wetland. For example, if a portion of one side of a wetland physically touches a tributary, then the wetland is jurisdictional in its entirety. Determining the entire wetland to be adjacent if any portion of it satisfies the ''adjacent wetlands'' definition is consistent with longstanding practice. The agencies have found this approach to be simpler and easier to implement in the field than establishing a means of administratively bifurcating wetlands. An adjacent wetland that changes classification (*e.g.,* as defined in Cowardin *et al.* 1979) within the overall wetland delineated boundary due to landscape position, hydrologic inundation, or other factors, such as changing from salt marsh to brackish to freshwater wetland, is jurisdictional as one adjacent wetland.

Certain wetland indicators may not be present year-round in a typical year due to normal seasonal or annual variability. Adjacent wetlands under this final rule include wetlands with alternating hydroperiods and seasonal wetlands with vegetation shifts. Consistent with the agencies' longstanding practice, the delineated boundary of a seasonal wetland remains constant, even though all three delineation factors may not be apparent year-round. This approach acknowledges seasonal variation in visible wetland factors as well as the variation in hydrology and climatic conditions across the country. For example, seasonal wetlands with vegetation shifts may display hydrophytic vegetation abutting another water of the United States throughout the year except during the dry season. Also, wetlands with alternating hydroperiods that abut another water of the United States in the arid West may have hydrology present only for three months while otherwise similar wetlands in the Southeast may have hydrology present for nine months. Wetland hydrology indicators that require direct observation of surface water or saturated soils are often present only during the normal wet portion of the growing season and may be absent during the dry season. The wetland hydrology factor is often much more variable on short time scales than the hydrophytic vegetation and hydric soil factors, especially in seasonal wetlands

like some bottomland hardwood forests which can lack flooding or saturation.

Some commenters noted that a ditch constructed in an adjacent wetland can drain water and create a zone of influence which may render the entire wetland non-jurisdictional under the proposed rule. Under this final rule, a wetland must first be considered adjacent to a paragraph (a)(1) through (3) water before a ditch constructed in it may be considered a tributary. Therefore, the wetland may still be jurisdictional as an adjacent wetland to the paragraph (a)(1) through (3) water under (c)(1) even if the ditch's zone of influence reduces the extent of the wetland around the ditch, as the wetland's jurisdictional status is not directly tied to the ditch. Historical and current aerial photographs, NWI maps, NRCS soils maps, and other similar resources may indicate whether a ditch was constructed in an adjacent wetland. There may also be certain instances where a ditch has lawfully drained a wetland.

H. Waters and Features That Are Not Waters of the United States

1. What are the agencies finalizing?

In paragraph (b) of the final rule, the agencies are codifying twelve exclusions from the definition of ''waters of the United States.'' Many of the exclusions reflect longstanding agency practice and are expressly included in the final rule to ensure predictability, as the agencies continue to implement them in the future. Two of the exclusions (waste treatment systems and prior converted cropland) have been expressly included in regulatory text for decades, but the agencies are defining them for the first time to enhance implementation clarity. The majority of paragraph (b) has been finalized as proposed, but as discussed in the next subsection, the agencies have made some changes to what they proposed in response to public comments and additional analysis of the proposed regulatory text. For example, in the final rule the agencies split ephemeral surface features and diffuse stormwater runoff and overland sheet flow into separate exclusions for added clarity.

Waters and features that are excluded under paragraph (b) of the final rule cannot be determined to be jurisdictional under any of the categories in the rule under paragraph (a). Any water not enumerated in paragraphs (a)(1) through (4) is not a ''water of the United States.'' In addition to this overarching exclusion, the final rule includes additional exclusions to provide more specificity for certain common landscape features and land uses that are more appropriately regulated, if at all, under the sovereign authorities of States and Tribes. For example, the final rule excludes groundwater from the definition of ''waters of the United States,'' including groundwater drained through subsurface drainage systems, reflecting the agencies' longstanding practice. The rule creates a new exclusion for ephemeral features, including ephemeral streams, swales, gullies, rills, and pools, and excludes diffuse stormwater run-off and directional sheet flow over upland. Adhering more closely to the agencies' original interpretation of the CWA, the rule excludes ditches from the definition of ''waters of the United States'' except those ditches identified as jurisdictional under paragraph (a)(1) or (2) and those ditches constructed in adjacent wetlands that do not meet the flow conditions of the definition of ''tributary'' but that meet the conditions of paragraph (a)(4). The agencies are retaining an exclusion for prior converted cropland but are defining it for the first time in regulatory text. The agencies are also retaining an exclusion for waste treatment systems.

The final rule also excludes artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease. In addition, the rule excludes artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6). The final rule excludes water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel. The agencies also have excluded stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off. Also excluded in the final rule are groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters.

As discussed in Section III.G, the agencies have defined ''upland'' in paragraph (c)(14) and specify in the regulatory text that certain water features constructed or excavated in upland or in non-jurisdictional waters are excluded from the definition of ''waters of the United States.'' In the final rule, ''upland'' means any land area that under normal circumstances does not satisfy all three wetland characteristics identified in the definition of ''wetlands'' (hydrology, hydrophytic vegetation, hydric soils) and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water. The term is used in six of the exclusions listed in paragraph (b), and the definition is intended to provide additional clarity as the agencies implement the exclusions while also informing the application of the ''adjacent wetlands'' definition. *See* Section III.G of this notice.

The agencies received a broad range of comments on the proposed rule's list of exclusions, some stating that the exclusions provide necessary clarity while allowing the regulated community to plan investments in infrastructure and other projects with increased regulatory certainty and predictability. Others expressed support for the new exclusion in paragraph (b)(1), stating that it clarified that if a water is not jurisdictional under paragraph (a), it is not subject to CWA jurisdiction. Other commenters supported the inclusion of definitions for prior converted cropland and waste treatment systems, acknowledging that the new definitions help clarify those longstanding exclusions. Some commenters opposed many of the exclusions, arguing that they restrict CWA jurisdiction over too many ecologically important waters. Some commenters argued that prior converted cropland and waste treatment systems should not be excluded from CWA jurisdiction, stating that nothing in the CWA supports the agencies' longstanding positions. The agencies have considered these diverse comments and have generally adhered to the approach set forth in the proposed rule, while making some adjustments to the regulatory text to address certain questions that were raised and to improve the clarity of the regulatory text, as discussed in the next subsection.

2. Summary of Final Rule Rationale and Public Comment

Many of these exclusions generally reflect the agencies' current and historic practice, and their inclusion in the final rule furthers the agencies' goal of providing greater clarity over which waters are and are not regulated under

the CWA. Just as the categorical assertions of jurisdiction over tributaries, lakes, ponds, and impoundments of jurisdictional waters, and adjacent wetlands simplify the jurisdictional determination process, the categorical exclusions likewise simplify the process. In certain circumstances, they also reflect the agencies' determinations of the limits of their jurisdiction under the CWA based on the text of the statute, Supreme Court guidance, and the agencies' longstanding practice and technical judgment that certain waters and features are not subject to regulation under the CWA. These waters are or could be subject to State or tribal jurisdiction, as the CWA recognizes that States and Tribes can regulate more broadly than the Federal government.

Some State comments on the proposed exclusions indicated that the exclusions uphold State sovereignty to administer and allocate water resources and preserve traditional State and local authority over private property. Some commenters also stated that the proposed exclusions are consistent with the principles of cooperative federalism under the CWA. For example, a commenter asserted that the types of waters proposed for exclusion are all waters that would traditionally fall under State jurisdiction and should remain subject to State regulation under the framework for cooperative federalism set forth in the CWA. The agencies agree that the CWA's cooperative federalism approach to protecting water quality is important and continue to reflect that approach in the exclusions finalized in this rule.

Importantly, the agencies' final rule clarifies that all waters and features identified in paragraph (b) as non-jurisdictional would not be waters of the United States. As stated in paragraph (b)(1) of the final rule, waters or water features not enumerated in paragraphs (a)(1) through (4) would not be a water of the United States. The agencies have taken this approach to avoid suggesting that but for an applicable exclusion, such features could be jurisdictional. This approach in the final rule comprehensively excludes all waters and features that the agencies have not included as waters of the United States under paragraph (a) of the rule. Different features are called different names in different parts of the country, so this approach is also intended to eliminate the risk of confusion. The agencies note that the examples of features in each exclusion are illustrative of the types of features covered under each exclusion.

Groundwater

In paragraph (b)(2) of the final rule, the agencies exclude groundwater, including groundwater drained through subsurface drainage systems. The agencies have never interpreted waters of the United States to include groundwater, and they continue that practice through this final rule by explicitly excluding groundwater. The agencies also note that groundwater, as opposed to subterranean rivers or tunnels, cannot serve as a connection between upstream and downstream jurisdictional waters. For example, a losing stream that flows to groundwater without resurfacing does not meet the definition of ''tributary'' because it does not contribute surface water flow to a downstream jurisdictional water. However, a subterranean river does not sever jurisdiction of the tributary if it contributes surface water flow in a typical year to a downstream jurisdictional water, as described in Section III.A.3, even though the subterranean river itself is not jurisdictional.

Many commenters cited legislative history in the development of the Act, the agencies' implementing regulations, and case law as evidence of Congressional intent in support of the groundwater exclusion. Commenters noted that CWA legislative history demonstrates that Congress clearly did not intend to include groundwater as ''waters of the United States,'' because Congress did not support a proposed amendment to include groundwater as waters of the United States. Many commenters stated that all subsurface water should be non-jurisdictional. Other commenters stated that groundwater is not a ''navigable water'' or a ''channel of interstate commerce'' and therefore should be excluded. Conversely, several commenters stated that groundwater is important to commerce, because it is essential as a source of drinking water for much of the population. Other commenters stated that groundwater should be jurisdictional, based on concerns regarding pollution moving to or from shallow subsurface waters. Some commenters stated that groundwater, including shallow subsurface water, could serve as a conduit for discharge of pollutants to surface water.

The agencies agree with those commenters who stated that nothing in the language of the CWA or its legislative history, Supreme Court interpretations, or past agency practices support the inclusion of groundwater, including groundwater drained through subsurface drainage systems, in the definition of ''waters of the United States.'' The agencies disagree with other commenters' assertion that groundwater should be included in the definition of ''waters of the United States.'' The agencies acknowledge the importance of groundwater as a resource and its role in the hydrologic cycle. But its regulation is most appropriately addressed by other Federal, State, tribal, and local authorities. Therefore, consistent with the agencies' longstanding practice, the final rule clarifies that groundwater is non-jurisdictional. This includes shallow subsurface water and groundwater that is channelized in subsurface systems, like tile drains used in agriculture. The agencies acknowledge that, in certain circumstances, pollutants released to groundwater can reach surface water resources. However, the statutory reach of ''waters of the United States'' must be grounded in a legal analysis of the limits on CWA jurisdiction that Congress intended by use of the term ''navigable waters,'' and an understanding and application of the limits expressed in Supreme Court opinions interpreting that term. This final rule does that, while also supporting the agencies' goals of providing greater clarity, certainty, and predictability for the regulated public and regulators.

While the final rule excludes groundwater from regulation, many States include groundwater in their definitions of ''waters of the State'' and therefore may subject groundwater to State regulation. Indeed, the CWA incentivizes State protection of groundwater; for example, grants under CWA section 319 may implement management programs which will carry out groundwater quality protection activities as part of a comprehensive nonpoint source pollution control program. 33 U.S.C. 1329(h)(5)(D). CWA section 319(i) directs the EPA Administrator to make grants to States for the purpose of assisting States in carrying out groundwater quality protection activities which the Administrator determines will advance the State toward implementation of a comprehensive nonpoint source pollution control program. Such activities include research, planning, groundwater assessment, demonstration programs, enforcement, technical assistance, education, and training to protect the quality of groundwater and to prevent contamination of groundwater from nonpoint sources of pollution. 33 U.S.C 1329(i). In addition, groundwater quality is regulated and protected through several other legal mechanisms, including the Safe

Drinking Water Act, the Resource Conservation and Recovery Act, and various State and local laws.[56]

Ephemeral Features and Diffuse Stormwater Run-Off

In paragraph (b)(3), the final rule excludes ephemeral features, including ephemeral streams, swales, gullies, rills, and pools. In paragraph (b)(4), the rule excludes diffuse stormwater run-off and directional sheet flow over upland. Such features are not jurisdictional under the terms of paragraph (a) in the final rule or its definitions in paragraph (c). They are specifically excluded in the final rule for additional clarity. The final rule differs from the proposed rule, as (b)(3) and (b)(4) were combined into one category of exclusions in the proposal. The agencies believe that separating the exclusions into two categories, as they have done for the final rule, provides greater clarity. The separation does not have a practical effect on or substantively change the types of waters and features that the final rule excludes compared to the proposed rule. As described in detail in Section III.A.3, the agencies have revised the proposed rule to clarify that while ephemeral features are not waters of the United States, a tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized ephemeral feature, such as an ephemeral stream or gully. However, if an upstream reach is connected to the downstream reach only by diffuse stormwater runoff or directional sheet flow over upland, the upstream reach is not jurisdictional under the final rule. Providing additional clarity in the paragraph (b) exclusions helps to highlight that only some excluded features are capable of providing a channelized surface water connection between upstream and downstream perennial or intermittent waters. Under the final rule, ephemeral features are not jurisdictional and do not become jurisdictional even if they maintain jurisdiction of relatively permanent upstream waters by conveying surface water from those waters to downstream jurisdictional waters in a typical year.

Some commenters supported the ephemeral features exclusion as being consistent with the CWA, Commerce Clause, and case law, particularly the plurality opinion in *Rapanos.* For example, one commenter indicated that the proposed exclusion aligned with CWA section 101(b) and, by avoiding jurisdiction over primarily dry features, did not significantly alter the Federal-State framework. Other commenters expressed concern that if they are not jurisdictional, ephemeral features could be subject to uncontrolled pollution or filled, and some commenters emphasized the potential adverse impacts to downstream jurisdictional waters into which ephemeral features flow.

By defining perennial and intermittent tributaries of traditional navigable waters as jurisdictional and defining ephemeral features as non-jurisdictional, and by including (b)(3) and (b)(4) exclusions explicitly emphasizing the non-jurisdictional status of ephemeral features and diffuse stormwater run-off, the agencies are balancing Congress' intent to interpret the term ''navigable waters'' more broadly than the classical meaning of that term and the notion that nothing in the legislative history of the Act ''signifies that Congress intended to exert anything more than its commerce power over navigation.'' *SWANCC,* 531 U.S. at 168 n.3. The exclusions in paragraphs (b)(3) and (b)(4) and the final rule's limitation of jurisdiction to perennial and intermittent rivers and streams most appropriately balances the Federal government's interest in regulating the nation's navigable waters with respecting State and Tribal land use authority over features that are only episodically wet during and/or following precipitation events. *See, e.g., Rapanos,* 547 U.S. at 734 (Scalia, J., plurality) (identifying ''ephemeral streams'' and ''directional sheet flow during storm events'' as beyond the scope of CWA jurisdiction).

Some commenters raised concerns with potential adverse impacts to downstream jurisdictional waters from discharges to non-jurisdictional ephemeral features. The agencies believe that a CWA section 402 permittee currently discharging to a jurisdictional water that becomes non-jurisdictional under this final rule would likely remain subject to the requirements of the Act. This specific concern was raised in *Rapanos,* that enforcement of section 402 could be frustrated by ''polluters . . . evad[ing] permitting requirement . . . by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters.'' *Id.* at 742–43. In the words of Justice Scalia, ''That is not so.'' *Id.* New or continuing discharges, whether illicit or not, could be subject to sections 301 and 402 of the Act if the discharge is conveyed from a point source to a ''water of the United States.'' The agencies view ephemeral features, such as arroyos or ditches, as potential conveyances of discharges of pollutants from point sources subject to NPDES permitting requirements. So too, the agencies believe, did Justice Scalia. He referred to ''channels''—a term used in the definition of ''point source'' at 33 U.S.C. 1362(14)—as ''ephemeral streams,'' ''dry arroyos in the middle of the desert,'' and ''manmade drainage ditches'' when characterizing the types of features that he believed stretched the meaning of the ''term 'waters of the United States' beyond parody.'' *Id.* at 734. Additional discussion of the final rule's treatment of ephemeral features is provided in Section III.A.3 of this notice.

