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

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

[NRC–2020–0179]

RIN 3150–AK51

List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM UMAX Canister Storage System, Certificate of Compliance No. 1040, Amendment No. 4

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is confirming the effective date of January 25, 2021, for the direct final rule that was published in the **Federal Register** on November 9, 2020. This direct final rule amended the Holtec International HI–STORM UMAX Canister Storage System listing in the ''List of approved spent fuel storage casks'' to include Amendment No. 4 to Certificate of Compliance No. 1040. Amendment No. 4 revises the certificate of compliance to update the technical specifications for radiation protection regarding the dose rate limit for the vertical ventilated module lid, update the technical specifications for the vent blockage limiting condition for operation, and add a Type 1 version of multi-purpose canister MPC–37.

DATES: The effective date of January 25, 2021, for the direct final rule published November 9, 2020 (85 FR 71223), is confirmed.

ADDRESSES: Please refer to Docket ID NRC–2020–0179 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–2020–0179. Address questions about NRC dockets to Dawn Forder; telephone: 301–415–3407; email: *Dawn.Forder@nrc.gov.* For technical questions, contact the individuals 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.* The final amendment to the certificate of compliance, the final changes to the technical specifications, and the final safety evaluation report are available in ADAMS under Accession No. ML20349A206.
- *Attention:* The PDR, where you may examine and order copies of public documents, is currently closed. You may submit your request to the PDR via email at *pdr.resource@nrc.gov* or call 1–800–397–4209 between 8:00 a.m. and 4:00 p.m., Monday through Friday, except on Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Christian J. Jacobs, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–6825; email: *Christian.Jacobs@nrc.gov* or Torre M. Taylor, Office of Nuclear Material Safety and Safeguards; telephone: 301–415–7900; email: *Torre.Taylor@nrc.gov.* Both are staff of the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: On November 9, 2020, the NRC published a direct final rule (85 FR 71223) amending its regulations in part 72 of title 10 of the *Code of Federal Regulations* for the Holtec International HI–STORM UMAX Canister Storage System listing in the ''List of approved spent fuel storage casks'' to include Amendment No. 4 to Certificate of Compliance No. 1040. Amendment No. 4 revises the certificate of compliance to update the technical specifications for radiation protection regarding the dose rate limit for the vertical ventilated module lid, update the technical specifications for the vent blockage limiting condition for operation, and add a Type 1 version of multi-purpose canister MPC–37.

In the direct final rule, the NRC stated that if no significant adverse comments were received, the direct final rule would become effective on January 25, 2021. The NRC received and docketed one comment on the companion proposed rule (85 FR 71274, November 9, 2020). An electronic copy of the comment can be obtained from the Federal Rulemaking website at *https://www.regulations.gov* under Docket ID NRC–2020–0179 and is also available in ADAMS under Accession No. ML20349A179.

The NRC evaluated the comment against the criteria described in the direct final rule and determined that it was not significant and adverse. Specifically, the comment was outside the scope of this rulemaking and did not oppose the rule; propose a change or an addition to the rule; or cause the NRC to make a change to the rule, the certificate of compliance, or the technical specifications. Therefore, this direct final rule will become effective as scheduled.

Dated: January 5, 2021.

For the Nuclear Regulatory Commission.

Cindy K. Bladey,

Chief, Regulatory Analysis and Rulemaking Support Branch, Division of Rulemaking, Environmental, and Financial Support, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2021–00231 Filed 1–12–21; 8:45 am]

BILLING CODE 7590–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 263

[Docket No. R–1739]

RIN 7100–AG09

Rules of Practice for Hearings

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule.

SUMMARY: The Board of Governors of the Federal Reserve System (the ''Board'') is issuing a final rule amending its rules of practice and procedure to adjust the amount of each civil money penalty (''CMP'') provided by law within its jurisdiction to account for inflation as required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015.

DATES: This final rule is effective on January 13, 2021.

FOR FURTHER INFORMATION CONTACT: Thomas O. Kelly, Senior Counsel (202–974–7059), Legal Division, Board of Governors of the Federal Reserve System, 20th Street and Constitution Ave. NW, Washington, DC 20551. For users of Telecommunication Device for the Deaf (TDD) only, contact 202–263–4869.

SUPPLEMENTARY INFORMATION:

Federal Civil Penalties Inflation Adjustment Act

The Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note (''FCPIA Act''), requires federal agencies to adjust, by regulation, the CMPs within their jurisdiction to account for inflation. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the ''2015 Act'') [1] amended the FCPIA Act to require federal agencies to make annual adjustments not later than January 15 of every year.[2] The Board is now issuing a new final rule to set the CMP levels pursuant to the required annual adjustment for 2021. The Board will apply these adjusted maximum penalty levels to any penalties assessed on or after January 13, 2021, whose associated violations occurred on or after November 2, 2015. Penalties assessed for violations occurring prior to November 2, 2015 will be subject to the amounts set in the Board's 2012 adjustment pursuant to the FCPIA Act.[3]

Under the 2015 Act, the annual adjustment to be made for 2021 is the percentage by which the Consumer Price Index for the month of October 2020 exceeds the Consumer Price Index for the month of October 2019. On December 23, 2020, as directed by the 2015 Act, the Office of Management and Budget (OMB) issued guidance to affected agencies on implementing the required annual adjustment which included the relevant inflation multiplier.[4] Using OMB's multiplier, the Board calculated the adjusted penalties for its CMPs, rounding the penalties to the nearest dollar.[5]

Administrative Procedure Act

The 2015 Act states that agencies shall make the annual adjustment ''notwithstanding section 553 of title 5, United States Code.'' Therefore, this rule is not subject to the provisions of the Administrative Procedure Act (the ''APA''), 5 U.S.C. 553, requiring notice, public participation, and deferred effective date.

Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* requires a regulatory flexibility analysis only for rules for which an agency is required to publish a general notice of proposed rulemaking. Because the 2015 Act states that agencies' annual adjustments are to be made notwithstanding section 553 of title 5 of United States Code—the APA section requiring notice of proposed rulemaking—the Board is not publishing a notice of proposed rulemaking. Therefore, the Regulatory Flexibility Act does not apply.

Paperwork Reduction Act

There is no collection of information required by this final rule that would be subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

List of Subjects in 12 CFR Part 263

Administrative practice and procedure, Claims, Crime, Equal access to justice, Lawyers, Penalties.

Authority and Issuance

For the reasons set forth in the preamble, the Board amends 12 CFR part 263 as follows:

PART 263—RULES OF PRACTICE FOR HEARINGS

■ 1. The authority citation for part 263 continues to read as follows:

Authority: 5 U.S.C. 504, 554–557; 12 U.S.C. 248, 324, 334, 347a, 504, 505, 1464, 1467, 1467a, 1817(j), 1818, 1820(k), 1829, 1831o, 1831p–1, 1832(c), 1847(b), 1847(d), 1884, 1972(2)(F), 3105, 3108, 3110, 3349, 3907, 3909(d), 4717; 15 U.S.C. 21, 78l(i), 78o–4, 78o–5, 78u–2; 1639e(k); 28 U.S.C. 2461 note; 31 U.S.C. 5321; and 42 U.S.C. 4012a.