Ditches

The final rule's ditch exclusion in paragraph (b)(5) is intended to provide greater clarity for the regulated public and to be more straightforward for agency staff to implement than current practice. The agencies have incorporated a clear statement in the final rule that all types of ditches would be excluded except where they meet the conditions of paragraph (a)(1) or (2) of the final rule or where, in limited instances, they meet the conditions of paragraph (c)(1). Further, as discussed in Section III.D and Section III.E of this notice, the final rule clarifies that ditches are tributaries under paragraph (a)(2) where they relocate a tributary, are constructed in a tributary, or are constructed in an adjacent wetland, so long as the ditch satisfies the flow conditions of the ''tributary'' definition. Many States, regional groups, and national associations that commented during the Federalism consultation as part of development of the proposed rule and during the agencies' general outreach efforts noted that the definition of ''waters of the United States'' should exclude ditches. The agencies received further comments on the proposed rule's category of jurisdictional ditches and the exclusion for all other ditches. Some commenters argued that all ditches should be jurisdictional if they convey any volume of water to a covered water, however infrequent or insubstantial, while others took the opposite view. As discussed in Sections III.D. and III.E., the approach adopted in this final rule reasonably balances the exclusion of features that are fundamental to State, tribal, and local land use planning while respecting the need to preserve jurisdiction over certain ditches.

[56] For additional description of these programs, *see https://www.epa.gov/npdes/interpretative-statement-releases-pollutants-point-sources-groundwater.*

Prior Converted Cropland

The agencies are finalizing the prior converted cropland exclusion in paragraph (b)(6) and adding a definition of ''prior converted cropland'' in paragraph (c)(9). The definition of ''prior converted cropland'' clarifies that the exclusion is no longer applicable when the cropland is abandoned *and* the land has reverted to wetlands, as that term is defined in paragraph (c)(16). Under this final rule, prior converted cropland is considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. Agricultural purposes include land use that makes the production of an agricultural product possible, including but not limited to grazing and haying. Additional discussion on agricultural purposes is provided below. This final rule also clarifies that cropland that is left idle or fallow for conservation or agricultural purposes for any period or duration of time remains in agricultural use (*i.e.,* it is used for, or in support of, agriculture purposes), and therefore maintains the prior converted cropland exclusion. The agencies conclude that this clarification will ensure that cropland enrolled in long-term and other conservation programs administered by the Federal government or by State and local agencies that prevents erosion or other natural resource degradation does not lose its prior converted cropland designation as a result of implementing conservation practices.

In 1993, the agencies categorically excluded prior converted cropland from the definition of ''waters of the United States.'' 58 FR 45034–36 (August 25, 1993). As further explained below, in keeping with the Food Security Act of 1985 (FSA), the 1993 preamble defined prior converted cropland as ''areas that, prior to December 23, 1985, were drained or otherwise manipulated for the purpose, or having the effect, of making production of a commodity crop possible [and that are] inundated for no more than 14 consecutive days during the growing season.'' 58 FR 45031. As explained in detail in the 1993 preamble, due to the degraded and altered nature of prior converted cropland, the agencies determined that such lands should not be treated as jurisdictional wetlands for purposes of the CWA because regulating such lands does not further the objective of the Act. 58 FR 45032. The 1993 preamble also set out a mechanism to ''recapture'' prior converted cropland into the section 404 program when the land has been abandoned and wetland features return. 58 FR 45034. This approach is consistent with the principles in the 1990 Corps Regulatory Guidance Letter 90–7. Although included in the 1993 preamble and Regulatory Guidance Letter 90–7, these principles have not been incorporated into the text of any promulgated rule until now. This rule therefore represents the first time the agencies are promulgating regulatory language to clarify the meaning of ''prior converted cropland'' for CWA purposes, the application of the exclusion, and a recapture mechanism based on abandonment and reversion to wetlands.

Historically, the agencies have attempted to create consistency between the CWA and the FSA wetlands conservation provisions for prior converted cropland. The agencies continue to believe that consistency across these programs is important for the regulated community (*see* 58 FR 45033), and therefore are continuing to exclude prior converted cropland from the definition of ''waters of the United States.'' By incorporating the abandonment principles from the 1993 preamble and providing examples of ''agricultural purposes,'' this final rule remains consistent with the concepts underlying the FSA but differs in implementation from certain aspects of USDA's current wetlands compliance authority. Incorporating the abandonment principle, as opposed to a pure ''change in use'' policy (described below), is important for the agencies to appropriately manage certain wetland resources while providing better clarity to the agricultural community.

When the 1993 preamble was published, the abandonment principle was consistent with USDA's implementation of the FSA. Three years later, the 1996 FSA amendments modified the abandonment principle and incorporated a ''change in use'' policy. *See* Public Law 104–127, 110 Stat. 888 (1996). Under the new policy, prior converted cropland would continue to be treated as such even if wetland characteristics returned because of lack of maintenance of the land or other circumstances beyond the owner's control, ''as long as the prior converted cropland continues to be used for agricultural purposes.'' H.R. 2854, Conf. Rep. No. 104–494, at 380 (1996). In 2005, the Corps and NRCS issued a joint ''Memorandum to the Field'' (the 2005 Memorandum) in an effort to again align the CWA section 404 program with the FSA by adopting the amended FSA's change in use policy. The 2005 Memorandum provided that, a ''certified [prior converted] determination made by [USDA] remains valid as long as the area is devoted to an agricultural use. If the land changes to a non-agricultural use, the [prior converted cropland] determination is no longer applicable, and a new wetland determination is required for CWA purposes.'' [57]

The 2005 Memorandum did not clearly address the abandonment principle that the agencies had been implementing since the 1993 rulemaking. The change in use policy articulated in the 2005 Memorandum was also never promulgated as a rule and was declared unlawful by one district court because it effectively modified the 1993 preamble language without any formal rulemaking process. *See New Hope Power Co.* v. *U.S. Army Corps of Eng'rs,* 746 F. Supp. 2d 1272, 1282 (S.D. Fla. 2010). Implementing the 2005 Memorandum created other challenges for the agencies and the regulated community. For example, because the 2005 Memorandum did not clearly address whether or how the abandonment principles should be applied in prior converted cropland cases, neither the agencies nor the regulated community could be certain which approach would be applied to a specific case.

The agencies received many public comments on the prior converted cropland exclusion, with some commenters noting that the exclusion will provide clarification needed to protect prior converted cropland that may be subject to flooding and to other natural occurrences that result in wet or saturated fields. The agencies also received public comments on both the abandonment principle and the change in use analysis. Some commenters supported the abandonment principle, stating, for example, that prior converted cropland should lose its status only when the land is abandoned and the area reverts back to wetland. Other commenters requested that the agencies finalize the change in use analysis, as articulated in the 2005 Memorandum. The agencies have considered these comments and for the reasons provided herein are finalizing the abandonment principle as proposed and are not adopting the change in use approach.

The agencies received many comments in support of the term ''for or in support of, agricultural purposes'' and recommendations as to how the term should be interpreted. Commenters

[57] Memorandum to the Field on Guidance on Conducting Wetland Determinations for the Food Security Act of 1985 and section 404 of the Clean Water Act, February 25, 2005, *available at https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll11/id/2508.*

requested that the agencies provide additional examples of agricultural purposes, including, but not limited to, idling land for conservation uses (*e.g.,* habitat; pollinator and wildlife management; and water storage, supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. The uses listed above, in addition to crop production, haying, and grazing, fall within the term ''agricultural purposes'' and, if documented, may maintain the prior converted cropland exclusion. Conservation practices, including those required or supported by USDA, State, and local programs (including recognized private sector programs that partner with government programs or that can provide verifiable documentation of participation) are critical to the success of agricultural systems across the country. Conservation practices and programs also are conducted ''for or in support of agricultural purposes'' and are appropriate to maintain the prior converted cropland exclusion.

The agencies also received public comment on the type of documentation that a landowner should maintain to demonstrate that cropland has been used ''for or in support of, agricultural purposes.'' Commenters suggested the use of aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business. The agencies agree that these types of documents and other documentation reasonably establishing ''agricultural purposes'' are appropriate to demonstrate that the prior converted cropland exclusion applies to a certain field or tract of land.

Finally, the agencies received public comments on whether the five-year timeframe for maintaining agricultural purposes is appropriate. Some commenters supported the five-year timeframe. Other commenters thought that five years was too long to avoid federal jurisdiction if wet cropland was providing some ecological or habitat benefit that should be maintained. Other commenters thought that the five-year timeframe was too short to account for unforeseen circumstances that could leave cropland idle for longer periods of time (*e.g.,* bankruptcy, the probate and estate administration process, natural disasters), and recommended that the agency adopt a seven, ten, or twenty-year timeframe. Some commenters specifically requested that the agencies allow more than five years when drought or flood conditions prevent cultivation, planting or harvest. The agencies have considered these comments and conclude that a five-year timeframe for maintaining agricultural purposes is reasonable and consistent with the 1993 preamble (58 FR 45033) and with the five-year timeframe regarding validity of an approved jurisdictional determination (2005 Corps Regulatory Guidance Letter (RGL) 05–02). The five-year timeframe is longstanding in the CWA section 404 program and will be familiar to landowners and regulators alike, increasing clarity in implementation. The agencies are finalizing the rule with the five-year timeframe, as proposed, but as described in the next subsection, the agencies will work closely with USDA, and will consider documentation from USDA, NOAA, FEMA, or other Federal or State agencies to determine if the land was used for or in support of agricultural purposes in the immediately preceding five years to evaluate whether cropland has in fact been abandoned.

The agencies consider rulemaking to be appropriate here in order to clarify the definition of ''prior converted cropland'' and to provide regulatory certainty over when such lands are no longer eligible for the CWA exclusion. This final rule provides much needed clarity about the prior converted cropland exclusion and how wetlands can be recaptured into CWA jurisdiction through the abandonment test. In addition to finalizing the exclusion as proposed, the Corps will withdraw the 2005 Memorandum simultaneous with the effective date of this rule.

Artificially Irrigated Areas, Artificial Lakes and Ponds, and Water-Filled Depressions

Paragraph (b) also excludes from waters of the United States under this final rule:

- Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease (paragraph (b)(7));
- Artificial lakes and ponds, including water storage reservoirs and farm, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) (paragraph (b)(8)); and
- Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel (paragraph (b)(9)).

Paragraphs (b)(7), (8), and (9) of the final rule identify features and waters that the agencies have generally excluded from the definition of ''waters of the United States'' in previous preambles since 1986 (*see, e.g.,* 51 FR 41206, 41217 (November 13, 1986) and 53 FR 20764–65 (June 6, 1988)). The agencies have codified these longstanding exclusions to further the agencies' goals of providing greater clarity and predictability for the regulated public and the regulators.

Several of these exclusions use the phrase ''upland.'' In keeping with the goal of providing greater clarity, the agencies have included in the final rule a definition of ''upland'' in paragraph (c)(14). It is important to note that a water of the United States is not considered ''upland'' just because it lacks water at a given time. Similarly, an area may remain ''upland'' even if it is wet sporadically or after a rainfall or flood event. In addition, the agencies recognize that excluded water features may be constructed or excavated in non-jurisdictional ponds, wetlands, or other non-jurisdictional features. Therefore, the agencies added the phrase ''non-jurisdictional waters'' to some of these exclusions to provide greater clarity and to confirm that these features can be constructed or excavated in a non-jurisdictional water, such as an isolated pond or wetland, while continuing to be excluded from federal jurisdiction.

The upland requirement does not apply to all exclusions under paragraph (b). For those waters or features in paragraph (b) of this final rule that do contain the stipulation that they must be constructed or excavated in upland or in non-jurisdictional waters to be excluded, the agencies intend that these features be constructed or excavated wholly in upland or in non-jurisdictional waters. For example, construction activities that enlarge a water of the United States beyond its current boundaries are not constructed wholly in upland. Where portions of a new or modified water feature are built in a jurisdictional water, the agencies would not view the new or modified feature as having been constructed or excavated wholly in upland or in non-jurisdictional waters, and therefore not subject to the exclusion. But where a stock watering pond, for example, is developed in a spring that is non-jurisdictional under this final rule, that pond will be considered by the agencies to have been constructed wholly in

upland and/or non-jurisdictional waters. Even if a feature is not constructed or excavated wholly in upland or in non-jurisdictional waters and meets the definition of ''waters of the United States,'' it may be otherwise excluded under another part of paragraph (b). The agencies note, however, that the mere interface between the excluded feature constructed or excavated wholly in upland and a jurisdictional water does not make that feature jurisdictional. For example, a ditch constructed or excavated wholly in upland that connects to a tributary would not be considered a jurisdictional ditch. The connection to a jurisdictional water does not eliminate applicability of a paragraph (b) exclusion conditioned by the upland or non-jurisdictional waters language. To avoid any confusion in implementation, this is why the agencies have not included the term ''wholly'' in the final regulatory text. Finally, an excluded feature under the final rule that develops wetland characteristics within the confines of the non-jurisdictional water or feature remains excluded from the definition of ''waters of the United States,'' with the exception in limited circumstances of wetlands that develop in ditches constructed in adjacent wetlands, as discussed in Section III.G.

Many commenters were in favor of the proposed exclusion under (b)(6) of the proposed rule, now under (b)(7), for artificially irrigated areas. A few commenters were opposed to the exclusion entirely, and some commenters were opposed to expanding the exclusion for other crops and/or aquaculture. Some commenters cited the need for clarity as to whether the listed crops were the only ones covered under the exclusion. After considering the comments received, the agencies have modified this exclusion in the final rule to clarify their intent that it is not limited to rice and cranberry production and applies more generally to ''agricultural production.'' The references to cranberries and rice in the proposed rule were examples and were not an exhaustive list of crops to which the exclusion would apply. When evaluating an area to determine whether it meets the exclusion, the focus should be on whether the area is artificially irrigated or flooded for the purpose of agricultural production and on whether it would revert to upland if the irrigation ceases.

Paragraph (b)(8) of the final rule provides that artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, are excluded from the definition of ''waters of the United States'' so long as these features are constructed or excavated in upland or in non-jurisdictional waters, and so long as these features are not impoundments of jurisdictional waters meeting the conditions of paragraph (c)(6). Many commenters provided edits and additions to the list of water features included in paragraph (b)(8). However, the agencies did not intend to provide an exhaustive list of features that are excluded under paragraph (b)(8) and have determined that any feature that meets the conditions of paragraph (b)(8) will be non-jurisdictional under this rule.

The agencies modified the proposed exclusion for artificial lakes and ponds to clarify their intent. As drafted in the proposed rule, the exclusion unintentionally would have been narrower than under the 1980s regulations. For example, when a farm pond is constructed in upland and connected via a ditch also constructed in upland to divert flow from a tributary and the farm pond does not connect back into the tributary system, it has been longstanding agency practice that the farm or stock pond is non-jurisdictional, similar to irrigation ditches which do not connect back into the tributary network. The pond's source of water is the tributary and serves to provide water for irrigation, livestock, and other agricultural uses. Because such ponds do not contribute surface water flow to a downstream paragraph (a)(1) water, they have not been jurisdictional under historic practice and are not jurisdictional under this final rule. Another example involves a stock watering pond developed in a non-jurisdictional spring. If that pond has a spillway that creates a potential surface water connection to a nearby stream, the pond has traditionally been excluded from CWA jurisdiction. This final rule adopts that longstanding position.

In the final rule, the agencies are clarifying that artificial features including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds are not jurisdictional unless they are impoundments of jurisdictional waters meeting the conditions of paragraph (c)(6), as discussed in Section III.F of this notice. The agencies acknowledge that many artificial lakes and ponds may have been created by impounding other waters. The text of the final rule clarifies that artificial lakes and ponds that also meet the conditions of a jurisdictional impoundment under paragraph (c)(6) are not excluded under paragraph (b)(8). However, consistent with longstanding practice, when an applicant receives a permit to impound a water of the United States in order to construct a waste treatment system (as excluded under paragraph (b)(12)), under this final rule the agencies are affirmatively relinquishing jurisdiction over the resulting waste treatment system as long as it is used for this permitted purpose. Also consistent with longstanding practice, waters upstream of the waste treatment system are still considered jurisdictional where they meet the final rule's definition of ''waters of the United States.''

The (b)(8) exclusion for artificial lakes and ponds uses the term ''constructed or excavated'' in the final rule, while the proposed rule used the term ''constructed.'' The agencies do not intend for this change to alter the meaning of the exclusion from proposal. The agencies believe that this edit provides clarity to the public about how excluded artificial lakes and ponds can be created—some are constructed through dams, dikes, or barriers, while some are excavated pits. Excavation can entail construction, and construction can entail excavation, but the agencies have decided to use both terms in the final rule for added clarity.

Several commenters stated that artificial lakes and ponds should be excluded regardless of whether they are located either wholly or partially in upland, and that the (b)(8) exclusion should extend to artificial lakes and ponds not constructed or excavated in upland. A few commenters noted that farmers and ranchers often determine the location of farm and stock ponds based on topography, which will typically result in the construction of such features in low areas that may have some characteristics of wetlands or a natural ephemeral feature. One commenter noted that many artificial lakes or ponds are isolated features, and that their connectivity to waters of the United States rather than their relationship to upland should be the primary factor in determining jurisdiction.

The final rule continues to require an artificial lake or pond to be constructed or excavated wholly in upland or in non-jurisdictional waters to be considered excluded under (b)(8). This reflects the agencies' longstanding policy, as discussed above with the stock watering pond example. Artificial lakes and ponds constructed or excavated partially in uplands or in non-jurisdictional waters and partially in jurisdictional waters are jurisdictional if such lakes and ponds meet the conditions of paragraph (c)(6). The agencies are concerned that if only

part of an artificial lake or pond need be in upland, the exclusion could be inappropriately applied to waters where just a small portion is constructed in upland. The agencies again note that the mere interface between the excluded lake or pond otherwise constructed or excavated wholly in upland and a jurisdictional water does not make that feature jurisdictional. For example, an artificial lake or pond that meets the conditions of paragraph (b)(8) and that connects to a tributary would not be considered jurisdictional. With respect to artificial lakes and ponds that are constructed in isolated or ephemeral features, the agencies modified the exclusion to make clear that artificial lakes or ponds constructed or excavated in non-jurisdictional features are excluded.

Paragraph (b)(9) of the final rule excludes water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel. In this final rule, the agencies have modified this exclusion from the proposal. In the proposed rule, such depressions would have been excluded where they are ''created in upland,'' but in the final rule such depressions are excluded where they are ''constructed or excavated in upland or in non-jurisdictional waters.'' The change from ''created'' to ''constructed or excavated,'' as discussed above, is not meant to change the meaning or applicability of the exclusion from the proposed rule, but rather is intended to add clarity to the regulated public about how such excluded water-filled depressions can be created.

Aside from this clarifying change, the agencies are finalizing this exclusion as it was proposed. In the final rule, this exclusion clarifies longstanding practice reflected in the agencies' 1986 and 1988 preambles, 51 FR 41206, 41217 (November 13, 1986); 53 FR 20764–65 (June 6, 1988) and includes several refinements to the language in those preambles. In addition to construction activity, the agencies have also reflected in the final rule an exclusion for water-filled depressions created in upland incidental to mining activity. This is consistent with the 1986 and 1988 preambles, which generally excluded pits excavated for obtaining fill, sand, or gravel, and the agencies believe there is no need to distinguish between features based on whether they are created by construction or mining activity.

Several commenters supported the (b)(9) exclusion, because such water-filled depressions are often needed for facility management but are not part of the tributary system and are not natural waters. Some commenters opposed the exclusion, stating that the exclusion benefited mining companies and would allow mining activities to negatively impact water quality. Other commenters stated that the exclusion should be expanded to include water-filled depressions constructed or excavated incidental to other activities such as silviculture, or incidental to all activities, asserting that the agencies should not have singled out specific industries in the exclusion. With respect to expanding the exclusion to encompass additional industries or activities, the agencies note that the (b)(9) exclusion is not the only one that addresses artificial waters. Paragraph (b) of the final rule excludes a number of artificial features not limited to specific industries. In addition, CWA section 404(f) exempts a number of discharges associated with certain activities in jurisdictional waters from the requirement to obtain a section 404 permit, including normal farming, ranching, and silviculture activities as part of an established operation. 33 U.S.C. 1344(f)(1)(A).

Some commenters wanted the (b)(9) exclusion to be expanded so that once a water-filled depression was excluded, it remained excluded for CWA section 404 purposes. The 1986 and 1988 preambles stated that these depressions were excluded ''unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.'' (51 FR 41206, 41217 (November 13, 1986); 53 FR 20764–65 (June 6, 1988)). The agencies proposed that such water-filled depression would remain excluded, which represented a change from the 1986 and 1988 preamble language. After further consideration, and after considering comments received, the agencies have concluded that once a feature subject to the (b)(9) exclusion is no longer used for the original purpose for which it was excluded, it no longer qualifies for the (b)(9) exclusion. This is consistent with the approach to other exclusions, such as waste treatment systems and artificially irrigated areas, and reaffirms the agencies' longstanding practice regarding this exclusion. In many cases, even if the (b)(9) exclusion may no longer apply to a feature, the feature may still remain non-jurisdictional because it does not meet the conditions of paragraphs (a)(1) through (4) and thus is excluded under paragraph (b)(1).

Stormwater Control Features

In paragraph (b)(10) of the final rule, the agencies exclude stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff. Although stormwater control features are not specifically included in the list of waters that the agencies consider to be generally non-jurisdictional per the 1986 and 1988 preamble language, 51 FR 41206 (November 13, 1986) and 53 FR 20764 (June 6, 1988), the agencies' longstanding practice is to view stormwater control features that are not built in waters of the United States as non-jurisdictional. Conversely, the agencies view some relatively permanent bodies of water, such as channelized streams with intermittent or perennial flow, as jurisdictional even when used as part of a stormwater management system. Nothing in this final rule changes the agencies' longstanding practice. Rather, this exclusion clarifies the appropriate limits of jurisdiction relating to these systems.

A key element of the exclusion is whether the feature or control system was built wholly in upland or in a non-jurisdictional water. As discussed above and as further clarified below, the agencies recognize that upland features may be connected to jurisdictional waters and that such a connection does not preclude application of the exclusion. Another key element is that the feature must convey, treat, infiltrate, or store stormwater. Stormwater control features have evolved considerably over time, and their nomenclature is not consistent, so in order to avoid unintentionally limiting the exclusion, the agencies have not included a list of excluded features in the final rule. The rule excludes the diverse range of stormwater control features that are currently in place and may be developed in the future. However, the agencies note that excluded stormwater control features when they have channelized surface water may provide a connection between the upstream reach of a relatively permanent water and a downstream jurisdictional water such that the upstream reach is jurisdictional. Even in this circumstance, the stormwater control feature would remain non-jurisdictional under this final rule. *See* Section III.D of this notice for further discussion. The agencies also note that while excluded from the definition of ''waters of the United States,'' stormwater control features may function as a conveyance of a discharge of pollutants from a point source to a water of the United States.

Traditionally, stormwater controls were designed to direct runoff away from people and property as quickly as possible. Cities built systems to collect, convey, or store stormwater, using structures such as curbs, gutters, and sewers. Retention and detention stormwater ponds were built to store excess stormwater until it could be more safely released. More recently, use of stormwater controls to remove pollutants before the stormwater is discharged has become more prevalent. Even more recently, cities have turned to green infrastructure, using existing natural features or creating new features that mimic natural hydrological processes that work to infiltrate, evaporate, or transpire precipitation, to manage stormwater at its source and keep it out of the conveyance system. These engineered components of stormwater management systems can address both flood control and water quality concerns, as well as provide other benefits to communities. This final rule is designed to avoid disincentives to this environmentally beneficial trend in stormwater management practices.

Many commenters supported the proposed rule's exclusion for stormwater control features constructed or excavated in upland, asserting that environmentally beneficial solutions to manage stormwater could be discouraged if such features were designated as ''waters of the United States.'' Several commenters noted concerns that an exclusion dependent on an upland location could potentially deter stormwater system operators from installing beneficial green infrastructure and suggested that jurisdictional waters incorporated into the stormwater system should be excluded. Many commenters suggested that the final rule should define ''stormwater control features'' that would be excluded.

The agencies' longstanding practice is to view stormwater control features as non-jurisdictional when built outside of waters of the United States. The agencies do not agree with commenters who stated that jurisdictional waters that are incorporated into a drainage or stormwater conveyance system should be excluded by virtue of the fact that they are part of the larger stormwater control system. A water does not lose its jurisdictional status if it is modified for use as a stormwater control measure. The agencies recognize that highly engineered municipal separate storm sewer systems (MS4s) that may have replaced natural drainage features may therefore have jurisdictional waters within their systems, but this does not represent a change from longstanding practice. For example, the Los Angeles River is a traditional navigable water highly engineered for stormwater control, and it still meets the requirements of a paragraph (a)(1) water. Regarding comments related to defining the term ''stormwater control features,'' the agencies do not name specific stormwater control features that would fall under the stormwater control feature exclusion, as they do not want the final rule to be perceived as limiting the exclusion, particularly given differences among regional naming conventions and the likelihood that technologies and nomenclature will evolve in the future.

Groundwater Recharge, Water Reuse, and Wastewater Recycling Structures

In this final rule under paragraph (b)(11), the agencies exclude from the definition of ''waters of the United States'' groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters. While such features are not explicitly listed in the categories of waters that the agencies generally consider to be non-jurisdictional in the 1986 and 1988 preamble language, 51 FR 41206 (November 13, 1986) and 53 FR 20764 (June 6, 1988), this exclusion clarifies the agencies' longstanding practice that waters and water features used for water reuse and recycling are not jurisdictional when constructed in upland or in non-jurisdictional waters. The agencies recognize the importance of water reuse and recycling, particularly in the arid West where water supplies can be limited and droughts can exacerbate supply issues. This exclusion is intended to avoid discouraging or creating barriers to water reuse and conservation practices and projects. Detention and retention basins can play an important role in capturing and storing water prior to beneficial reuse. Similarly, groundwater recharge basins and infiltration ponds are becoming more prevalent tools for water reuse and recycling. These features are used to collect and store water, which then infiltrates into groundwater via permeable soils. Though these features are often created in upland, they are also often located in close proximity to tributaries or other larger bodies of water. The exclusion in paragraph (b)(11) of the final rule codifies the agencies' longstanding practice and encourages water management practices that the agencies recognize are important and beneficial.

Many commenters expressed support for the proposed rule's exclusion for wastewater recycling structures. Some commenters stated that the exclusion would encourage water reuse and other innovative approaches to water management. A few commenters supported the exclusion because they said wastewater recycling structures should be regulated at the State level. Some commenters stated that considering a wastewater recycling structure a water of the United States could create unnecessary regulatory and economic burdens, while providing no additional water quality protection. Several commenters stated that the exclusion of groundwater recharge basins and similar structures was consistent with Justice Scalia's plurality opinion in *Rapanos,* as groundwater recharge basins do not discharge to any navigable waters, are filled only during part of the year, and do not otherwise constitute a traditional navigable water within the meaning of the plurality's jurisdictional test. A number of commenters suggested that the qualifying language in the proposed rule's wastewater recycling structures exclusion, which would have limited the exclusion to wastewater recycling structures ''constructed in upland,'' could create barriers to water reuse and conservation.

For the reasons described above, the agencies believe that the (b)(11) exclusion reflects an appropriate balance among CWA policies and encouraging water reuse and effective water management. As a result, this final rule includes the (b)(11) exclusion largely unchanged from the proposal. The agencies did modify the exclusion in response to comments to add the term ''water reuse'' to the exclusion as it is commonly used in water and wastewater management. The agencies also added ''or non-jurisdictional waters'' to the exclusion to ensure that it is not narrowly restricted to construction in upland only. As discussed above, the agencies will apply the qualifier ''constructed or excavated in upland or in non-jurisdictional waters'' consistently across four exclusions that use the term.

Waste Treatment Systems

Paragraph (b)(12) of the final rule excludes waste treatment systems. The waste treatment system exclusion has existed since 1979 (44 FR 32854), and the agencies are continuing the exclusion under this final rule. The agencies are also for the first time providing in the final rule a definition of ''waste treatment system'' under paragraph (c)(15), so as to clarify which waters and features are considered part of a waste treatment system and therefore excluded. Continuing the agencies' longstanding practice, any

entity with a waste treatment system would need to comply with the CWA by obtaining a section 404 permit for new construction in a water of the United States, and a section 402 permit for discharges from the waste treatment system into waters of the United States. Consistent with the proposal, the agencies intend for this exclusion to apply only to waste treatment systems constructed in accordance with the requirements of the CWA and to all waste treatment systems constructed prior to the 1972 CWA amendments. One ministerial change in the final rule from the 2019 Rule is the deletion of a cross-reference to a regulatory definition of ''cooling ponds'' that no longer exists in the Code of Federal Regulations.[58]

Many commenters supported the waste treatment system exclusion and definition as proposed and agreed that the proposed exclusion would codify the agencies' longstanding practice. Some commenters requested that the exclusion be expanded to include all ancillary systems, channels, appurtenances, conveyances, and diversion ditches associated with the waste treatment system. Other commenters stated that the proposed exclusion was unlawful and that it should be eliminated entirely. Some commenters suggested that there may be confusion concerning the agencies' intent to apply the exclusion to waste treatment systems constructed prior to the 1972 CWA amendments and requested that this concept be explicitly included in the final regulatory text.

The agencies have considered these public comments and have finalized the waste treatment exclusion as it was proposed. As noted above, the agencies agree with commenters that this final rule codifies the longstanding exclusion that was first included in regulation in 1979. The agencies disagree with suggestions to expand or eliminate the exclusion and have finalized the definition as proposed. The agencies also disagree with the suggestion that the exclusion is unlawful and that there is confusion over the agencies' intent to apply this exclusion to all waste treatment systems constructed prior to the 1972 CWA amendments. The agencies clearly stated their intent to do so in the notice of proposed rulemaking and in this final rule, and do not believe it is necessary to repeat this intent in the regulatory text. The regulatory text applies to all waste treatment systems that meet the definition set forth therein, including systems constructed prior to the 1972 CWA amendments, and there is no basis for construing the exclusion not to apply to such systems.

The agencies also considered other exclusions recommended by stakeholders prior to the proposed rule and suggested in comments on the proposed rule. The agencies did not include these additional proposed exclusions in the final rule. Some of the suggested exclusions were so broadly characterized that they would have introduced confusion and potentially excluded waters that the agencies have consistently determined should be covered as waters of the United States. Other suggested exclusions were so site-specific or activity-based that they did not warrant inclusion in the nationally-applicable definition. Still other suggested exclusions were covered by another exclusion in the rule, and thus would have been superfluous, in whole or in part.

3. How will the agencies implement the final rule?

To determine whether a water meets the final rule's exclusions in paragraphs (b)(1) through (b)(12), the agencies will first evaluate whether the water meets the definition of ''waters of the United States'' under paragraphs (a)(1) through (4). If the water does not satisfy any of the paragraph (a)(1) through (4) conditions, it is non-jurisdictional under paragraph (b)(1). If the water does satisfy one or more of the conditions to be a paragraph (a)(1) through (4) water, the agencies will evaluate if the water is identified in any of the categories of excluded waters and features under paragraphs (b)(2) through (12) of this final rule. If the water meets any of these exclusions, the water is excluded even if the water satisfies one or more of the conditions to be a paragraph (a)(1) through (4) water.

As discussed above, the agencies' final rule includes an exclusion for groundwater under paragraph (b)(2), including groundwater drained through subsurface drainage systems. The final rule clarifies that even when groundwater is channelized in subsurface systems, like tile drains used in agriculture, it remains subject to the exclusion. However, the exclusion does not apply to surface expressions of groundwater, such as where groundwater discharges to the channel bed and becomes baseflow in intermittent or perennial streams. The agencies' exclusion for groundwater in the final rule is consistent with longstanding agency practice.

Some commenters requested that the agencies provide guidance as to how to implement the exclusion for ephemeral features. For example, a commenter stated that a blanket exclusion of ephemeral streams without regard to flow quantity could increase the difficulty in delineating such features and could limit activities to certain time periods. Some commenters suggested the agencies consider certain ephemeral features to be jurisdictional on a situational or regional basis, while other commenters supported a case-by-case determination of ephemeral features that would fall under the exclusion, rather than excluding ephemeral features categorically. One commenter requested implementation tools, including visual aids or benchmarks to identify excluded features, observing that distinguishing between ephemeral and intermittent waters may be challenging.