■ 2. Section 263.65 is revised to read as follows:

§ 263.65 Civil money penalty inflation adjustments.

(a) *Inflation adjustments.* In accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which further amended the Federal Civil Penalties Inflation Adjustment Act of 1990, the Board has set forth in paragraph (b) of this section the adjusted maximum amounts for each civil money penalty provided by law within the Board's jurisdiction. The authorizing statutes contain the complete provisions under which the Board may seek a civil money penalty. The adjusted civil money penalties apply only to penalties assessed on or after January 13, 2021, whose associated violations occurred on or after November 2, 2015.

(b) *Maximum civil money penalties.* The maximum (or, in the cases of 12 U.S.C. 334 and 1832(c), fixed) civil money penalties as set forth in the referenced statutory sections are set forth in the table in this paragraph (b).

TABLE 1 TO PARAGRAPH (b)

Statute	Adjusted civil money penalty
12 U.S.C. 324:	
Inadvertently late or misleading reports, inter alia	$4,146
Other late or misleading reports, inter alia	41,463
Knowingly or reckless false or misleading reports, inter alia	2,073,133
12 U.S.C. 334	301
12 U.S.C. 374a	301
12 U.S.C. 504:	
First Tier	10,366
Second Tier	51,827

[1] Public Law 114–74, 129 Stat. 599 (2015) (codified at 28 U.S.C. 2461 note).

[2] 28 U.S.C. 2461 note, section 4(b)(1).

[3] 77 FR 68680 (Nov. 16, 2012).

[4] OMB Memorandum M–21–10, *Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (Dec. 23, 2020).

[5] Under the 2015 Act and implementing OMB guidance, agencies are not required to make an adjustment to a CMP if, during the 12 months preceding the required adjustment, such penalty increased due to a law other than the 2015 Act by an amount greater than the amount of the required adjustment. No other laws have adjusted the CMPs within the Board's jurisdiction during the preceding 12 months.

TABLE 1 TO PARAGRAPH (b)—Continued

Statute	Adjusted civil money penalty
Third Tier	2,073,133
12 U.S.C. 505:	
First Tier	10,366
Second Tier	51,827
Third Tier	2,073,133
12 U.S.C. 1464(v)(4)	4,146
12 U.S.C. 1464(v)(5)	41,463
12 U.S.C. 1464(v)(6)	2,073,133
12 U.S.C. 1467a(i)(2)	51,827
12 U.S.C. 1467a(i)(3)	51,827
12 U.S.C. 1467a(r):	
First Tier	4,146
Second Tier	41,463
Third Tier	2,073,133
12 U.S.C. 1817(j)(16):	
First Tier	10,366
Second Tier	51,827
Third Tier	2,073,133
12 U.S.C. 1818(i)(2):	
First Tier	10,366
Second Tier	51,827
Third Tier	2,073,133
12 U.S.C. 1820(k)(6)(A)(ii)	341,000
12 U.S.C. 1832(c)	3,011
12 U.S.C. 1847(b)	51,827
12 U.S.C. 1847(d):	
First Tier	4,146
Second Tier	41,463
Third Tier	2,073,133
12 U.S.C. 1884	301
12 U.S.C. 1972(2)(F):	
First Tier	10,366
Second Tier	51,827
Third Tier	2,073,133
12 U.S.C. 3110(a)	47,378
12 U.S.C. 3110(c):	
First Tier	3,791
Second Tier	37,901
Third Tier	1,895,095
12 U.S.C. 3909(d)	2,579
15 U.S.C. 78u–2(b)(1):	
For a natural person	9,753
For any other person	97,523
15 U.S.C. 78u–2(b)(2):	
For a natural person	97,523
For any other person	487,616
15 U.S.C. 78u–2(b)(3):	
For a natural person	195,047
For any other person	975,230
15 U.S.C. 1639e(k)(1)	11,906
15 U.S.C. 1639e(k)(2)	23,811
42 U.S.C. 4012a(f)(5)	2,252

By order of the Board of Governors of the Federal Reserve System, under delegated authority.

Ann Misback,

Secretary of the Board.

[FR Doc. 2021–00235 Filed 1–12–21; 8:45 am]

BILLING CODE 6210–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

RIN 3245–AH64

Extension of Participation in 8(a) Business Development Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule contains amendments to the regulations governing the 8(a) Business Development (BD) program. The U.S. Small Business Administration (SBA) is revising its regulations to implement a provision in the Consolidated Appropriations Act, 2021 (Appropriations Act), and the National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021), which authorized certain 8(a) Participants to extend their 8(a) BD program term by a period of one year. This interim final rule amends the 8(a) BD program regulations to carry out the changes made by the Act.

DATES:

Effective date: This interim final rule is effective on January 13, 2021.

Comment date: Comments must be received no later than March 15, 2021.

ADDRESSES: You may submit comments, identified by RIN: 3245–AH64 by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* Van Tran, Deputy Associate Administrator, Office of Business Development, Small Business Administration, at *8aQuestions@sba.gov.*

SBA will post all comments on *http://www.regulations.gov.* If you wish to submit confidential business information (CBI), as defined in the User Notice at *http://www.regulations.gov,* please submit the information to Van Tran, Deputy Associate Administrator, Office of Business Development, Small Business Administration at *8aQuestions@sba.gov.* Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Van Tran, Deputy Associate Administrator, Office of Business Development, Office of Government Contracting and Business Development, at *8aQuestions@sba.gov,* or SBA's 8(a) BD information line at (415) 744–0328.

SUPPLEMENTARY INFORMATION:

I. Background Information

On December 27, 2020, President Trump signed into law the Appropriations Act, Public Law 116–260, Div. N, title III, sec. 330 (Dec. 27, 2020), to, among other things, make appropriations for the 2021 fiscal year and to provide coronavirus emergency response and relief. Section 330 of the Appropriations Act mandates that SBA must ensure that any small business concern participating in the 8(a) BD program on or before September 9, 2020 has the option to extend such participation for a period of one year from the end of its program term, regardless of whether the concern previously elected to voluntarily suspend its program participation in connection with the President's nationwide coronavirus emergency disaster declaration on March 13, 2020. (Presidential Disaster Declaration on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID–19) Outbreak (March 13, 2020) (*https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak*).

Section 869 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116–283, title VIII, sec. 869 (January 1, 2021) (NDAA 2021) also contained the same language authorizing business concerns participating in the 8(a) BD program on or before September 9, 2020 to extend their participation in the program for a period of one year from the end of their program terms. The statutory language of both the Appropriations Act and NDAA 2021 authorizes an extension for firms participating in the program ''on or before September 9, 2020.'' There is no further clarifying language as to what ''before'' September 9, 2020 is intended to encompass. It is SBA's understanding that Congress extended the term of participation in the 8(a) BD program because it believed that the pandemic has adversely affected 8(a) concerns and their ability to participate in and receive the full benefits of the program. Thus, SBA believes it is reasonable to conclude that any firms participating in the program as of the date the national disaster was declared due to the pandemic (*i.e.,* March 13, 2020) should receive the program term extension authorized by Congress.

This extension authority does not extend to business concerns that graduated from or otherwise left the 8(a) BD program prior to March 13, 2020, or to business concerns that were admitted to the 8(a) BD program after September 9, 2020. In addition, this rule clarifies that the extension will not apply to business concerns that were Participants in the 8(a) BD program at any point between March 13, 2020, and September 9, 2020, but were terminated, early graduated or voluntarily withdrew from the program in lieu of being terminated or early graduated. SBA has already determined that such business concerns are no longer eligible to participate in the 8(a) BD program.

In addition, both the Appropriations Act and the NDAA 2021 provide that SBA shall issue regulations implementing the provision not later than 15 days after the date of enactment, and that the regulations shall be issued without regard to the notice requirements under section 553(b) of title 5, United States Code. As such, this rule is being implemented as an interim final rule with an immediate effective date.

In order to implement the statutory language of section 330 of the Appropriations Act and section 869 of the NDAA 2021, SBA is amending § 124.2 of its regulations to incorporate the optional program term extension for small business concerns participating in the 8(a) BD program on March 13, 2020. Specifically, revised § 124.2 provides that for a firm participating in the 8(a) BD program as of March 13, 2020 and through January 13, 2021, SBA will extend its program term by one year unless the concern declines such extension. A firm that was participating in the 8(a) BD program as of March 13, 2020, but has since graduated or otherwise left the program before January 13, 2021 must notify SBA of its intent to be readmitted for a period of one year from the date it completed its program term. Any such notification must be received by SBA no later than March 15, 2021. In addition, a firm seeking to be readmitted must certify that it continues to meet the applicable eligibility requirements as set forth in §§ 124.101 through 124.111.

SBA is also revising § 124.2 to clarify that any period of extension under the Act will be added to a Participant's transitional stage of participation in the 8(a) BD program. SBA has selected this approach for two reasons. First, in authorizing an extension of 8(a) BD program participation, Congress clearly intended to give certain 8(a) Participants the opportunity to recover and take full advantage of the program's business development assistance, including the additional assistance available to firms in the transitional stage as set forth in § 124.404(c). Second, it would be administratively burdensome and illogical to place a Participant that has already entered the transitional stage (or completed its program term) back in the development stage during its period of extension.

As part of this revision, SBA is also making conforming amendments to § 124.404 to clarify the respective terms of the developmental and transitional stages of program participation.

Lastly, SBA is revising § 124.509 of its regulations to clarify how an extension of participation under the Act will impact an 8(a) Participant's requirement to attain the targeted dollar levels of non-8(a) revenue in its extended program term. Currently, under SBA's regulations, a Participant in the transitional stage of the 8(a) BD program (*i.e.,* years five through nine) must generally achieve certain targets of revenue derived from sources other than sole source or competitive 8(a) contracts. The purpose of these targets is to ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after

leaving the 8(a) BD program. As such, the targets increase incrementally during the transitional stage of the program. Where a Participant fails to meet its applicable competitive business activity target for the just completed program year and SBA determines that the Participant did not make good faith efforts to obtain the requisite non-8(a) revenue, that Participant will be ineligible for sole source 8(a) contracts in the current program year unless a waiver is granted by SBA.

Currently, a Participant in the ninth year of its program term must derive at least 50 percent of its revenues from sources other than sole source or competitive 8(a) contracts. As noted above, the statutory language contained in section 330 of the Appropriations Act and section 869 of the NDAA 2021 was added because Congress believed that firms participating in the 8(a) BD program may not have been able to experience the full benefits of the program due to complications caused by the pandemic. Thus, it is our view that firms that were in program year nine as of March 13, 2020 should not be subject to a higher business activity target for the time added on to the end of their program terms by section 330 and section 869. As such, the same 50 percent business activity target that applies to program year nine will also apply to the extended program term. In order to receive sole source 8(a) contracts during the extended program term a Participant must meet (or have met) the applicable 50 percent non-8(a) business activity target or have made good faith efforts to obtain the requisite non-8(a) revenue in the ninth program year (or fifth year of the transitional stage). Because the period of extension for firms that were participating as of March 13, 2020 but have since graduated or otherwise left the program may be less than a full year, SBA understands that it may be more difficult to meet the 50 percent non-8(a) business activity target for the extended program term. However, SBA encourages Participants to make good faith efforts to obtain at least 50 percent of their revenue from non-8(a) sources during the extension period in order to ease the transition to the competitive marketplace after graduating from the 8(a) BD program. As a point of clarification, SBA notes that this interim final rule does not revise the schedule of the transitional stage or the corresponding business activity target requirements for current 8(a) Participants in years one through five of the transitional stage of the program. In other words, for purposes of the business activity target requirements any such Participant that elects to extend its participation in the program under the Act will not repeat a year in the transitional stage or revert back to a prior year in the transitional stage as a result of the program extension.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 330(b) of the Appropriations Act and section 869(b) of the NDAA 2021 authorize SBA to issue implementing regulations without regard to notice requirements under 5 U.S.C. 553(b). However, SBA is providing a 60-day comment period for the public to comment on this Interim Final Rule. SBA's justification for the use of an interim final rule and immediate effective date follow.

III. Justification for Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act, 5 U.S.C. 553. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that it would be contrary to the public interest. Specifically, advance public notice and comment would delay the delivery of critical business development assistance Congress sought to extend to firms that are presently not eligible for the program's assistance because they have already graduated or otherwise left the 8(a) BD program. As explained above, such firms will need to notify SBA that they would like to be readmitted to the program as soon as possible in order to take full advantage of the extension period.

In addition, both the Appropriations Act and the NDAA provisions cited provide specific authority for SBA to proceed with this rule. Section 330(b) of the Appropriation Act provides: ''(b). Emergency Rulemaking Authority—Not later than 15 days after the date of enactment of this Act, the Administrator shall issue regulations to carry out this section without regard to the notice requirements under section 553(b) of title 5, United States Code.'' Similarly, section 869(b) of the NDAA 21 provides: ''(b) Emergency Rulemaking Authority.—Not later than 15 days after the date of enactment of this section, the Administrator shall issue regulations to carry out this section without regard to the notice requirements under section 553(b) of title 5, United States Code.''

Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be received on or before the close of the comment period noted in the **DATES** section of this interim final rule. SBA will then consider these comments in making any necessary revisions to these regulations.

IV. Justification for Immediate Effective Date

The APA requires that ''publication or service of a substantive rule shall be made not less than 30 days before its effective date, except as—otherwise provided by the agency for good cause found and published with the rule.'' 5 U.S.C. 553(d)(3). The purpose of this provision is to provide interested and affected member of the public sufficient time to adjust their behavior before the rule takes effect.