This final rule is intended to establish categorical bright lines that provide clarity and predictability for regulators and the regulated community. Consistent with that goal, the final rule eliminates the case-specific application of Justice Kennedy's significant nexus test, and instead establishes clear categories of jurisdictional waters and non-jurisdictional waters and features that adhere to the basic principles articulated in the *Riverside Bayview, SWANCC,* and *Rapanos* decisions, including key principles expressed in Justice Scalia's plurality opinion and Justice Kennedy's concurring opinion in that case, as discussed at length in this preamble, while respecting the overall structure and function of the CWA. The agencies have existing field and remote tools and additional implementation tools and methods under development that will help distinguish flow classifications of streams and other waterbodies. The agencies can use many tools and remote and field-based methods described in Section III.D.3 to distinguish between paragraph (b)(3) ephemeral streams, swales, gullies, rills, and pools and paragraph (b)(4) areas with diffuse stormwater run-off and directional sheet flow over upland, while comparing both against waters subject to jurisdiction under paragraph (a). Under past and existing practice, the agencies have substantial experience using remote tools and field observations to distinguish between channelized and non-channelized features, and the agencies expect that many landowners can distinguish between these features using visual observations. Under this final rule, landscapes with non-channelized, diffuse stormwater and overland sheet flow are excluded regardless of the flow regime characteristics, because under

[58] *See* 47 FR 52290, 52291, 52305 (Nov. 19, 1982) (deleting definition of cooling ponds at 40 CFR 423.11(m)).

these circumstances, flow is occurring only in direct response to precipitation over areas that meet the definition of ''upland.'' As explained by the *Rapanos* plurality, regulating these features as waters of the United States extends beyond the rational meaning of the term. 547 U.S. at 734.

With respect to implementing the final rule's paragraph (b)(5) exclusion for certain ditches, the reach of a ditch that meets paragraph (a)(1) or (2) of the final rule is considered a water of the United States, with ''reach'' interpreted similarly to how it is used for tributaries in Section III.D of this notice (*i.e.,* a section of a ditch along which similar hydrologic conditions exist, such as discharge, depth, area, and slope). The jurisdictional status of other reaches of the same ditch must be assessed based on the specific facts and under the terms of the final rule to determine the jurisdictional status of those reaches. For example, a ditch that is constructed in a tributary is not an excluded ditch under paragraph (b)(5) so long as it satisfies the flow conditions of the ''tributary'' definition or the conditions of the ''adjacent wetlands'' definition as further described in Section III.D and Section III.E. Further, the ditch exclusion does not affect the possible status of a ditch as a point source. Also, a ditch constructed in an adjacent wetland that satisfies the conditions of paragraph (a)(4) is not excluded. The agencies believe that the final rule's ditch exclusion encompasses most irrigation and drainage ditches, including most roadside and other transportation ditches, as well as most agricultural ditches.

In paragraph (b)(6) of this final rule, the agencies are reconfirming the longstanding prior converted cropland exclusion. This final rule also codifies the abandonment principle as applied to the prior converted cropland exclusion, as first articulated in the 1993 preamble (58 FR 45033), and provides additional clarification regarding what constitutes ''agricultural purposes.'' As a result of this final rule, the change in use analysis will no longer be used to evaluate whether the prior converted cropland exclusion applies. Under the final rule, when cropland has been abandoned (*i.e.,* the cropland has not been used for or in support of agricultural purposes for a period of greater than five years), and wetlands have returned, any prior converted cropland designation for that site will no longer be valid for purposes of the CWA.

The USDA is responsible for making determinations as to whether land is prior converted cropland for its FSA purposes, whereas the agencies are responsible for determining applicability of the exclusion for CWA purposes, consistent with the government's longstanding interpretation of the agencies' authority under the CWA. *See* 33 CFR 328.3(a)(8) (''Notwithstanding the determination of an area's status as prior converted cropland by any other Federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.''); CWA Regulatory Programs, 58 FR 45,008, 45,036 (Aug. 25, 1993); Administrative Authority to Construe § 404 of the Federal Water Pollution Control Act (''Civiletti Memorandum''), 43 Op. Att'y Gen. 197 (1979). The agencies will defer to USDA for purposes of establishing whether a parcel or tract of land has received a prior converted cropland determination and is therefore eligible for the prior converted cropland exclusion under this rule. A landowner without an existing prior converted cropland determination may seek a new determination from the USDA.[59] The USDA is subject to specific statutes designed to protect landowner privacy and, as such, is prohibited from making certain parcel-specific information available without the landowner's consent. To ensure that the agencies can rely on a USDA prior converted cropland determination, the landowner will need to either provide a copy of the determination or provide the agencies with a signed consent form to allow the agencies access to the relevant information for the limited purpose of verifying USDA's prior converted cropland determination. The agencies recognize that privacy and confidentiality issues concerning certain producer information is addressed at section 1619 of the Food, Conservation, and Energy Act of 2008 (7 U.S.C. 8791(b)) and section 1244(b) of the Food Security Act of 1985, as amended (16 U.S.C. 3844(b)). If a parcel is found to be prior converted cropland, as defined in this rule, it is not a water of the United States.

Once a threshold determination has been made that certain lands are prior converted cropland, the EPA and the Corps are responsible for implementing the prior converted cropland exclusion for CWA purposes and identifying (as further explained below) whether the lands have been abandoned and whether wetlands conditions have returned such that they are no longer eligible for the prior converted cropland exclusion in this rule and thus may be waters of the United States. In addition to working closely with the USDA, the agencies will consider documentation from NOAA and FEMA when evaluating whether a parcel of land may no longer be eligible for the CWA prior converted cropland exclusion. In all cases, the burden to prove that such parcel is a water of the United States remains on the agencies. The agencies' implementation of the prior converted cropland exclusion for CWA regulatory purposes does not affect the USDA's administration of the FSA or a landowner's eligibility for benefits under FSA programs.[60]

Under the final rule, to determine the continuing applicability of the prior converted cropland exclusion, the Corps must first determine whether the land has been ''abandoned.'' As described previously, prior converted cropland will be considered abandoned if it is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. In making an abandonment determination, the Corps will work with the landowner and USDA, as appropriate, to determine whether the land is currently or has been used for or in support of agricultural purposes at least once in the immediately preceding five years. As noted above, there are many uses that may fall within this category, including but not limited to, grazing; haying; idling land for conservation purposes (*e.g.,* habitat; pollinator and wildlife management; and water storage, water supply, and flood management); irrigation tailwater storage; crawfish farming; cranberry bogs; nutrient retention; and idling land for soil recovery following natural disasters like hurricanes and drought. Some of those land uses may not be obvious to Corps field staff, so the agencies may rely on public or private documentation to demonstrate that the land is enrolled in a conservation program or is otherwise

[59] The agencies note that the USDA's regulatory definition of ''prior converted cropland'' in the FSA and the definition being established in this final rule have different purposes and they are substantively different. Based on the FSA's statutory requirements, the USDA definition of ''prior converted cropland'' requires that agricultural commodity crop production be made possible prior to 1985. *See* 7 CFR 12.2(a)(8); 16 U.S.C. 3801 (defining converted wetland) and 16 U.S.C. 3822(b)(1)(A) (establishing the pre-1985 exemption). If commodity crop production was made possible on a particular parcel or tract of land prior to 1985, that land is eligible for the prior converted cropland exclusion in this final rule. Once eligibility is determined, the agencies will evaluate the land to determine if the exclusion currently applies, or if the land has been abandoned, as described in this final rule.

[60] See the Notice of Proposed Rulemaking at 84 FR 4193 for a summary of how the agencies historically implemented and enforced this exclusion.

being used for or in support of agricultural purposes. Such information may include aerial photographs, topographical maps, cultivation maps, crop expense or receipt records, field- or tract-specific grain elevator records, and other records generated and maintained in the normal course of doing business, including government agency records documenting participation in a conservation program, and other documentation reasonably establishing one or more ''agricultural purposes.''

The final rule requires that the land be used for or in support of agricultural purposes within the immediately preceding five years. In implementing this requirement, the agencies will consider documentation from USDA, NOAA, FEMA, and other Federal and State agencies to determine whether the land was used for or in support of agricultural purposes in the immediately preceding five years. For example, USDA administers multiple programs that track whether fields have been planted or harvested in the normal course, or enrolled in long-term conservation rotations, and the agency provides crop insurance for years where those activities were halted for reasons covered under their insurance policies; NOAA tracks long- and short-term weather patterns and can provide information and data concerning flood or drought conditions that may cause or contribute to idling land in support of agricultural purposes; and FEMA administers emergency response programs for natural disasters, including hurricanes, wildfires, and other events that could also require idling land for soil recovery and other agricultural purposes. The agencies will take into account this information, and additional documentation reasonably establishing ''agricultural purposes'' when evaluating whether cropland has been used for or in support of agricultural purposes in the immediately preceding five years.

If the Corps determines that the land is abandoned, then it must evaluate the current condition of the land to determine whether wetland conditions have returned. If wetlands are currently present on the property, the agencies will determine whether the wetlands are ''adjacent wetlands'' and therefore ''waters of the United States,'' consistent with this final rule. As the term ''prior *converted* cropland'' suggests, and as stated in the preamble to the 1993 Rule, land properly designated as prior converted cropland has typically been so extensively modified from its prior condition that it no longer exhibits wetland hydrology or vegetation, and no longer performs the functions it did in its natural and original condition as a wetland. 58 FR 45032. It is often altered and degraded, with long-term physical and hydrological modifications that substantially reduce the likelihood of reestablishment of hydrophytic vegetation. Consistent with longstanding agency policy and wetland delineation procedures, if a former wetland has been lawfully manipulated to the extent that it no longer exhibits wetland characteristics under normal circumstances, it would not be jurisdictional under the CWA. The altered nature of prior converted cropland and its conditions constitute the ''normal circumstances'' of such areas. The agencies expect the majority of prior converted cropland in the nation to fall into this category and not to be subject to CWA regulation, even after it is abandoned. However, at least some abandoned prior converted cropland may, under normal circumstances, meet the definition of ''wetlands'' under paragraph (c)(16).

In paragraph (b)(7), the agencies clarify their longstanding view that the artificial irrigation exclusion applies only to the specific land being artificially irrigated, including fields flooded for agricultural production, including but not limited to rice or cranberry growing, which would revert to upland should artificial irrigation cease. Historically, the agencies have taken the position that ponds for rice growing are generally not considered waters of the United States, as reflected in the 1986 and 1988 preambles. *See* 51 FR 41206, 41217 (November 13, 1986) and 53 FR 20764–65 (June 6, 1988). In the past, the agencies have considered those under the artificial lakes or ponds category of waters that are generally non-jurisdictional, but this final rule includes them in the artificial irrigation exclusion category as any wetland crop species, such as rice and cranberry operations, that is typically supplied with artificial flow irrigation or similar mechanisms.

A number of commenters addressed the difficulty in proving that land would revert to upland when irrigation ceased and suggested clarification as to whether documentation was needed as proof. The agencies agree that proving that land would revert to upland may be challenging in some circumstances. The agencies have developed strategies and guidance to assist with determining if wetland conditions will persist when irrigation ceases. This includes, but is not limited to, utilizing aerial photography, soil maps, LiDAR, remote sensing, and field assessments to determine if wetland conditions are the result of irrigation or are naturally occurring.

Commenters also raised concern about whether the exclusion is only available for rice and cranberry growing areas. The inclusion of rice and cranberries in the proposed rule were simply examples and not intended to be exhaustive. In this final rule, the agencies conclude that it is not necessary to list all crops potentially eligible for the exclusion, and therefore simply reference ''agricultural production.'' The relevant factor in determining the application of the exclusion is not what type of crop may be planted or cultivated, but whether the area is artificially irrigated and would revert to upland should irrigation cease.

Under the final rule, the exclusion for waters meeting the conditions of paragraph (b)(8) applies to artificial lakes and ponds created through construction or excavation in upland or in non-jurisdictional features. Such artificial lakes and ponds would not be jurisdictional under the final rule even if they maintain a hydrologic surface connection to waters of the United States or are inundated by waters of the United States. Conveyances created in upland that are physically connected to and are a part of the excluded feature also are excluded.

A commenter inquired as to whether the artificial waterbody created by impounding a jurisdictional tributary would be jurisdictional. The agencies note that under the final rule, impoundments are considered jurisdictional if they impound a paragraph (a)(1) through (4) water, which includes jurisdictional tributaries, and contribute surface water flow in a typical year to a paragraph (a)(1) water or are inundated by flooding from a paragraph (a)(1) through (3) water in a typical year. Impounding a jurisdictional tributary does not create a non-jurisdictional lake or pond that would be excluded under paragraph (b)(8), but rather creates a jurisdictional impoundment so long as it meets the conditions of paragraph (a)(3) as defined in paragraph (c)(6). The agencies note that artificial lakes and ponds that are excluded from the definition of ''waters of the United States'' could, in some circumstances, be point sources of pollutants subject to sections 301 and 402 of the Act.

Under paragraph (b)(9), water-filled depressions constructed or excavated in upland or in non-jurisdictional waters that are incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill,

sand, or gravel are excluded from the definition of ''waters of the United States.'' To determine whether a water or feature meets this exclusion, the agencies will evaluate whether the water feature is constructed or excavated in upland or in non-jurisdictional waters as part of these industrial activities. In addition, such water-filled depressions and pits could become waters of the United States once construction or mining activities have permanently ceased and the depressions or pits meet the conditions of a paragraph (a)(1) through (4) water.

The final rule excludes in paragraph (b)(10) stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off. As stated previously, the rule excludes a diverse range of stormwater control features that are currently in place and that may be developed in the future. To determine if such a water or feature meets the exclusion, the agencies will evaluate whether the stormwater feature is constructed or excavated in upland or in non-jurisdictional waters.

Paragraph (b)(11) of the final rule clarifies that groundwater recharge, water reuse, and wastewater recycling structures constructed or excavated in upland or in non-jurisdictional waters are excluded. To determine whether a such a structure meets this exclusion, the agencies will evaluate whether the water or feature is constructed or excavated in upland or in non-jurisdictional waters. This exclusion includes detention and retention basins as well as groundwater recharge basins and infiltration ponds excavated in upland or in non-jurisdictional waters for wastewater recycling. The exclusion also covers water distributary structures that are built in upland or in non-jurisdictional waters for water recycling. These features often connect or carry surface water flow to other water recycling structures, for example, a channel or ditch that carries water to an infiltration pond. Consistent with longstanding practice, the agencies do not consider these water distributary systems jurisdictional.

As discussed previously, the agencies are not changing the longstanding approach to implementing the waste treatment system exclusion. As a result, the agencies will continue to apply the exclusion to systems that are treating water to meet the requirements of the CWA. Discharges from these systems to waters of the United States would continue to be subject to regulation by the CWA section 402 permitting program. Similarly, if a waste treatment system is abandoned or otherwise ceases to serve the treatment function for which it was designed, it does not continue to qualify for the exclusion.

Some commenters suggested the agencies clarify the way in which the waste treatment system exclusion is currently implemented. Many comments inquired as to whether stormwater systems and wastewater reuse facilities are considered part of a complete waste treatment system for purposes of the waste treatment system exclusion. To enhance clarity, the agencies have provided in the final rule two related exclusions in paragraphs (b)(10) and (b)(11) and have added settling basins and cooling ponds to the definition of ''waste treatment system'' in paragraph (c)(15). The agencies note that cooling ponds that are created under CWA section 404 in jurisdictional waters and that have CWA section 402 permits are subject to the waste treatment system exclusion under the 2019 Rule and will also be excluded under the final rule. Cooling ponds created to serve as part of a cooling water system with a valid State or Federal permit constructed in waters of the United States prior to enactment of the 1972 amendments of the CWA and excluded from jurisdiction under the 2019 Rule also remain excluded under the final rule. Some commenters on the proposed rule's waste treatment system exclusion expressed confusion regarding whether stormwater treatment features would be excluded under the exclusion for stormwater control features or under the waste treatment exclusion. Such determinations will depend on the specific attributes of the control and the water feature and thus need to be made on a case-by-case basis. It is possible that a stormwater feature could qualify for both the stormwater control features exclusion and the waste treatment systems exclusion. This same principle applies to other exclusions that may have similar cross-over features, like certain ditches used in stormwater management systems.