In light of the urgent need to assist 8(a) small business concerns during the pandemic, SBA finds that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date. While this interim final rule is effective immediately upon publication, SBA is inviting public comment on the rule during a 60-day period and will consider the comments in developing a final rule. SBA has included an applicability date to make clear that the rule is applicable for eligible 8(a) companies to either retain or regain their 8(a) status as quickly as possible.

V. Compliance With Executive Orders 12866, 13771, 12988, 13132, and 13175, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

The Office of Information and Regulatory Affairs has determined that this interim final rule is not significant for the purposes of Executive Order 12866 and is not considered a major rule under the Congressional Review Act.

This interim final rule is necessary to implement section 330 of the Appropriations act and section 869 of

the NDAA 2021 in order to provide relief to 8(a) firms adversely impacted by the March 13, 2020, emergency declaration. SBA anticipates that this rule will substantially benefit such 8(a) firms, their employees, and the communities they serve. The rule will allow 8(a) firms to continue to be eligible to be awarded both competitive and sole source 8(a) contracts for an extended period in the program. In FY 2019, 8(a) firms were awarded 5.15% of federal contract dollars amounting to $30.39 billion with $8.62 billion awarded through set asides, $9.90 billion awarded as sole-source, and $11.87 billion awarded though open competition or with another preference (*e.g.,* HUBZone) applied.[1] In the past five years (FY 2016–FY 2020) the average total contract awards per 8(a) firm ranged from $3.15 million in FY 2018 to $4.45 million in FY 2016.

An addition of one year to the term of 8(a) firms will increase the pool of firms participating in the program by up to 400 to 600 8(a) firms each year for the next ten years, which reflects the amount of firms that have graduated from the 8(a) program annually in the past five years, on average. Approximately 4,150 8(a) firms would be eligible to receive benefits for an additional year in the 8(a) program during the course of the next ten years based on the number of firms within the current 8(a) portfolio and including those firms that graduated since March 13, 2020. While more firms will be eligible to participate in the 8(a) program each year, the impact on 8(a) contract dollars awarded is anticipated to be non-substantive.

SBA will also need to account for costs associated with the management of an additional year of eligibility for 8(a) firms, which includes business development assistance and compliance oversight. In FY 2019, with nearly 5,200 8(a) firms in the program, SBA expended approximately $12,150 per 8(a) Program Participant based on a total program cost of $63.17 million; this figure includes overhead costs[2]. An additional year of eligibility would likely increase total program costs stemming from program services. However, some of these costs (*e.g.,* overhead) would be redistributed across the 8(a) program and other SBA programs or reduced due to economies of scale. SBA is unable to estimate the marginal costs associated with an additional year at the end of a firm's term in the 8(a) program, but anticipates that it would not exceed SBA's annual costs for an 8(a) Participant.

Executive Order 13771

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

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. 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, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13175

This 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.

Paperwork Reduction Act

The SBA has determined that this rule does not affect any existing collection of information. The rule does require a concern seeking to be readmitted to the 8(a) BD program to notify SBA of its intent to be readmitted and make a certification that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111 of title 13 of the Code of Federal Regulations. SBA is not seeking to collect information through any required form, but rather is anticipating a simple email from the business concern to SBA notifying SBA of its intent to be readmitted to the 8(a) BD program. There are 346 business concerns whose program terms have expired since March 13, 2020. Those are the only business concerns who would be subject to the notification requirement.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, rules that are exempt from notice and comment are exempt from the RFA requirements when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with the Regulatory Flexibility Ac. Ch.1. p.9.* Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA is amending 13 CFR part 124 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 1. The authority citation for part 124 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, Pub. L. 116–260, sec. 330, and 42 U.S.C. 9815.

■ 2. Revise § 124.2 to read as follows:

§ 124.2 What length of time may a business participate in the 8(a) BD program?

(a) Except as set forth in paragraph (b) of this section, a Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine-year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal as provided for in this subpart.

(b) Pursuant to section 330 of the Consolidated Appropriations Act, 2021,

[1] Congressional Research Service, SBA's ''8(a) Program'': Overview, History, and Current Issues, Page 36–37, *https://crsreports.congress.gov/product/pdf/R/R44844.*

[2] SBA's FY 2021 Congressional Justification and Annual Performance Report, Table 10, Page 16, *https://www.sba.gov/cj.*

and section 869 of the National Defense Authorization Act for Fiscal Year 2021, a small business concern participating the 8(a) BD program on March 13, 2020, may elect to extend such participation by a period of one year from the end of its program term, regardless of whether it previously elected to suspend participation in the program under the procedures set forth in § 124.305(h)(1)(iii).

(1) Unless expressly declined in writing, SBA will extend a Participant's program term by one year if the concern was a Participant in the 8(a) BD program on March 13, 2020, and continued its participation through January 13, 2021. Declines of such extension must be submitted to: Deputy Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to *8aQuestions@sba.gov.*

(2) Except as set forth in paragraph (b)(2)(iii) of this section any concern that was a Participant in the 8(a) BD program on March 13, 2020, but graduated or otherwise left the program before January 13, 2021 may elect to be readmitted to the 8(a) BD program for the period of time equal to one year from the date of the original expiration of the concern's program term. A concern seeking to be readmitted to the 8(a) BD program must notify SBA of its intent to be readmitted no later than March 15, 2021.

Example 1 to paragraph (b)(2) introductory text. Business Concern A was a Participant in the 8(a) BD program on September 9, 2020, and its program term expired on November 25, 2020. On January 28, 2021, Business Concern A notified SBA of its election to be readmitted to the 8(a) BD program under the process outlined in this paragraph (b)(2). Business Concern A would be eligible to participate in the 8(a) BD program until November 25, 2021.

(i) All requests for readmittance must be submitted to: Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or email to *8aQuestions@sba.gov.*

(ii) As part of a concern's notification to SBA of its intent to be readmitted to the 8(a) BD program, the concern must certify that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111. SBA may, in its discretion, request information or documentation to assess whether the concern meets the eligibility criteria for readmittance.

(iii) Business concerns that were Participants in the 8(a) BD program on March 13, 2020, but were terminated or early graduated by SBA or elected to voluntarily withdraw or early graduate in lieu of termination are not eligible to extend their program terms.

(iv) The readmittance of a business concern owned and controlled by a tribe, ANC, NHO, or CDC to the 8(a) BD program under this paragraph (b)(2) will be disregarded for purposes of the ownership restrictions applicable to Participants owned by a tribe, ANC, NHO, or CDC as set forth in §§ 124.109(c)(3)(ii), 124.110(e), and 124.111(d). The date to commence the two-year waiting period for the tribe, ANC, NHO, or CDC to own another business concern in the 8(a) BD program with the same primary NAICS code as the readmitted concern will not be readjusted with the firm's readmittance.

■ 3. Amend § 124.404 by revising the second sentence of paragraph (a) to read as follows:

§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

(a) * * * The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term or has elected to extend its participation pursuant to § 124.2(b).

* * * * *

■ 4. Amend § 124.509 by revising paragraph (b)(2) and adding an example to paragraph (d)(4) to read as follows:

§ 124.509 What are non-8(a) business activity targets?

* * * * *

(b) * * *

(2) *Non-8(a) business activity targets.*—(i) During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

TABLE 1 TO PARAGRAPH (b)(2)(i)

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

(ii) Any Participant that extended its program term pursuant to § 124.2(b) of this chapter must meet the business activity target for year 5 or meet the applicable requirements of paragraph (d) or (e) of this section in order to preserve its eligibility for sole source 8(a) contracts during the extended program period. The applicable business activity target for the extended program period will be the same as that for year 5 of the transitional stage (*i.e.,* 50% non-8(a) revenue).

* * * * *

(d) * * *

(4) * * *

Example 3 to paragraph (d)(4): Firm C elected to extend its participation in the 8(a) BD program as set forth in § 124.2 of this chapter. Firm C had $10 million in total revenue during year 5 in the transitional stage (year 9 in the program), of which $8.5 million were 8(a) revenues and $1.5 million were non-8(a) revenues, and SBA determined that Firm C did not make good faith efforts to meet its non-8(a) business activity target. In order to be eligible for sole source 8(a) contracts during year 6 of the transitional stage (year 10 in the program), Firm C must demonstrate at its first or second quarterly review that it had received at least $3.5 million in non-8(a) revenue and new non-8(a) awards (the amount by which it failed to meet the 50% non-8(a) business activity target for year 5 in the transitional stage). If, at its first two quarterly reviews during year 6 of the transitional stage (year 10 in the program), Firm C could not demonstrate that it had received at least $3.5 million in non-8(a) revenue and new non-8(a) awards, Firm C would not be eligible for sole source 8(a) contracts for the remainder of its program term.

* * * * *

Jovita Carranza,

Administrator.

[FR Doc. 2021–00602 Filed 1–12–21; 8:45 am]

BILLING CODE 8026–03–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 250 and 254

[Docket DOT–OST–2020–0251]

RIN 2105–AE81

Implementing Certain Provisions of the TICKETS Act and Revisions to Denied Boarding Compensation and Domestic Baggage Liability Limits

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Department of Transportation's (or the Department's) oversales rule by clarifying that the maximum amount of Denied Boarding Compensation (DBC) that a carrier may provide to a passenger denied boarding involuntarily is not limited, and by prohibiting airlines from involuntarily denying boarding to a passenger after the passenger's boarding pass has been collected or scanned and the passenger has boarded, subject to safety and security exceptions. Further, pursuant to existing regulations, this final rule raises the liability limits for denied boarding compensation that U.S. and foreign air carriers may impose from the current figures of $675 and $1,350 to $775 and $1,550. Also, in accordance with existing regulations, this final rule raises the liability limit U.S. carriers may impose for mishandled baggage in domestic air transportation, adjusting the limit of liability from the current amount of $3,500 to $3,800.

DATES: This rule is effective on April 13, 2021.

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SUPPLEMENTARY INFORMATION:

I. Clarifying That the Department's Oversales Rule Does Not Limit the Maximum Amount of DBC Carriers May Offer to Passengers Denied Boarding Involuntarily, and Related Provisions

Section 425(e) of the FAA Reauthorization Act of 2018 (Pub. L. 115–254, October 5, 2018), which includes the Transparency Improvements and Compensation to Keep Every Ticketholder Safe Act of 2018 (TICKETS Act), requires the Department to complete a rulemaking to clarify that (1) there is no maximum level of compensation an air carrier or foreign air carrier may pay to a passenger who is involuntarily denied boarding as the result of an oversold flight, and (2) the DBC compensation levels set forth in the regulation are the minimum levels of compensation an air carrier or foreign air carrier must pay to a passenger who is involuntarily denied boarding as the result of an oversold flight. ''Maximum'' DBC amount and DBC ''limit'' are terms found in various provisions of the Department's oversales rule in 14 CFR part 250. The concept of ''maximum'' DBC amount that a carrier is required to pay and a ''limit'' imposed on DBC calculation results were intended to (1) ensure passengers involuntarily denied boarding receive, *at a minimum,* a DBC amount required by the regulation when the DBC calculation resulted in a higher amount; and (2) allow carriers to impose a limit on the amount that they are liable for compensating eligible passengers in the event of involuntary denied boarding, if carriers choose to do so. Part 250 was never intended to *prohibit* carriers from voluntarily paying an amount of DBC that is higher than the ''maximum'' DBC amounts or DBC ''limits'' set forth in part 250.

Although during the many decades since the promulgation of the oversales rule, the Department has seen no evidence of industry confusion about the meaning of these terms, by passing the TICKETS Act, Congress is requiring DOT to revise the rule for clarity to avoid any potential public confusion about whether carriers may choose to pay a higher amount of DBC. Accordingly, in this final rule, the Department is making some editorial changes to the regulatory text in part 250 to make this point clear. Specifically, this final rule eliminates words and phrases such as ''maximum'' or ''no more than'' from § 250.5 to clarify that carriers are permitted to pay more than the amounts set by the regulations. Instead of using these terms, the amended part 250 states that carriers are required to provide to eligible passengers *at least* the lower amount of: (1) 200% of the passenger's one-way fare or $775 for delays of more than one hour but less than two hours for domestic flights and delays of more than one hour but less than four hours for international flights, and (2) 400% of the passenger's one-way fare or $1550 for delays of more than two hours for domestic flights and delays of more than four hours for international flights. Further, the Department is replacing the term ''maximum denied boarding compensation'' and ''denied boarding compensation limit(s)'' with the term ''denied boarding compensation liability limit(s)'' or ''DBC liability limit(s).'' The new terms make clear that the monetary amounts prescribed by the rule are intended to allow carriers to limit the amount they are required to compensate passengers that are involuntarily denied boarding if the carriers choose to do so, and that the terms are not intended to impose a ceiling for the amount of compensation a carrier may offer and a passenger may receive. Further, by this final rule, the Department is adding paragraph (g) in § 250.5 to state that nothing in the rule prohibits carriers from offering denied boarding compensation in an amount more than the amount calculated according to part 250, or the denied boarding compensation liability limits provided by part 250. Similar amendments are made for the written denied boarding notice prescribed in § 250.9.

Like the denied boarding compensation liability limit, the domestic baggage liability limit provided in 14 CFR part 254 is intended to permit carriers to adopt a ceiling that caps their liability for delayed, lost, or damaged bags in domestic air transportation, and it is not intended to prohibit them from offering a compensation that is a higher amount than the adopted ceiling amount. As such, the Department is also removing the terms ''minimum limit of [baggage] liability'' and ''minimum liability amount'' used in 14 CFR 254.6, and replacing them with the term ''domestic baggage liability limit.''