It is important to reiterate that while the waters and features listed in the final rule's exclusions are not waters of the United States, some of them may convey surface water flow to a downstream jurisdictional water, so that reaches of a water upstream and downstream of the excluded water or feature may meet the definition of ''tributary'' in paragraph (c)(12). For example, when some water from a tributary is moved into a downstream jurisdictional water through an excluded ditch, the ditch itself is excluded from jurisdiction under the final rule but the tributary upstream of the ditch is jurisdictional if the non-jurisdictional ditch conveys surface water flow in a typical year to the downstream jurisdictional reach.

I. Placement of the Definition of ''Waters of the United States'' in the Code of Federal Regulations

1. What are the agencies finalizing?

The definition of ''waters of the United States'' has historically been placed in eleven locations in the Code of Federal Regulations (CFR). For the sake of simplicity, in this final rule, the agencies are codifying the definition of ''waters of the United States'' in only two places in the CFR—once in Title 33 (which implements the Corps' statutory authority) and once in Title 40 (which generally implements the EPA's statutory authority).

2. Summary of Final Rule Rationale and Public Comment

The agencies proposed to maintain the definition of ''waters of the United States'' at 33 CFR 328 and in ten locations in Title 40. The agencies solicited comment on an alternative approach under which the definition would be codified in just two locations within the CFR, rather than in the eleven locations in which it has previously appeared. Most commenters recommended that the definition of ''waters of the United States'' be codified twice, once in Title 33 of the CFR and once in Title 40 of the CFR. These commenters recommended limiting codification to two locations in order to clarify that there is a single definition of ''waters of the United States'' applicable to the entire CWA, to reduce confusion and conflicting interpretations under different programs, and to promote ease of use for the regulated community and for laypersons. Many of these commenters suggested including a cross-reference in the original ten locations of Title 40 of the CFR. Some commenters recommended continuing the agencies' practice of codifying the definition of ''waters of the United States'' in eleven locations within the CFR.

The agencies agree with commenters that stated that codifying the definition of ''waters of the United States'' in two locations within the CFR will reduce confusion and promote ease of use for States, Tribes, local government, the regulated community, and the general public. With this final rule, the agencies are codifying the definition of ''waters of the United States'' in Title 33 of the CFR, which implements the Corps' statutory authority, at 33 CFR 328.3, and in Title 40, which generally implements

the EPA's statutory authority, at 40 CFR 120.2. In the sections of the CFR where the EPA's regulatory definition previously existed, 40 CFR 110.1, 112.2, 116.3, 117.1, 122.2, 230.3, 232.2, 300.5, 302.3, 401.11, and Appendix E to 40 CFR part 300, this final rule cross-references the newly created section of the regulations containing the definition of ''waters of the United States.'' The agencies have placed the EPA's definition of ''waters of the United States'' in a previously unassigned part of 40 CFR. The change in placement has no implications on CWA program implementation; it is made for the sole purpose of enhancing the clarity of the federal regulations. Placing the definition of ''waters of the United States'' in a single section in the part of the regulations that implements the EPA's authority and once again in the part of the regulations that implements the Corps' authority makes clearer to members of the public that there is a single definition of ''waters of the United States'' applicable to the CWA and its implementing regulations.

IV. State, Tribal, and Federal Agency Datasets of Waters of the United States

During the extensive pre-proposal outreach to the general public and focused engagement with States and Tribes, the agencies heard from a number of States about their familiarity with waters within their borders and their expertise in aquatic resource mapping. As co-implementers of CWA programs, they also emphasized the potential benefit of greater State and tribal involvement in jurisdictional determinations. For these reasons, several States suggested that the agencies consider their knowledge and increase the role of States and Tribes in identifying those waters that are waters of the United States. Stakeholders also indicated that maps could increase certainty and transparency regarding the data and methods used to determine which waters are jurisdictional and which waters are not.

In the Notice of Proposed Rulemaking for this rule, the agencies solicited comment as to how to create a regulatory framework that would authorize interested States, Tribes, and other Federal agencies to develop for the agencies' approval geospatial datasets representing waters of the United States, as well as waters excluded from the definition, ''waters of the State'' or ''waters of the Tribe'' within their respective borders. 84 FR 4154, 4198–4200 (February 14, 2019). This concept was not part of the proposed regulatory text; the agencies utilized the notice to solicit input and suggestions from the regulated public, States, Tribes, and other stakeholders.

Some commenters raised concerns regarding the limitations of data currently available for creating geospatial datasets of jurisdictional waters, particularly commenting on the limitations of national datasets such as the National Hydrography Dataset (NHD) and the National Wetlands Inventory (NWI). Some commenters expressed concerns about the resolution, completeness, accuracy, and usefulness of publicly-available data, with some stating that geospatial datasets cannot accurately assess the details needed to remotely determine or delineate jurisdictional waters. Other commenters noted that, despite the limitations in the available data, the agencies should attempt to quantify changes in the jurisdictional status of specific waterbody categories as a result of the final rule.

The agencies agree that there are significant limitations to the extent to which currently available data can be used to identify the scope of all or even a subset of jurisdictional waters. There are currently no comprehensive datasets through which the agencies can depict the universe of federally-regulated waters under the CWA. For example, the agencies attempted to use the NHD at high resolution and NWI to assess the potential change in CWA jurisdiction as a result of the proposed rule to revise the definition of ''waters of the United States,'' but ultimately concluded that the limitations of these datasets precluded their use for quantifying the extent of waters whose jurisdictional status could change under the proposed rule, as discussed in Section V and in the Resource and Programmatic Assessment for the final rule. Due to these limitations, which were confirmed during the public comment period for the proposed rule and an evaluation by the agencies, the agencies also did not use the NHD or NWI to assess potential changes in jurisdiction as a result of the final rule.

While the NHD and NWI are the most comprehensive hydrogeographic datasets mapping waters and wetlands in the United States and are useful resources for a variety of Federal programs, including CWA programs, they currently have technical limitations that present significant challenges for use as standalone tools to determine the full scope of CWA jurisdiction and for creating geospatial datasets of jurisdictional waters, regardless of the regulatory definition of ''waters of the United States.'' Importantly, the NHD and NWI were not created for regulatory purposes, so their limitations as comparative tools for CWA jurisdiction are not surprising.

Due in part to the resolution of the data, limitations of the NHD for purposes of accurately mapping the scope of jurisdictional waters under the CWA include errors of omission (*e.g.,* failure to map streams that exist on the ground); errors of commission (*e.g.,* mapping streams that do not exist on the ground); horizontal positional inaccuracies; misclassification of stream flow condition, particularly in headwaters; and inconsistent mapping in different parts of the country. The NWI presents similar challenges for identifying federally-regulated waters, including the foundational obstacle of having a ''wetlands'' definition that differs from the federal regulatory ''wetlands'' definition. The NWI also contains errors of omission (*e.g.,* failure to map wetlands that exist on the ground), errors of commission (*e.g.,* mapping wetlands that do not exist on the ground), and potentially inaccurate wetland boundary identification. The limitations identified herein are examples and do not represent an exhaustive list of challenges faced by the agencies in potentially using them to identify the scope of CWA jurisdiction. For a more detailed discussion of the NHD and NWI datasets and their limitations for use as standalone tools to determine the full scope of waters that are and are not waters of the United States, *see* Chapter II of the Resource and Programmatic Assessment supporting this final rule.

It has been the consistent position of the agencies that the NHD and the NWI do not represent the scope of waters subject to CWA jurisdiction.[61] Indeed,

[61] *See, e.g.,* Letter from Nancy Stoner, Acting Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (July 28, 2014) (emphasis added), *available at https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf.* (''[N]o national or statewide maps have been prepared by any agency, including EPA, showing the scope of waters subject to the Clean Water Act. . . . To develop maps of jurisdictional waters requires site-specific knowledge of the physical features of water bodies, and *these data are not available*[.]'') (emphasis added); *see also* Letter from Nancy Stoner, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (August 6, 2014), *available at https://web.archive.org/web/20180919173837/https://science.house.gov/sites/republicans.science.house.gov/files/documents/epa_releases_maps_letter.pdf*); U.S. EPA, *Mapping the Truth,* The EPA Blog (Aug. 28, 2014), *available at https://blog.epa.gov/2014/08/28/mapping-the-truth/* (''While these [U.S. Geological Survey and Fish & Wildlife Service] maps are useful tools for water resource managers, they cannot be used to

Continued

as part of the 2015 rulemaking, the agencies stated that they ''do not have maps depicting waters of the United States under either present regulatory standards or those in the final [2015] rule.'' [62] This remains true today; the agencies do not have maps of waters of the United States under the 2015 Rule, under the 2019 Rule, or under this final rule. For this reason, and to provide the public and the agencies with more information on which waters are or are not waters of the United States, the agencies sought public comment on a possible framework for developing geospatial datasets.

The agencies acknowledge that they have previously taken the position that ''maps of all the jurisdictional or non-jurisdictional waters are not feasible,'' [63] and that maps ''cannot be used to determine Clean Water Act jurisdiction—now or ever,'' *see* U.S. EPA, *Mapping the Truth,* The EPA Blog (August 28, 2014). Rather than declaring the task too difficult, the agencies have decided to initiate development of state-of-the-art geospatial data tools through Federal, State, and tribal partnerships to provide an enhanced, publicly-accessible platform for critical CWA information, such as the location of federally jurisdictional waters, the applicability of State and tribal water quality standards, permitted facility locations, impaired waters, and other significant features. Such mapped features would make it easier for agency field staff, the general public, property owners, permit-holders and others to understand the relationship between familiar geographical features and the overlay of CWA jurisdictional waters. For Federal, State, and tribal agencies, such geospatial datasets could improve the administration of CWA programs and attainment of water quality goals. Geospatial datasets and resulting future maps that indicate waters likely subject to federal jurisdiction could allow members of the regulated community to more easily and quickly ascertain whether they may want to contact a government agency regarding the potential need for a CWA permit. These datasets, when fully developed, would promote greater regulatory certainty, relieve some of the regulatory burden associated with determining the need for a permit, and play an important part in helping to attain the goals of the CWA. In the future, the agencies and States could use geospatial datasets to identify waters with applicable water quality standards, total maximum daily loads, water quality monitoring data, and other beneficial information in one layered geospatial map.

Since the proposed rule was published, the agencies have been engaging with other Federal agencies to discuss existing geospatial datasets and discuss opportunities to build upon them to map the nation's aquatic resources, including both waters of the United States and non-jurisdictional waters. To align the agencies' waters of the United States mapping interests with the U.S. Department of Interior's (DOI) established and ever-improving aquatic resource mapping efforts, including the NHD, NWI, and other datasets, the EPA and the Corps are engaging with the U.S. Geological Survey (USGS) and the U.S. Fish and Wildlife Service (FWS) and have established a technical working group to develop strategies that can address their CWA mapping needs.[64] The agencies believe the most efficient way to address their regulatory needs is to better align their efforts with DOI's existing processes and national mapping capabilities. The EPA, USGS, and FWS have a long history of working together to map the nation's aquatic resources. As the agencies pursue this mapping effort, they will continue to collaborate with DOI to enhance the NHD, NWI, and other products to better map the nation's water resources and the waters of the United States while enhancing their utility to other CWA programs that the EPA and the Corps implement.

In addition, the EPA's Office of Research and Development (ORD) has established an ''Improved Aquatic Resource Mapping'' research area, which will be implemented in coordination with the Corps and EPA's Office of Water. This research area could build upon longstanding EPA aquatic resource research and leverage existing research partnerships with other Federal agencies, States, and Tribes to improve mapping of aquatic resources. This research effort is intended to support the agencies' need for improved data to inform CWA jurisdictional determinations, to support other regulatory and non-regulatory needs, and to contribute to ongoing and new EPA research. In the long-term, the agencies anticipate that this effort will yield improved methods of verifying aquatic resources to support CWA jurisdictional determinations and other programmatic needs. In the short-term, ORD intends to produce three primary products to begin to advance this goal: A review of the existing aquatic resource mapping methodologies, development of novel geospatial datasets in select watersheds, and development of calibration and validation datasets. All three products can incorporate outreach efforts to communicate and transfer results to stakeholders.

The agencies also believe that any future efforts they pursue to work with States, Tribes, and Federal agencies to create geospatial datasets of jurisdictional waters will improve the data and information that is available to the public about the jurisdictional scope of the CWA, recognizing that data limitations may always exist. Many commenters supported the development of geospatial datasets or a mapping system of waters of the United States to provide a clear understanding of the presence or absence of jurisdictional waters. Many such commenters provided caveats and anticipated challenges. Other commenters suggested that creating such datasets posed too many challenges to be worthwhile. Many of these commenters considered the development of geospatial datasets of jurisdictional waters to be infeasible or inappropriate based on the need for field verification and maintenance to keep the datasets up-to-date, and the concern that potentially incomplete lists could be inaccurately perceived as a definitive list of all waters of the United States. These commenters stated that any datasets established should be used

determine Clean Water Act jurisdiction—now or ever.''); Letter from Kenneth J. Kopocis, Deputy Assistant Adm'r, EPA Office of Water, to Lamar Smith, Chairman, Comm. on Science, Space, and Tech., U.S. House of Representatives (Jan. 8, 2015) (''These [USGS] maps were not prepared for the purpose of, nor do they represent, a depiction of the scope of waters protected under the Clean Water Act.''); Impact of the Proposed ''Waters of the United States''' Rule on State and Local Governments Before the H. Comm. on Transp. & Infrastructure and the S. Comm. on Env't & Pub. Works, 114th Cong. (2015)(testimony of Gina McCarthy, Adm'r, EPA)(stating that the NHD and NWI maps were ''not used to determine jurisdiction and not intended to be used for jurisdiction,'' ''are not relevant to the jurisdiction of the 'waters of the U.S.','' ''are not consistent with how we look at the jurisdiction of the Clean Water Act,'' and have ''nothing to do, as far as I know, with any decision concerning jurisdiction of the Clean Water Act'').

[62] *See Response to Comments for the Clean Water Rule,* Clean Water Rule Comment Compendium Topic 8: Tributaries, Docket ID. No. EPA–HQ–OW–2011–0880–20872, p. 442, *https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872.*

[63] *Id.* at p. 593.

[64] *See* Letter from David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army, to Dr. Tim Petty, Asst. Sec. for Water and Science, U.S. DOI, and Rob Wallace, Asst. Sec. for Fish, Wildlife, and Parks, U.S. DOI (September 17, 2019); *see also* Letter from Dr. Jim Reilly, Director, U.S. Geological Survey, to David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army (October 1, 2019); *see also* Letter from Gary Frazer, Asst. Dir. for Ecological Services, U.S. Fish and Wildlife Service to David Ross, Asst. Adm'r, EPA Office of Water, and Ryan Fisher, Principal Deputy Asst. Sec. of the Army (Civil Works), U.S. Army (December 4, 2019).

only as a planning tool to inform jurisdictional determinations or to provide guidance on the location of potential waters of the United States.

The agencies solicited comment on potential approaches to establishing a framework to allow States, Tribes, or Federal agencies to create geospatial datasets of jurisdictional waters. Some commenters supported deferring this effort to a future rulemaking. Several commenters recommended using existing technology to prioritize mapping traditional navigable waters prior to attempting to map jurisdictional tributaries or wetlands. A few commenters suggested engaging in several pilot projects or a phased approach before rolling out a dataset nationwide. Some commenters suggested that data in the geospatial datasets should either expire or be updated every five years, to reflect the timeframe for approved jurisdictional determinations or to ensure that the datasets effectively represent current conditions.

The agencies solicited comment on appropriate features and attributes of the website that would publish this information, as well as any privacy considerations the agencies should understand. A few commenters opposed making public the details of jurisdictional determinations or expressed privacy concerns regarding the creation of geospatial datasets of jurisdictional waters. Some commenters stated that jurisdictional determinations or geospatial datasets of jurisdictional waters should be made available to the public.