The TICKETS Act also requires the Department to complete a rulemaking to ensure that carriers must proactively offer to pay compensation to a passenger who is voluntarily or involuntarily denied boarding on an oversold flight, rather than waiting until the passenger requests the compensation. The Department has carefully reviewed the existing rule text and its enforcement records, and believes that the Department's oversales rule already imposes such requirements on carriers. Specifically, with respect to passengers denied boarding voluntarily, § 250.2b provides that, in the event of an oversold flight, carriers shall request volunteers for denied boarding before using any other boarding priority. The rule further defines a ''volunteer'' as ''a person who responds to the carrier's request for volunteers and who willingly accepts *the carrier's offer of compensation,* at any amount, in exchange for relinquishing the confirmed reserved space (emphasis added).'' In other words, for a carrier to fulfill its obligation of soliciting for

volunteers before denying any passenger boarding involuntarily, carriers must first request volunteers with an offer of compensation. Further, with respect to passengers denied boarding involuntarily, § 250.8 provides that carriers must tender to passengers DBC on the day and in the place the denied boarding occurs, or within 24 hours after the denied boarding occurs. Carriers are required to do so even if the eligible passenger is not aware of the entitlement to DBC and therefore does not make a request for compensation. Although the Department's Office of Aviation Consumer Protection interprets part 250 as requiring carriers to offer, proactively, compensation to passengers voluntarily and involuntarily denied boarding, the Department is amending § 250.2b to require explicitly that carriers must provide compensation proactively instead of waiting for passengers to request the compensation in an oversale situation. The Department will continue to enforce part 250 to ensure that passengers that have volunteered to be denied boarding in response to carriers' offers of compensation and passengers denied boarding involuntarily receive proper compensations due to them.

For a carrier that imposes a liability limit to its denied boarding compensation and mishandled domestic baggage compensation, the limits must be updated to these new amounts for transportation taking place on or after the effective date (as opposed to tickets sold on or after the effective date). All notices to passengers required by parts 250 and 254 as they pertain to the new DBC liability limits and domestic baggage liability limit must be updated by the effective date of this final rule.

II. Codifying Sections 425(b)–(d) of the TICKETS Act Prohibiting Removal of Passengers Who Already Boarded Flights

Section 425(b) of the TICKETS Act contains a self-effectuating provision that prohibits airlines from denying boarding to a revenue passenger traveling on a confirmed reservation or involuntarily removing that passenger from a flight, if the passenger checked in before the check-in deadline and had a ticket or boarding pass collected or electronically scanned and accepted by the gate agent. Pursuant to sections 425(c) and (d) of the TICKETS Act, this prohibition is subject to safety, security, or health risk exceptions and it may not be construed as a limitation on the responsibility or authority of a pilot in command of an aircraft under 14 CFR 121.533. This prohibition also may not limit a penalty imposed on an individual for interfering with flight crew members and attendants, as provided in 49 U.S.C. 46504. The requirements in sections 425(b)–(d) of the TICKETS Act became effective on October 5, 2018, the effective date of the FAA Reauthorization Act of 2018. This final rule codifies these requirements exactly as provided in the FAA Reauthorization Act of 2018 [1] in 14 CFR part 250, and makes it enforceable by the Department.

Covered Carriers Under the TICKETS Act

The Department's oversales rule, 14 CFR part 250, applies to direct air carriers and foreign air carriers with respect to scheduled flight segments using an aircraft that has a designed passenger capacity of 30 or more passenger seats, operating in interstate air transportation, or foreign air transportation with respect to nonstop flight segments originating at a point within the United States. In contrast, pursuant to section 402 of the FAA Reauthorization Act of 2018, ''covered air carrier'' as used in the TICKETS Act means an air carrier or a foreign air carrier as those terms are defined in 49 U.S.C. 40102. Under 49 U.S.C. 40102, an ''air carrier'' means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation; and a ''foreign air carrier'' means a person, not a citizen of the United States, undertaking by any means, directly or indirectly, to provide foreign air transportation. This means that more air carriers and foreign air carriers are covered under the TICKETS Act than carriers covered under the existing requirements of part 250. The requirement of sections (b)–(d) of the TICKETS Act apply to all direct and indirect air carriers and foreign air carriers that fall under the definitions of section 40102.[2] As such, we are revising the applicability section of part 250, § 250.2, to specify that the requirements regarding removing a revenue passenger from a flight, as codified under 14 CFR 250.7, has a broader scope than the other provisions of part 250.

Ticket or Boarding Pass Collected or Electronically Scanned and Accepted by the Gate Agent

According to the TICKETS Act, airlines are prohibited from removing a passenger or denying a passenger boarding after the passenger's ticket or boarding pass is ''*collected* or electronically scanned *and accepted* by the gate agent'' (emphasis added). Therefore, a carrier agent's physical collection of a paper boarding pass alone does not indicate an acceptance of the passenger to board the aircraft. Similarly, when a carrier uses electronic devices of any kind to scan a boarding pass (*e.g.,* a paper boarding pass, an electronic boarding pass on a mobile device), the scanning itself alone does not indicate that the carrier has accepted the passenger for boarding. After the physical collection or electronic scanning, the gate agent may have reasons to not permit a passenger to board (*e.g.,* the agent may find out that the passenger was trying to board a wrong flight, or may find out that the passenger has been selected to be involuntarily denied boarding). In those situations, the carrier may legally deny the passenger boarding because the passenger has not been accepted by a gate agent. Alternatively, if the gate agent accepts a passenger for boarding after collecting or scanning the passenger's boarding pass, the carrier is prohibited from removing the passenger from the flight thereafter.

III. Revision of Carriers' Liability Limits for Denied Boarding Compensation

The Department's oversales rule, 14 CFR part 250, requires that the DBC liability limit amounts be periodically adjusted to reflect changes in the Consumer Price Index for All Urban Consumers (CPI–U). Specifically, 14 CFR 250.5(e) provides for the review of denied boarding compensation every two years through a specific formula to calculate the revised DBC liability limit amounts. The formula is below:

Current DBC limit [3] in § 250.5(a)(2) multiplied by (a/b) rounded to the nearest $25

[1] Instead of incorporating the statutory language verbatim, the Department made certain necessary editorial changes to the statutory language when codifying the statute into the rule text. The changes made are: (1) Deleting the effective date of the requirements in the statute which is ''the date of the enactment of this Act'' because the effective date of the requirements as codified in 14 CFR part 250 is the date that is 90 days from the publication date of this final rule; and (2) changing the lead sentence in the ''Limitation'' paragraph from ''The prohibition pursuant to subsection (b) shall not apply . . .'' to ''The prohibition pursuant to paragraph (a) of this section shall not apply. . . .''

[2] The Department does not believe that Congress intended to apply the broader scope of section 40102 definitions to section (e) of the TICKETS Act, which relates to denied boarding compensation. It is our understanding that should Congress intend to require carriers that are not currently covered by part 250 to provide denied boarding compensations to passengers, it would have stated so specifically.

[3] The term ''DBC limit'' in the current rule text will be revised to ''DBC liability limit'' to clarify that carriers are permitted to limit their liability to the amount provided by regulation, or to offer a higher amount, consistent with the requirement of the TICKETS Act.