As the agencies work to pursue improved geospatial mapping of waters in the future, they intend to also work to enhance information that is already available to the public on jurisdictional determinations. The Corps maintains a website at *https://permits.ops.usace.army.mil/orm-public* that presents information on the Corps' approved jurisdictional determinations and CWA section 404 permit decisions. Similarly, the EPA maintains a website at *https://watersgeo.epa.gov/cwa/CWA-JDs/* that presents information on approved jurisdictional determinations made by the Corps and the EPA under the CWA since August 28, 2015. These websites will incorporate approved jurisdictional determinations made under the revised definition of ''waters of the United States'' that the agencies are finalizing in this notice.

In the Notice of Proposed Rulemaking, the agencies expressed interest in learning about experiences States, Tribes, and other Federal agencies have had with mapping aquatic resources and using this information for program implementation. A few State and tribal commenters expressed interest in working as partners with the agencies on mapping jurisdictional waters. Some State and local governments offered to share existing geospatial data with the agencies. Other State commenters were less supportive of an effort to map jurisdictional waters, with some raising concerns about the regulatory implications of mapping based on experiences in their States. Several State commenters raised concerns about costs of a mapping effort, with some commenters pointing to their own costly past mapping efforts. One commenter cited a State study that found that the State's best attempt at mapping wetlands was only 56 percent successful at classifying wetlands compared to field delineations. The agencies will consider the comments and concerns raised and coordinate closely with States, Tribes, and other Federal agencies in future efforts to develop geospatial datasets. The agencies do not anticipate developing a regulatory framework for geospatial datasets that would impose requirements on States and Tribes to develop geospatial datasets of jurisdictional waters; the option would simply be available for interested States and Tribes.

The agencies believe that pursuing the development of geospatial datasets of waters of the United States could provide for greater regulatory certainty and provide important information to States, Tribes, the regulated community, and the public. The agencies are in the early stages of this effort, and they will be informed by public comments and suggestions received in response to this rulemaking as they move forward.

V. Overview of the Effects of the Rule and Supporting Analyses

This section provides an overview of the potential effects of the final rule on federal and state regulatory programs and potential economic impacts of the final rule. Additional detail on these analyses are contained in and described more fully in the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of ''Waters of the United States''* and in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of ''Waters of the United States.''* Copies of these documents are available in the docket for this action.

In defining the term ''waters of the United States'' under the CWA, Congress gave the agencies discretion to articulate reasonable limits on the meaning of that term, confined of course by the statutory text and Supreme Court guidance recognizing the outer limits of the agencies' authorities. *See, e.g., Rapanos,* 547 U.S. at 758 (Roberts, C.J., concurring) (''Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.'') (emphasis in original). With this action, the agencies are finalizing a new definition of ''waters of the United States.''

As discussed in Section II.E, the agencies conclude that this final rule clearly establishes the scope of jurisdictional waters under the CWA consistent with the legislative history and text of the statute and Supreme Court case law and provides greater regulatory predictability than the 2019 Rule regulatory text as interpreted by the Supreme Court and implemented through agency guidance. This final rule replaces the 2019 Rule.

With respect to the CWA section 404 permitting program for the discharge of dredged and fill material, the agencies recognize that this final rule could affect approved jurisdictional determinations (AJDs) issued before the 2015 Rule or in States where the 2015 Rule was not in effect due to litigation, under the 2015 Rule, or under the 2019 Rule. An AJD is a document issued by the Corps stating the presence or absence of waters of the United States on a parcel. *See* 33 CFR 331.2. As a matter of policy, AJDs are valid for a period of five years from the date of issuance unless new information warrants revision before the expiration date or a District Engineer identifies specific geographic areas with rapidly changing environmental conditions that merit re-verification on a more frequent basis. *See* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 05–02, § 1(a), p. 1 (June 2005) (RGL 05–02). The possessor of a valid AJD may request that the Corps reassess a parcel and grant a new AJD before the five-year expiration date. An AJD constitutes a final agency action pursuant to the agencies' definition of ''waters of the United States'' at the time of its issuance. *See Hawkes,* 136 S. Ct. at 1814. This final rule does not invalidate an AJD that was issued before the 2015 Rule or in States where the 2015 Rule was not in effect due to litigation, under the 2015 Rule, or under the 2019 Rule. As such, these AJDs will remain valid until the expiration date unless one of the criteria for revision is met under RGL 05–02, or the recipient

of such an AJD requests that a new AJD be issued pursuant to this final rule.

Preliminary jurisdictional determinations (PJDs) issued by the Corps, however, are merely advisory in nature, make no legally binding determination of jurisdiction, and have no expiration date. *See* 33 CFR 331.2; *see also* U.S. Army Corps of Engineers, Regulatory Guidance Letter No. 16–01 (October 2005). PJDs do not definitively state whether waters of the United States are present on a parcel. *See Hawkes,* 136 S. Ct. at 1812. However, as with AJDs, a recipient of a PJD may request a new PJD or an AJD be issued under this final rule.

This final rule should not significantly affect the scope of waters over which the Corps retains permitting authority in States that have assumed the CWA section 404 dredged or fill material permit program pursuant to section 404(g), or the waters over which the Corps would retain permitting authority should States and Tribes assume the program in the future. When States or Tribes assume administration of the section 404 program, the Corps retains administration of permits in certain waters. 33 U.S.C. 1344(g). The scope of CWA jurisdiction as defined by ''waters of the United States'' is distinct from the scope of waters over which the Corps retains authority following State or tribal assumption. The Corps-retained waters are identified during approval of a State or tribal section 404 program, and any modifications are approved through a formal EPA process. 40 CFR 233.36. The way in which the Corps identifies waters to be retained was most recently addressed on July 30, 2018, in a memorandum from R.D. James, Assistant Secretary of the Army (Civil Works).[65] The EPA also intends to clarify the issue in a separate ongoing rulemaking process designed to facilitate State and tribal assumption of the section 404 program. The scope of waters assumed by States or Tribes that are granted permitting authority under section 404(g) is dependent on the definition of ''waters of the United States,'' and will change with this final rule. For the States that already have section 404 programs (Michigan and New Jersey), those States have corresponding State wetland permitting programs that may apply in State waters that will no longer be jurisdictional under the final rule.

For the proposed rule, the agencies conducted a series of analyses to better understand the potential effects across CWA programs associated with a revised definition of ''waters of the United States.'' The agencies solicited comment on all aspects of the analyses performed and published in support of the proposed rule, including the assumptions made, information used, and the three case studies presented in the economic analysis. The agencies further requested that commenters provide any data that could assist the agencies in evaluating and characterizing potential effects of the proposed rule. The agencies have incorporated additional information on tribal programs, updated the aquatic resource analysis, and have made other changes, particularly in light of the final rule repealing the 2015 Rule and recodifying the pre-existing regulations (the 2019 Rule). The 2019 Rule was finalized between the proposed and final rulemaking phases of this rule and changed the baseline for the analyses and discussion of potential effects on aquatic resources, CWA programs, and costs. The agencies note that the final rule is not based on the information in the agencies' economic analysis or resource and programmatic assessment. *See, e.g., NAHB,* 682 F.3d at 1039–40. This information was not used to establish the new regulatory text for the definition of ''waters of the United States.''

As discussed in Section IV and in the proposed rule preamble (84 FR 4200), the agencies are not aware of any map or dataset that accurately or with any precision portrays the scope of CWA jurisdiction at any point in the history of this complex regulatory program. Establishing a mapped baseline from which to assess regulatory changes is likewise impracticable at this time, just as it was when the agencies finalized the 2015 Rule.[66] The challenge of identifying an accurate baseline is further complicated by a long history of an evolving definition of ''waters of the United States.'' As summarized in Section II, what was understood about the potential scope of CWA jurisdiction changed in the 1970s following *National Resources Defense Council, Inc.* v. *Callaway,* 392 F. Supp. 685 (D.D.C. 1975), in the mid-1980s with *Riverside Bayview* and regulatory updates, in 2001 with the landmark *SWANCC* decision, in 2006 with the fractured *Rapanos* decision, in 2007 and 2008 with the agencies' attempts to discern the meaning of the *Rapanos* decision through guidance and throughout the ensuing decade of litigation that tested those interpretations, in 2015 with a major rulemaking to redefine the operative phrase ''waters of the United States'' and throughout the complex litigation following that rulemaking, and in 2019 with a rule to repeal the 2015 Rule and recodify pre-existing regulations. As the Chief Justice of the Supreme Court succinctly observed in 2016, ''[i]t is often difficult to determine whether a particular piece of property contains waters of the United States . . . .'' *Army Corps of Eng'rs* v. *Hawkes Co.,* 136 S. Ct. at 1812. Given the complicated history of ''waters of the United States,'' the agencies are not aware of any means to quantify changes in CWA jurisdiction with any precision that may or may not occur as a result of this final rule.

The agencies acknowledge that they faced criticism from many commenters regarding the accuracy and assumptions they made when attempting to estimate changes in jurisdiction for the 2015 Rule's economic analysis (EA), which was then utilized for a portion of the proposed rule EA and the 2019 Rule EA. For the 2015 Rule EA, the agencies reviewed Corps approved jurisdictional determinations made under pre-2015 Rule practice to evaluate how the jurisdictional status of those waters might change under the 2015 Rule. Other commenters on the proposed rule critiqued the agencies for not repeating the analysis used to support the 2015 Rule's EA. The agencies have determined that the analysis of approved jurisdictional determinations conducted for the 2015 Rule EA may have incorrectly assumed that the 2015 Rule would affect entities regulated under the CWA in direct proportion to the percent change in positive jurisdictional determinations. This proportional assumption could have yielded overestimates of costs and benefits of the rule. Thus, the agencies have determined that conducting such an analysis for this final rule would not be appropriate.

In addition, some commenters questioned the adequacy of the agencies' Resource and Programmatic Assessment (RPA) analyses for the proposed rule, primarily because the agencies did not use the NHD or NWI, even heavily caveated. Other commenters raised concerns about the lack of the quantification of potential changes in jurisdiction and asserted that the agencies overestimated the ability of

[65] The memorandum is available at *https://www.army.mil/e2/c/downloads/525981.pdf.*

[66] *See* U.S. EPA and Department of the Army, Response to Comments of the EPA-Army Clean Water Rule at Topic 8: Tributaries p. 442 (May 20, 2015) (''2015 Rule RTC'') (Docket ID: EPA–HQ–OW–2011–0880–20872), available at *https://www.regulations.gov/document?D=EPA-HQ-OW-2011-0880-20872.*(''The agencies do not have maps depicting waters of the United States under either present regulatory standards or those in the final rule.''); *see also id.* at 593 ('[M]aps of all the jurisdictional or non-jurisdictional waters are not feasible[.]'').

States to regulate additional non-jurisdictional waters. Other commenters noted that even though the NHD and the NWI have limitations, the errors associated with the datasets would underestimate, not overestimate, the scale of resources likely to be identified as non-jurisdictional under the proposed rule.

As discussed in the RPA for the final rule, the agencies attempted to use publicly available data from national datasets (*i.e.,* the NHD and the NWI) to estimate the potential extent of aquatic resources across the country before publishing the proposed rule. The agencies ultimately concluded that the limitations of the datasets (*e.g.,* errors of omission, errors of commission, positional inaccuracies, misclassification of flow regime, different definitions compared to both existing and proposed regulations) precluded using the NHD and the NWI to quantify the potential extent of waters whose CWA jurisdictional status could change under the proposed revised definition. Because these limitations still exist, the agencies decided to qualitatively describe the potential effects of this final rule relative to the baseline of the 2019 Rule as implemented.

Some commenters stated that the RPA and the EA for the proposed rule thoroughly addressed the potential impacts of the proposed revised definition, correctly acknowledged the technical limitations of the analysis and datasets, accurately noted that the avoided costs of the proposal far outweighed any foregone benefits it may have, and agreed with the agencies' decision not to rely on flawed data to perform comparative analyses of the proposed regulatory changes. Other commenters expressed support for the RPA's comprehensive analysis of the potential implications of the revised definition for all relevant CWA programs and the interplay between relevant State and federal regulations.

Recognizing that there will be limitations with any approach, in the RPA and EA for the final rule the agencies describe how the revised definition compares to the baseline of the 2019 Rule as implemented (*i.e.,* the pre-2015 regulations that were recodified in 2019, and as interpreted by the Supreme Court and implemented consistent with those decisions and informed by agency guidance). *See* 84 FR 56626 (Oct. 22, 2019). The documents outline the agencies' assessment of the potential effects of the revised definition on types of aquatic resources (*e.g.,* wetlands, tributaries, impoundments) across the country and on CWA programs, and the RPA provides further information on programs addressing aquatic resource quality under other Federal statutes. To further inform the final rule and in an effort to respond to comments received on the proposed rule analyses, the agencies conducted additional research on current State and tribal laws and programs to better understand how States and Tribes already regulate waters within their borders. Descriptions of State programs are in Appendix A of the RPA, and descriptions of tribal programs are in Appendix B of the RPA.

To assess the potential effects of the rule on aquatic resources, the agencies examined data records in the Corps' Operation and Maintenance Business Information Link, Regulatory Module (ORM2) database that documents Corps decisions regarding the jurisdictional status of various aquatic resource types (*i.e.,* jurisdictional determinations). The aquatic resource types used in ORM2 generally track the *Rapanos* Guidance (*e.g.,* ''relatively permanent waters,'' ''non-relatively permanent waters'') but do not directly correlate with the terms used in the final rule, with limited exceptions. For the final rule, the agencies updated their analysis from the proposal RPA and EA to reflect data from ORM2 for fiscal years 2013–2018. Because of various limitations in accurately estimating a change in CWA jurisdiction, as described in Section IV of this notice, and uncertainties regarding the way States and Tribes might respond following a change in the definition of ''waters of the United States,'' many of the potential effects of the final rule are discussed qualitatively, and some are discussed quantitatively where possible.

As discussed in the RPA and the EA for the final rule, the agencies also evaluated potential effects of the final rule across CWA regulatory programs. The RPA and EA describe certain potential short-term effects for CWA regulatory programs; however, the potential long-term effects will depend on whether or how States and Tribes choose to modify their existing regulatory programs. For example, States may elect to make changes to their statutes or regulations to regulate waters that are no longer jurisdictional under the final rule. As discussed more fully in the EA, complete State ''gap-filling'' could result in a zero-net impact in the long-run.

Regarding the permitting programs under sections 402 and 404 of the CWA, the final rule will reduce the scope of waters subject to CWA permitting compared with the baseline of the 2019 Rule as implemented. For instance, the 2019 Rule, as implemented, would regulate certain ephemeral streams found to have a significant nexus with traditional navigable waters according to the 2008 *Rapanos* Guidance, whereas the revised definition in this final rule categorically excludes ephemeral features. Because fewer waters and wetlands are federally regulated under this rule relative to the 2019 Rule as implemented, the agencies anticipate that the regulated public would need to prepare fewer CWA permit applications. Additionally, some facilities currently discharging under a CWA section 402 permit may no longer be required to obtain permit coverage under federal law where there is a jurisdictional change to the receiving water and the receiving water does not convey pollutants from a point source to a water of the United States. The agencies note that they retain section 402 permitting authority over discharges that reach jurisdictional waters through conveyances, such as non-jurisdictional waters. In some section 402 permits, water quality-based effluent limitations may be modified, subject to applicable anti-backsliding permit requirements, where a facility discharges to a water that is non-jurisdictional under the final rule, but the pollutants discharged still reach a jurisdictional water. Any permittee with questions about the effects of this rule should consult their permitting authority, as State law may be broader than federal authority under the CWA. A reduction in jurisdictional waters under the final rule may reduce the number of federal permits that require a section 401 certification and may reduce the applicability of the section 311 program and associated Oil Spill Liability Trust Fund, as discussed in more detail in the EA and RPA.

A change in the scope of CWA jurisdiction could affect existing and future State or tribal CWA section 303(d) lists and Total Maximum Daily Load (TMDL) restoration plans under section 303(d). For example, some States or Tribes may not assess non-jurisdictional waters, and thus may identify fewer waters as impaired and may develop fewer TMDLs. States may continue to apply their own State law-based programs to identify and restore impaired waters, although this activity would not be required under the CWA for waters that are not jurisdictional under the final rule. The agencies expect that States will, however, be able to focus their section 303(d) financial resources on a more targeted range of waters and could accelerate adoption of plans and standards on waters that may

have more ecological value. If Western States, for example, do not need to assess dry washes in the desert and establish CWA water quality standards for those typically dry ''waters,'' they can focus their research and restoration resources on waters with more substantial aquatic habitat. For additional discussion of potential effects on State and tribal water quality standards and section 303(d) programs, *see* the RPA.

Some commenters on the proposed rule raised concerns about its potential effects on CWA financial assistance programs. The agencies do not anticipate that the final rule will affect the EPA's current CWA financial assistance programs. With respect to CWA sections 106 and 319 grant programs, the authorizing language and the range of programmatic activities are sufficiently broad that they have long addressed both jurisdictional and non-jurisdictional waters, so it is unlikely that a change in the definition of ''waters of the United States'' will affect the programs and funding allocations.

Other commenters raised concerns about potential effects of the proposed rule on sources of drinking water. Drinking water regulations under the Safe Drinking Water Act (SDWA) will continue to apply to water delivered by public water systems, with the goal of protecting public health. The Drinking Water State Revolving Fund is available to help fund State source water protection programs and finance improvements to drinking water utilities. Overall, the potential effects of a change in CWA jurisdiction on drinking water quality will depend on whether activities affecting non-jurisdictional waters also affect the quality of the water at a drinking water utility's water intake, and the capabilities of individual drinking water utilities to respond to a potential change in source water quality.

In the EA for the proposed rule, the agencies applied a two-stage analysis to make the best use of limited local and national level water resource information in their effort to assess the potential implications of the proposal. When the proposed rule was published, the agencies determined that the outputs of this two-stage analysis were the best way to illustrate the potential overall impact of the proposed rule compared to the 2015 Rule being in effect nationwide (*i.e.,* the sum effect of both stages) and the 2015 Rule not being in effect (*i.e.,* second stage only). In the ''Stage 1'' analysis in the EA for the proposed rule, the agencies used the EA for the 2015 Rule as a starting point, made several updates, and developed a quantitative assessment limited to Stage 1. Because the 2015 Rule was repealed (84 FR 56626) between the proposed and final rule stages of this rulemaking, the EA for this final rule does not contain the Stage 1 quantitative analysis comparing the 2015 Rule with the pre-existing regulations.

The EA for the final rule incorporates an updated analysis depicting how States may respond to a change in CWA jurisdiction. This analysis of State authorities and programs was initially presented in the EA for the related rulemaking effort, *Economic Analysis for the Final Rule: Definition of ''Waters of the United States''—Recodification of Pre-Existing Rules.* Potential State responses to a change in the definition of a ''water of the United States'' fall along a continuum and depend on legal and other constraints. Some States rely on the federal CWA to regulate impacts to wetlands and other aquatic resources. These States may be affected by this action; however, nothing in the CWA or this final rule prevents or precludes states from regulating more stringently than federal requirements. Some States, based on limitations established in State law, cannot currently regulate a more expansive set of waters than those subject to the federal CWA definition of ''waters of the United States.'' In contrast, States that regulate surface waters and wetlands as broadly as or more broadly than the 2019 Rule as implemented, independently of the scope of the federal CWA, may not be affected by this action. Complete State ''gap-filling'' could result in no change in compliance costs to the regulated community and no change in environmental benefits (that is, neither avoided costs nor forgone benefits would occur), suggesting a zero-net impact in the long-run. States that fall between these extremes are evaluated by either including or excluding them from the estimates of cost savings and forgone benefits. In reality, some States may regulate only a subset of affected waters, but the agencies did not have sufficient information to incorporate that level of detail into the analysis.

Another potential outcome of the change in CWA jurisdiction is that State governments may be able to find more efficient ways of managing local resources than the Federal government, consistent with the theory of ''environmental federalism'' as described in the EA for the final rule. Depending on the value of a newly characterized non-jurisdictional water, States may or may not choose to regulate that water and the compliance costs and environmental benefits of its regulation could increase or decrease, respectively. In either case, however, net benefits would increase, assuming that a State can more efficiently allocate resources towards environmental protection due to local knowledge of amenities and constituent preferences. As effective regulation requires political capital and fiscal resources, however, the likely best indication of the way in which States will exercise their authority as the Federal government changes the scope of CWA jurisdiction is the way in which they have exercised authority in the past and whether the infrastructure to manage the regulatory programs already exists. The qualitative analysis is intended to provide information on the likely direction of the potential effects of the final rule on CWA regulatory programs.

In addition, the agencies conducted case studies in three major watersheds (Ohio River basin, Lower Missouri River basin, and Rio Grande River basin) to provide information for a quantitative assessment of the potential effects of the final rule. The case studies considered potential ecological effects, and their accompanying potential economic effects for programs implemented pursuant to sections 311, 402, and 404 of the CWA. Because of data limitations, the agencies were able to provide national-level estimates of the potential avoided permit and mitigation costs and forgone benefits for only the CWA section 404 program. The agencies developed several scenarios to estimate the national annual avoided costs and foregone benefits of the CWA section 404 program under the final rule using different assumptions about potential State dredged and fill regulation of waters. Using the same methodologies employed in the case studies, under scenarios assuming State regulation of dredged and fill activities in newly non-jurisdictional waters, the agencies estimate that the final rule would produce annual avoided costs ranging between $109 million to $264 million and annual forgone benefits ranging between from $55 million to $63 million. Under the scenario that assumes that no States will regulate dredged and fill activities in newly non-jurisdictional waters, an outcome the agencies believe is unlikely, the agencies estimate the final rule would produce annual avoided costs ranging from $245 million to $513 million, and annual forgone benefits are estimated at $173 million.

VI. Statutory and Executive Order Reviews

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

This action is an ''economically significant regulatory action'' that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket for this action. In addition, the agencies prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the *Economic Analysis for the Navigable Waters Protection Rule: Definition of ''Waters of the United States,''* which is available in the docket and briefly summarized in Section V. Additional analysis can be found in the *Resource and Programmatic Assessment for the Navigable Waters Protection Rule: Definition of ''Waters of the United States''* which is also available in the docket.

While the economic analysis is informative in the rulemaking context, the agencies are not relying on the economic analysis performed pursuant to Executive Orders 12866 and 13563 and related procedural requirements as a basis for this final rule. *See, e.g., NAHB,* 682 F.3d at 1039–40 (noting that the quality of an agency's economic analysis can be tested under the APA *if* the ''agency decides to rely on a cost-benefit analysis as part of its rulemaking'').

B. Executive Order 13771: Reducing Regulation and Controlling Regulatory Costs

Pursuant to Executive Order 13771 (82 FR 9339, February 3, 2017), this final rule is a deregulatory action. Details on the estimated cost savings of this rule can be found in the Economic Analysis in the docket for this rule.

C. Paperwork Reduction Act

This action does not impose any new information collection burden under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2050–0021 and 2050–0135 for the CWA section 311 program and 2040–0004 for the CWA section 402 program. For the CWA section 404 program, the current OMB approval number for information requirements is maintained by the Corps (OMB approval number 0710–0003). However, there are no new approval or application processes required as a result of this rulemaking that necessitate a new Information Collection Request (ICR).

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this final rule on small entities, ''small entity'' is defined as: (1) A small business that is a small industrial entity as defined in the U.S. Small Business Administration's size standards (*see* 13 CFR 121.201); (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

The purpose of the RFA is ''to fit regulatory and informational requirements to the scale of the businesses, organizations and governmental jurisdictions subject to the regulation.'' 5 U.S.C. 601. Small entities subject to this final rule are largely those entities whose activities are directly covered by the CWA sections 402, 404, and 311 programs. The final rule is expected to result in fewer entities subject to these programs, and a reduced regulatory burden for many of the entities that will still be subject to these programs. As a result, small entities subject to these regulatory programs are unlikely to suffer adverse impacts as a result of regulatory compliance.

As addressed in the Economic Analysis for the final rule, narrowing the scope of CWA regulatory jurisdiction over waters may result in a reduction in the ecosystem services provided by some waters, and as a result, some entities may be adversely impacted. Some business sectors that depend on habitat, such as those catering to hunters or anglers, or that require water treatment to meet production needs, could experience a greater impact relative to other sectors. Potential changes in ecosystem services are likely to be small, infrequent, and dispersed over wide geographic areas, thereby limiting the significance of these impacts on these business sectors. In addition, States and Tribes may already address waters potentially affected by a revised definition, thereby reducing forgone benefits.

The sectors likely to be most impacted by the rule are mitigation banks and companies that provide aquatic resource restoration services. Because fewer waters would be subject to the CWA regulation under the final rule than are subject to regulation under the 2019 Rule, there may be a reduction in demand for mitigation and restoration services under the section 404 permitting program. Assessing impacts to this sector is problematic, however, because this sector lacks a precise SBA small business definition, and many of the businesses that fall within this sector are also classified under various other North American Industry Classification System (NAICS) categories. Furthermore, impacts to this sector would not be the direct result of these businesses complying with the final rule, rather, they would be the indirect result of other entities no longer being required to mitigate for discharges of dredged or fill material into waters that would no longer be jurisdictional under the final rule. In addition, potential impacts would be lessened when accounting for State and tribal dredged and fill programs that would necessitate the purchase of mitigation credits or through the actions of States and Tribes that choose to regulate their wetlands under State or tribal law. For a more detailed discussion see the RFA section of the Economic Analysis for the final rule.

The agencies 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. As documented in the Economic Analysis for the final rule, the agencies do not expect the cost of the rule to result in adverse impact to a significant number of small entities, since the rule is expected to result in net cost savings for all entities affected by this rule. The agencies have therefore concluded that this action will relieve regulatory burden to small entities.

E. Unfunded Mandates Reform Act

This final rule does not contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The definition of ''waters of the United States'' applies broadly to CWA programs. The final action imposes no enforceable duty on any State, local, or tribal governments or the private sector, and does not contain regulatory requirements that significantly or uniquely affect small governments.

F. Executive Order 13132: Federalism

Consulting with State and local government officials, or their representative national organizations, is an important step in the process prior to proposing regulations that may have implications for State and local governments under the terms of Executive Order 13132 (64 FR 43255, August 10, 1999). State and local governments were engaged in a 60-day Federalism consultation at the outset of rule development starting on April 19, 2017. All letters received by the agencies during Federalism consultation may be found on in the docket at EPA Docket Id No. EPA–HQ–OW–2018–0149–0088, available at *https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088.*

The agencies held nineteen Federalism meetings between April 19 and June 16, 2017. Seventeen intergovernmental associations, including nine of the ten organizations identified in EPA's 2008 E.O. 13132 Guidance, attended the initial Federalism consultation meeting, as well as several associations representing State and local governments. Organizations in attendance included: The National Governors Association, the National League of Cities, the National Association of Counties, the U.S. Conference of Mayors, the Council of State Governments, the National Conference of State Legislatures, the County Executives of America, the National Association of Towns and Townships, the Environmental Council of the States, the Western Governors Association, the National Association of Clean Water Agencies, the Association of Clean Water Administrators, the National Association of State Departments of Agriculture, the Association of State Wetlands Managers, the Association of State Floodplain Managers, the National Water Resources Association, the State/Local Legal Center, and several members of EPA's Local Government Advisory Committee (LGAC).

The LGAC met 10 times during this period to address the charge given to its members by the EPA Administrator on a revised rule and completed a report addressing the questions outlined in their charge. The July 14, 2017, final report can be obtained here: *https://www.epa.gov/sites/production/files/2017-07/documents/lgac-final-wotusreport-july2017.pdf* and in the docket as attachment to EPA Docket Id No. EPA–HQ–OW–2018–0149–0088, available at *https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0149-0088.*

The agencies then conducted additional outreach to States prior to proposing the rule to ensure that the agencies could hear the perspectives on how the agencies might revise the definition of ''waters of the United States'' from State co-regulators. The agencies held two additional webinars, the first for Tribes, States, and local governments on December 12, 2017; and one for States on February 20, 2018. In addition, one in-person meeting to seek technical input on the development of the proposed rule was held with a group of nine states (Arizona, Arkansas, Florida, Iowa, Maryland, Minnesota, Oregon, Pennsylvania, and Wyoming) on March 8 and 9, 2018.

These meetings and the letters provided by representatives provided a wide and diverse range of interests, positions, comments, and recommendations to the agencies. The agencies have prepared a report summarizing their consultation and additional outreach to State and local governments and the results of this outreach. A copy of the final report is available in the docket (Docket Id. No. EPA–HQ–OW–2018–0149) for this final rule.

Following publication of the proposed rule, the agencies held four additional in-person meetings with State representatives to answer clarifying questions about the proposal, and to discuss implementation considerations and State interest in working with the agencies to develop geospatial datasets of water resources as articulated in the preamble to the proposed rule.

Under the technical requirements of Executive Order 13132, agencies must conduct a federalism consultation as outlined in the Executive Order for regulations that (1) have federalism implications, that impose substantial direct compliance costs on state and local governments, and that are not required by statute; or (2) that have federalism implications and that preempt state law. This rule does not impose any new costs or other requirements on states, preempt state law, or limit states' policy discretion; rather, it provides more discretion for states as to how best to manage waters under their sole jurisdiction. Executive Order paras. (6)(b) and (6)(c). As discussed in the earlier sections of the notice, this final rule establishes a clear boundary between waters subject to federal regulatory requirements under the CWA and those that States may solely manage under their independent authorities. This action 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. The rule preserves State authority to choose whether or not to regulate waters that are not waters of the United States under the CWA. The agencies believe that the requirements of the Executive Order have been satisfied in any event.

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

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, Nov. 9, 2000), requires the agencies to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law.

During tribal consultation and engagement efforts and in tribal comments on the proposed rule, many Tribes expressed concern that the proposed rule would or could adversely impact tribal waters. Two tribes supported the proposed rule and noted that it would increase the tribes' ability to manage and regulate their own Reservation lands. The agencies acknowledge that because they generally implement CWA programs on tribal lands, a reduced scope of CWA jurisdiction will affect Tribes differently than it will affect States. Currently, of the Tribes that are eligible, most have not received treatment in a manner similar to a state (TAS) status to administer CWA regulatory programs. While some Tribes have established tribal water programs under tribal law or have the authority to establish tribal programs under tribal law, many Tribes may lack the capacity to create a tribal water program under tribal law, to

administer a program, or to expand programs that currently exist. Other Tribes may rely on the Federal government for enforcement of water quality violations. Nonetheless, the rule preserves tribal authority to choose whether or not to regulate waters that are not covered under the CWA. Any decision by the Tribes to protect beyond the limits of the CWA is not compelled by the statute or by this final rule.

The EPA consulted with tribal officials under the *EPA Policy on Consultation and Coordination with Indian Tribes* early in the process of developing this action to permit them to have meaningful and timely input into its development. The Department of the Army participated in the consultation process and further engagement with Tribes. All letters received by the agencies during tribal consultation may be found in the docket for this action, Docket Id. No. EPA–HQ–OW–2018–0149.

The EPA initiated a tribal consultation and coordination process before proposing this rule by sending a ''Notification of Consultation and Coordination'' letter on April 20, 2017, to all of the 567 Tribes federally recognized at that time. The letter invited tribal leaders and designated consultation representatives to participate in the tribal consultation and coordination process. The agencies held two identical webinars concerning this matter for tribal representatives on April 27 and May 18, 2017. Tribes and tribal organizations sent 44 pre-proposal comment letters to the agencies as part of the consultation process. Of those Tribes requesting consultation, the agencies met with nine Tribes at a staff-level and with three Tribes at a leader-to-leader level pre-proposal. The agencies continued engagement with Tribes after the end of the formal consultation, including at national update webinars on December 12, 2017, and February 20, 2018, and an in-person tribal co-regulators workshop on March 6 and 7, 2018.

Following the publication of the proposed rule, the agencies held four in-person meetings with tribal representatives to answer clarifying questions about the proposal, and to discuss implementation considerations and tribal interest in working with the agencies to develop geospatial datasets of water resources as articulated in the preamble to the proposed rule. In addition, the agencies continued to meet with individual Tribes requesting consultation or engagement following publication of the proposed rule, holding staff-level meetings with four Tribes and leader-to-leader level meetings with eight Tribes post-proposal. The agencies also continued engaging with Tribes and tribal organizations via listening sessions at regional and national tribal meetings. In total, the agencies met with 21 individual Tribes requesting consultation, holding leader-to-leader level consultation meetings with 11 individual tribes and staff-level meetings with 13 individual tribes (the agencies met with some tribes more than once). The agencies have prepared a report summarizing the consultation and further engagement with tribal nations. This report, *Summary Report of Tribal Consultation and Engagement for the Navigable Waters Protection Rule: Definition of ''Waters of the United States''* (Docket Id. No. EPA–HQ–OW–2018–0149), is available in the docket for this final rule.