Where:

a = July CPI–U of year of current adjustment

b = the CPI–U figure in August 2011 when the inflation adjustment provision was added to part 250.

Section 250.5(e) specifies that the DBC liability limit in § 250.5(a)(3) shall be twice the revised limit for § 250.5(a)(2), the DBC liability limit in § 250.5(b)(2) shall be the same as the revised limit for § 250.5(a)(2), and the DBC liability limit in § 250.5(b)(3) shall be twice the revised limit in § 250.5(a)(2).

In a final rule issued on May 27, 2015, the Department reviewed the DBC liability limit amounts then in effect ($650 and $1,300). Based on the formula prescribed in § 250.5(e), using the CPI–U for July 2014, the Department determined that the DBC liability limit amounts should be raised to $675/$1,350.[4]

For this review, we are using the CPI–U for July 2020, which was issued by the Bureau of Labor Statistics on August 12, 2020. In this review, we apply the formula using the CPI–U from August 2011 (the basis month required by the formula) and July 2020. The results of this calculation require that the DBC liability limit amounts be raised. Specifically, the appropriate inflation adjustment for the amount provided in § 250.5(a)(2) is $675 × 259.101/226.545 [$675 × 1.1437], which yields $772. The base amount of $675 in the formula was the denied boarding compensation liability limit amount in § 250.5(a)(2),[5] as adjusted by the 2015 final rule; 259.101 was the CPI–U for July 2020, and 226.545 was the CPI–U for August 2011. Section 250.5(e) requires us to round the adjustment to the nearest $25, which is $775 in this case. Section 250.5 under paragraphs (a)(3) and (b)(3) provide that for passengers who are not rerouted to reach their destination within two hours of the planned arrival time of their original domestic flight (four hours for international transportation), the DBC liability limit amount is twice the amount provided by § 250.5(a)(2) and (b)(2); therefore, under the formula adjustment, this amount is twice $775, or $1,550.

IV. Revision of Domestic Baggage Liability Limit

The baggage liability limit that air carriers may apply to domestic air service is established by 14 CFR part 254. This limit applies to a carrier's liabilities towards any provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's baggage that was in a carrier's custody during domestic air transportation. Like the requirements regarding the provision of DBC to passengers in appropriate circumstances, this requirement has never limited the maximum amount of compensation a carrier may provide a passenger in connection with mishandled baggage. It merely provides a regulatory minimum liability limit that carriers may set. Section 254.6 requires review every two years of the limit of liability prescribed in part 254 and revision of the limit of liability, if necessary, to reflect changes in the CPI–U as of July of each review year through a specific formula. The formula is below:

$2500 × (a/b) rounded to the nearest $100

Where:

a = July CPI–U of year of current adjustment

b = the CPI–U figure in December 1999 when the inflation adjustment provision was added to part 254.

The application of the formula during the 2014–2015 review of the domestic baggage liability limit raised the amount from $3,400 to the current amount of $3,500. The current review requires another inflation adjustment. Applying the formula using the consumer price index for December 1999 (the basis month required by the formula) and July 2020, the appropriate inflation adjustment is $2,500 × 259.101/168.30 [$2,500 × 1.5395], which yields $3,848.75. The base amount of $2,500 in the formula was the minimum liability limit in part 254 at the time that this biennial indexing provision was added to the rule in 1999, 259.101 was the CPI–U for July 2020, and 168.30 was the CPI–U for December 1999. Section 254.6 requires rounding the adjustment to the nearest $100, which is $3,800.

V. Regulatory Analyses and Notices

A. Good Cause for Issuing Rule Without Prior Notice and Comment

Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553) provides that when an agency, for good cause, finds that notice and public procedure thereon are impractical, unnecessary, or contrary to the public interest, the agency may issue a final rule without providing notice and an opportunity for public comment (5 U.S.C. 553(b)(3)(B)). The Department has determined that there is good cause to issue this final rule without notice and an opportunity for public comment because such notice and comment would be unnecessary.

This rule implements section 425(e) of the TICKETS Act by making conforming changes to the rule text of 14 CFR part 250 to clarify that the Department's oversales regulation does not impose a ceiling on the amount of denied boarding compensation an airline may provide to a passenger involuntarily denied boarding. These editorial changes do not amend what the rule previously required and is not expected to impact carriers' current practice. This rule also implements sections 425(b)–(d) of the TICKETS Act by incorporating, virtually verbatim, the statutory language prohibiting airlines from involuntarily denying boarding to a passenger after the passenger's boarding pass has been collected or scanned and the passenger has boarded. Since the Department is exercising no discretion to implement these TICKETS Act provisions, public comment is unnecessary.

The Department has also determined that under 5 U.S.C. 553(b)(3)(B) good cause exists for dispensing with a notice of proposed rulemaking and public comment for the inflation adjustments herein as the application of this rule does not involve any agency discretion. These adjustments are a ministerial inflation update based on the terms and formulas set by 14 CFR 250.5 and 14 CFR 254.6. Those formulas were subject to notice and comment in the rulemaking proceedings during which they were added to the baggage liability and oversales rules. Accordingly, because this is purely a formula update, we find that there is good cause to dispense with notice and comment for this rulemaking.

B. Executive Order 12866

This final rule has been evaluated following existing policies and procedures, and is considered not significant under Executive Order 12866 and DOT's Regulatory Policies and Procedures. Therefore, the rule has not been reviewed by the Office of Management and Budget (OMB) under Executive Order 12866. This regulation conforms with the policies and procedures of DOT's administrative rule on rulemakings. 49 CFR part 5.

[4] 80 FR 30144.

[5] Section 250.5(a)(2) provides that the liability limit amount for DBC is $675 for passengers who are denied boarding involuntarily on a domestic flight by a carrier who offers alternate transportation that is planned to arrive at the passenger's first stopover or final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight. Section 250.5(a)(3) provides that the liability limit amount for DBC is $1,350 for passengers who are denied boarding involuntarily on a domestic flight by a carrier who offers alternate transportation that is planned to arrive at the passenger's first stopover or final destination more than two hours after the planned arrival time of the passenger's original flight.

Revisions Implementing the TICKETS Act

The rule revises 14 CFR part 250 to implement certain provisions of the TICKETS Act, but does not impose additional costs on carriers. The revision clarifies the meaning of ''maximum'' DBC and DBC ''limits,'' but does not affect the amounts carriers must compensate passengers. Instead, the clarification is intended to prevent any potential misunderstanding from the public. The revision also prohibits removing passengers after their boarding passes are accepted by carriers or after they board aircraft, codifying a self-effectuating statutory provision. Removing passengers after their boarding passes are accepted is not a common practice among carriers, and the revision will not require carriers to alter their behavior meaningfully. Thus, the benefits and costs associated with implementing the TICKETS Act provisions are *de minimis.*

Denied Boarding Compensation Liability Limits

The rule provides for an inflation adjustment to the DBC liability limit amounts that air carriers and foreign air carriers must pay passengers who are involuntarily denied boarding. The inflation adjustment is required by regulation and does not involve any exercise of discretion or interpretation. Because the Department does not have the flexibility to alter the inflation adjustment, it did not consider regulatory alternatives. The rule increases transfers from carriers to passengers to the extent that it increases compensation; any increase, however, would be minimal. In 2019, 20,868 passengers—24 passengers per 1,000,000 enplaned passengers—were involuntarily denied boarding on scheduled domestic and outbound international flights.[6] Many of those passengers qualified for compensation amounts below the DBC liability limit, and their compensation would not have been affected by the increase in the limits.