As required by section 7(a), the EPA's Tribal Consultation Official has certified that the requirements of the executive order have been met in a meaningful and timely manner. A copy of the certification is included in the docket for this action.

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

This action is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because the environmental health or safety risks addressed by this action do not present a disproportionate risk to children.

I. 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.

J. National Technology Transfer and Advancement Act

This action is not subject to the National Technology Transfer and Advancement Act of 1995 because the rule does not involve technical standards.

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

This action is not subject to Executive Order 12898 (59 FR 7629, February 11, 1994) because there is no significant evidence of disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898.

L. Congressional Review Act

This action is subject to the Congressional Review Act, and the agencies will submit a rule report to each House of the Congress and to the Comptroller General of the United States. OMB has concluded that this action is a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

33 CFR Part 328

Navigation (water), Water pollution control, Waterways.

40 CFR Part 110

Oil pollution, Reporting and recordkeeping requirements.

40 CFR Part 112

Oil pollution, Penalties, Reporting and recordkeeping requirements.

40 CFR Part 116

Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 117

Hazardous substances, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 120

Environmental protection, Water pollution control, Waterways.

40 CFR Part 122

Administrative practice and procedure, Confidential business information, Environmental protection, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 230

Water pollution control.

40 CFR Part 232

Intergovernmental relations, Water pollution control.

40 CFR Part 300

Air pollution control, Carbon monoxide, Chemicals, Environmental protection, Greenhouse gases, Hazardous substances, Hazardous waste, Intergovernmental relations, Lead, Natural resources, Occupational safety and health, Oil pollution, Ozone, Penalties, Reporting and recordkeeping requirements, Sulfur Dioxide, Superfund, Volatile organic compounds, Water pollution control, Water supply.

40 CFR Part 302

Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

40 CFR Part 401

Waste treatment and disposal, Water pollution control.

Dated: January 23, 2020.

Andrew R. Wheeler,

Administrator, Environmental Protection Agency.

Dated: January 23, 2020.

R.D. James,

Assistant Secretary of the Army (Civil Works), Department of the Army.

Title 33—Navigation and Navigable Waters

For the reasons set forth in the preamble, title 33, chapter II of the Code of Federal Regulations is amended as follows:

PART 328—DEFINITION OF WATERS OF THE UNITED STATES

■ 1. Authority: The authority citation for part 328 is revised read as follows: 33 U.S.C. 1251 *et seq.*

■ 2. Section 328.3 is amended by revising paragraphs (a) through (c) and removing paragraphs (d) through (f) to read as follows:

§ 328.3 Definitions.

* * * * *

(a) *Jurisdictional waters.* For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (b) of this section, the term ''waters of the United States'' means:

(1) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

(2) Tributaries;

(3) Lakes and ponds, and impoundments of jurisdictional waters; and

(4) Adjacent wetlands.

(b) *Non-jurisdictional waters.* The following are not ''waters of the United States'':

(1) Waters or water features that are not identified in paragraph (a)(1), (2), (3), or (4) of this section;

(2) Groundwater, including groundwater drained through subsurface drainage systems;

(3) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(4) Diffuse stormwater run-off and directional sheet flow over upland;

(5) Ditches that are not waters identified in paragraph (a)(1) or (2) of this section, and those portions of ditches constructed in waters identified in paragraph (a)(4) of this section that do not satisfy the conditions of paragraph (c)(1) of this section;

(6) Prior converted cropland;

(7) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(8) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (c)(6) of this section;

(9) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(10) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;

(11) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(12) Waste treatment systems.

(c) *Definitions.* In this section, the following definitions apply:

(1) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that:

(i) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (a)(1), (2), or (3) of this section;

(ii) Are inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year;

(iii) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by a natural berm, bank, dune, or similar natural feature; or

(iv) Are physically separated from a water identified in paragraph (a)(1), (2), or (3) of this section only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (a)(1), (2), or (3) of this section in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(2) *Ditch.* The term *ditch* means a constructed or excavated channel used to convey water.

(3) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(4) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(5) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(6) *Lakes and ponds, and impoundments of jurisdictional waters.* The term *lakes and ponds, and impoundments of jurisdictional waters* means standing bodies of open water that contribute surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water

is also jurisdictional if it is inundated by flooding from a water identified in paragraph (a)(1), (2), or (3) of this section in a typical year.

(7) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(8) *Perennial.* The term *perennial* means surface water flowing continuously year-round.

(9) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (c)(16) of this section. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(10) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.,* in northern climes or mountainous regions).

(11) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(12) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (a)(1) of this section in a typical year either directly or through one or more waters identified in paragraph (a)(2), (3), or (4) of this section. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term *tributary* includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

(13) *Typical year.* The term *typical year* means when precipitation and other climatic variables are within the normal periodic range (*e.g.,* seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.

(14) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (c)(16) of this section, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

(15) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(16) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

* * * * *

Title 40—Protection of Environment

For reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 110—DISCHARGE OF OIL

■ 3. The authority citation for part 110 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.,* 33 U.S.C. 1321(b)(3) and (b)(4) and 1361(a); E.O. 11735, 38 FR 21243, 3 CFR parts 1971–1975 Comp., p. 793.

■ 4. Section 110.1 is amended by revising the definition of ''Navigable waters'' and removing the definition of ''Wetlands'' to read as follows:

§ 110.1 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

PART 112—OIL POLLUTION PREVENTION

■ 5. The authority citation for part 112 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 6. Section 112.2 is amended by revising the definition of ''Navigable waters'' and removing the definition of ''Wetlands'' to read as follows:

§ 112.2 Definitions.

* * * * *

Navigable waters means waters of the United States, including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

PART 116—DESIGNATION OF HAZARDOUS SUBSTANCES

■ 7. The authority citation for part 116 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 8. Section 116.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 116.3 Definitions.

* * * * *

Navigable waters means ''waters of the United States,'' including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

PART 117—DETERMINATION OF REPORTABLE QUANTITIES FOR HAZARDOUS SUBSTANCES

■ 9. The authority citation for part 117 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.,* and Executive Order 11735, superseded by Executive Order 12777, 56 FR 54757.

■ 10. Section 117.1 is amended by revising paragraph (i) to read as follows:

§ 117.1 Definitions.

* * * * *

(i) *Navigable waters* means ''waters of the United States, including the territorial seas,'' as defined in § 120.2 of this chapter.

* * * * *

■ 11. Add part 120 to read as follows:

PART 120—DEFINITION OF WATERS OF THE UNITED STATES

Sec.
120.1 Purpose and scope.
120.2 Definitions.

Authority: 33 U.S.C. 1251 *et seq.*

§ 120.1 Purpose and scope.

Part 120 contains the definition of ''navigable waters'' and ''waters of the United States'' for purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations.

§ 120.2 Definitions.

For the purposes of this part, the following terms shall have the meanings indicated:

Navigable waters means waters of the United States, including the territorial seas.

Waters of the United States means:

(1) *Jurisdictional waters.* For purposes of the Clean Water Act, 33 U.S.C. 1251 *et seq.* and its implementing regulations, subject to the exclusions in paragraph (2) of this section, the term ''waters of the United States'' means:

(i) The territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide;

(ii) Tributaries;

(iii) Lakes and ponds, and impoundments of jurisdictional waters; and

(iv) Adjacent wetlands.

(2) *Non-jurisdictional waters.* The following are not ''waters of the United States'':

(i) Waters or water features that are not identified in paragraph (1)(i), (ii), (iii), or (iv) of this definition;

(ii) Groundwater, including groundwater drained through subsurface drainage systems;

(iii) Ephemeral features, including ephemeral streams, swales, gullies, rills, and pools;

(iv) Diffuse stormwater run-off and directional sheet flow over upland;

(v) Ditches that are not waters identified in paragraph (1)(i) or (ii) of this definition, and those portions of ditches constructed in waters identified in paragraph (1)(iv) of this definition that do not satisfy the conditions of paragraph (3)(i) of this definition;

(vi) Prior converted cropland;

(vii) Artificially irrigated areas, including fields flooded for agricultural production, that would revert to upland should application of irrigation water to that area cease;

(viii) Artificial lakes and ponds, including water storage reservoirs and farm, irrigation, stock watering, and log cleaning ponds, constructed or excavated in upland or in non-jurisdictional waters, so long as those artificial lakes and ponds are not impoundments of jurisdictional waters that meet the conditions of paragraph (3)(vi) of this definition;

(ix) Water-filled depressions constructed or excavated in upland or in non-jurisdictional waters incidental to mining or construction activity, and pits excavated in upland or in non-jurisdictional waters for the purpose of obtaining fill, sand, or gravel;

(x) Stormwater control features constructed or excavated in upland or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater run-off;

(xi) Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in upland or in non-jurisdictional waters; and

(xii) Waste treatment systems.

(3) *Definitions.* In this section, the following definitions apply:

(i) *Adjacent wetlands.* The term *adjacent wetlands* means wetlands that:

(A) Abut, meaning to touch at least at one point or side of, a water identified in paragraph (1)(i), (ii), or (iii) of this definition;

(B) Are inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year;

(C) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by a natural berm, bank, dune, or similar natural feature; or

(D) Are physically separated from a water identified in paragraph (1)(i), (ii), or (iii) of this definition only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrologic surface connection between the wetlands and the water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year, such as through a culvert, flood or tide gate, pump, or similar artificial feature. An adjacent wetland is jurisdictional in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year.

(ii) *Ditch.* The term *ditch* means a constructed or excavated channel used to convey water.

(iii) *Ephemeral.* The term *ephemeral* means surface water flowing or pooling only in direct response to precipitation (*e.g.,* rain or snow fall).

(iv) *High tide line.* The term *high tide line* means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds, such as those accompanying a hurricane or other intense storm.

(v) *Intermittent.* The term *intermittent* means surface water flowing continuously during certain times of the year and more than in direct response to precipitation (*e.g.,* seasonally when the groundwater table is elevated or when snowpack melts).

(vi) *Lakes and ponds, and impoundments of jurisdictional waters.* The term *lakes and ponds, and impoundments of jurisdictional waters* means standing bodies of open water that contribute surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A lake, pond, or impoundment of a jurisdictional water does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a culvert, dike, spillway, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. A lake or pond, or impoundment of a jurisdictional water is also jurisdictional if it is inundated by flooding from a water identified in paragraph (1)(i), (ii), or (iii) of this definition in a typical year.

(vii) *Ordinary high water mark.* The term *ordinary high water mark* means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.

(viii) *Perennial.* The term *perennial* means surface water flowing continuously year-round.

(ix) *Prior converted cropland.* The term *prior converted cropland* means any area that, prior to December 23, 1985, was drained or otherwise manipulated for the purpose, or having the effect, of making production of an agricultural product possible. EPA and the Corps will recognize designations of prior converted cropland made by the Secretary of Agriculture. An area is no longer considered *prior converted cropland* for purposes of the Clean Water Act when the area is abandoned and has reverted to wetlands, as defined in paragraph (3)(xvi) of this definition. Abandonment occurs when prior converted cropland is not used for, or in support of, agricultural purposes at least once in the immediately preceding five years. For the purposes of the Clean Water Act, the EPA Administrator shall have the final authority to determine whether prior converted cropland has been abandoned.

(x) *Snowpack.* The term *snowpack* means layers of snow that accumulate over extended periods of time in certain geographic regions or at high elevation (*e.g.,* in northern climes or mountainous regions).

(xi) *Tidal waters* and *waters subject to the ebb and flow of the tide.* The terms *tidal waters* and *waters subject to the ebb and flow of the tide* mean those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters and waters subject to the ebb and flow of the tide end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

(xii) *Tributary.* The term *tributary* means a river, stream, or similar naturally occurring surface water channel that contributes surface water flow to a water identified in paragraph (1)(i) of this definition in a typical year either directly or through one or more waters identified in paragraph (1)(ii), (iii), or (iv) of this definition. A tributary must be perennial or intermittent in a typical year. The alteration or relocation of a tributary does not modify its jurisdictional status as long as it continues to satisfy the flow conditions of this definition. A tributary does not lose its jurisdictional status if it contributes surface water flow to a downstream jurisdictional water in a typical year through a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar natural feature. The term *tributary* includes a ditch that either relocates a tributary, is constructed in a tributary, or is constructed in an adjacent wetland as long as the ditch satisfies the flow conditions of this definition.

(xiii) *Typical year.* The term *typical year* means when precipitation and other climatic variables are within the normal periodic range (*e.g.,* seasonally, annually) for the geographic area of the applicable aquatic resource based on a rolling thirty-year period.

(xiv) *Upland.* The term *upland* means any land area that under normal circumstances does not satisfy all three wetland factors (*i.e.,* hydrology, hydrophytic vegetation, hydric soils) identified in paragraph (3)(xvi) of this definition, and does not lie below the ordinary high water mark or the high tide line of a jurisdictional water.

(xv) *Waste treatment system.* The term *waste treatment system* includes all components, including lagoons and treatment ponds (such as settling or cooling ponds), designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge).

(xvi) *Wetlands.* The term *wetlands* means areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

■ 12. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

■ 13. Section 122.2 is amended by:
■ a. Lifting the suspension of the last sentence of the definition of ''Waters of the United States'' published July 21, 1980 (45 FR 48620).
■ b. Revising the definition of ''Waters of the United States''.
■ c. Removing the definition of ''Wetlands''.

The revision reads as follows:

§ 122.2 Definitions.

* * * * *

Waters of the United States or *waters of the U.S.* means the term as it is defined in § 120.2 of this chapter.

* * * * *

PART 230—SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

■ 14. The authority citation for part 230 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 15. Section 230.3 is amended by:
■ a. Removing paragraph (b) and reserved paragraphs (f), (g), (j), and (l);
■ b. Redesignating paragraphs (c) through (e) as paragraphs (b) through (d);
■ c. Redesignating paragraphs (h) and (i) as paragraphs (e) and (f)
■ d. Redesignating paragraph (k) as paragraph (g);
■ e. Redesignating paragraphs (m) through (q) as paragraphs (h) through (l);
■ f. Redesignating paragraph (q-1) as paragraph (m);
■ g. Redesignating paragraph (r) as paragraph (n);
■ h. Redesignating paragraph (s) as paragraphs (o);
■ i. Revising newly designated paragraph (o); and
■ j. Removing paragraph (t).

The revision reads as follows:

§ 230.3 Definitions.

* * * * *

(o) *Waters of the United States* means the term as it is defined in § 120.2 of this chapter.

PART 232—404 PROGRAMS DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

■ 16. The authority citation for part 232 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 17. Section 232.2 is amended by revising the definition of ''Waters of the United States'' and removing the definition of ''Wetlands'' to read as follows:

§ 232.2 Definitions.

* * * * *

Waters of the United States means the term as it is defined in § 120.2 of this chapter.

PART 300—NATIONAL OIL AND HAZARDOUS SUBSTANCES POLLUTION CONTINGENCY PLAN

■ 18. The authority citation for part 300 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 19. Section 300.5 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 300.5 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

■ 20. In appendix E to part 300, section 1.5 Definitions is amended by revising the definition of ''Navigable waters'' to read as follows:

Appendix E to Part 300—Oil Spill Response

* * * * *

1.5 Definitions. * * *

Navigable waters means the waters of the United States, including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

PART 302— DESIGNATION, REPORTABLE QUANTITIES, AND NOTIFICATION

■ 21. The authority citation for part 302 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 22. Section 302.3 is amended by revising the definition of ''Navigable waters'' to read as follows:

§ 302.3 Definitions.

* * * * *

Navigable waters means the waters of the United States, including the territorial seas, as defined in § 120.2 of this chapter.

* * * * *

PART 401— GENERAL PROVISIONS

■ 23. The authority citation for part 401 is revised to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

■ 24. Section 401.11 is amended by revising paragraph (l) to read as follows:

§ 401.11 General definitions.

* * * * *

(l) *Navigable waters* means ''waters of the United States, including the territorial seas,'' as defined in § 120.2 of this chapter.

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