Domestic Baggage Liability

The rule provides for an inflation adjustment to the amount of the minimum limit on baggage liability that air carriers may assert in cases of mishandled baggage. The adjustment is required by current regulation, with no opportunity for interpretation. The rule increases transfers from carriers to passengers to the extent that it increases mishandled baggage compensation. This increase would be limited, however, because the majority of mishandled baggage cases do not result in claims that meet the liability limit. Based on information provided by carriers during an inflation adjustment review to the domestic baggage limit in 2013, slightly more than half of one percent of mishandled bags qualify for the current limit.[7]

C. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601–612) requires an assessment of the impact of proposed and final rules on small entities unless the agency certifies that the proposed regulation will not have a significant economic impact on a substantial number of small entities. An air carrier or a foreign air carrier is a small business if it provides air transportation only with small aircraft (*i.e.,* aircraft with up to 60 seats/18,000-pound payload capacity). See 14 CFR 399.73. The revisions of the baggage liability amounts affect flight segments operated with large aircraft, *i.e.,* more than 60 seats. The revisions of the DBC amounts affect flight segments operated with aircraft designed to have passenger capacity of 30 or more. As a result, many operations of small entities, such as air taxis and many commuter air carriers, are not covered by the rule. Moreover, any additional costs for small entities associated with the rule will be minimal and, in the case of baggage liability, may be covered by insurance. Accordingly, I hereby certify that this action will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

This final rule imposes no new reporting or record keeping requirements necessitating clearance by OMB.

E. National Environmental Policy Act

The Department has analyzed the environmental impacts of this proposed action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321, *et seq.*), and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979) available at *https://www.transportation.gov/office-policy/transportation-policy/procedures-consideringenvironmental-impacts-dot-order-56101c.* Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment, and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS). See 40 CFR 1508.1(d). In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS. *Id.* Paragraph 4.c.6.i of DOT Order 5610.1C provides that ''[a]ctions relating to consumer protection, including regulations'' are categorically excluded. The purpose of this rulemaking is to adjust the amounts for denied boarding compensation and the minimum domestic baggage liability limit. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

List of Subjects

14 CFR Part 250

Air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 254

Air carriers, Administrative practice and procedure, Consumer protection, Reporting and recordkeeping requirements.

Accordingly, the Department of Transportation amends 14 CFR parts 250 and 254 as follows:

PART 250—OVERSALES

■ 1. The authority citation for 14 CFR part 250 continues to read as follows:

Authority: 49 U.S.C. 329 and chapters 41102, 41301, 41708, 41709, and 41712

■ 2. Revise § 250.2 to read as follows:

§ 250.2 Applicability.

Except for § 250.7, this part applies to every carrier, as defined in § 250.1, with respect to scheduled flight segments

[6] Source: *Air Travel Consumer Report,* February 2020 edition, page 38. *https://www.transportation.gov/individuals/aviation-consumer-protection/february-2020-air-travel-consumer-report.*

[7] The information provided to the Department by carriers in 2013 was based on the number of mishandled baggage reports (MBRs) filed with carriers by passengers, which was consistent with the reporting requirement in effect then pursuant to 14 CFR part 234. The number of MBRs in general is equal to the number of passengers who experienced mishandled bags. In 2016, the Department revised part 234 by requiring reporting carriers to report the number of mishandled bags instead of MBRs. See, *Final Rule, Reporting of Data for Mishandled Baggage and Wheelchairs and Scooters Transported in Aircraft Cargo Compartments,* 81 FR 76300, Nov. 2, 2016. The new reporting requirement became effective in 2019. As one MBR may contain multiple mishandled bags, the number of mishandled bags is in general slightly larger than the number of MBRs.

using an aircraft that has a designed passenger capacity of 30 or more passenger seats, operating in interstate air transportation or foreign air transportation with respect to nonstop flight segments originating at a point within the United States. Section 250.7 applies to any air carrier or foreign air carrier as those terms are defined in 49 U.S.C. 40102.

■ 3. Amend § 250.2b by adding paragraph (d) to read as follows:

§ 250.2b Carriers to request volunteers for denied boarding.

* * * * *

(d) Carriers must proactively offer to pay compensation to a passenger who is voluntarily or involuntarily denied boarding on an oversold flight, rather than waiting until the passenger requests the compensation.

■ 4. Amend § 250.5 by revising paragraphs (a)(2) and (3), (b)(2) and (3), and (e) and adding paragraph (g) to read as follows:

§ 250.5 Amount of denied boarding compensation for passengers denied boarding involuntarily.

(a) * * *

(2) Compensation shall be at least 200 percent of the fare to the passenger's destination or first stopover, or $775, whichever is lower, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and

(3) Compensation shall be at least 400 percent of the fare to the passenger's destination or first stopover, or $1,550, whichever is lower, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight.

(b) * * *

(2) Compensation shall be at least 200 percent of the fare to the passenger's destination or first stopover, or $775, whichever is lower, if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and

(3) Compensation shall be at least 400 percent of the fare to the passenger's destination or first stopover, or $1,350, whichever is lower, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if not, the airport of the passenger's final destination less than four hours after the planned arrival time of the passenger's original flight.

* * * * *

(e) The Department of Transportation will review the denied boarding compensation liability limit amounts prescribed in this part every two years except for the first review, which will take place in 2012, to put the reviews specified in this section on the same cycle as the reviews of domestic baggage liability limits specified in 14 CFR 254.6. The Department will use any increase in the Consumer Price Index for All Urban Consumers (CPI–U) as of July of each review year to calculate the increased denied boarding compensation liability limit amounts. The Department will use the following formula:

(1) Current Denied Boarding Compensation liability limit in paragraph (a)(2) of this section multiplied by (a/b) rounded to the nearest $25 where a = July CPI–U of year of current adjustment and b = the CPI–U figure in August 2011 when the inflation adjustment provision was added to this part.

(2) The Denied Boarding Compensation liability limit in paragraph (a)(3) of this section shall be twice the revised limit for paragraph (a)(2) of this section.

(3) The Denied Boarding Compensation liability limit in paragraph (b)(2) of this section shall be the same as the revised limit for paragraph (a)(2) of this section, and the Denied Boarding Compensation liability limit in paragraph (b)(3) of this section shall be twice the revised limit for paragraph (a)(2) of this section.

* * * * *

(g) Nothing in this part prohibits carriers from offering denied boarding compensations in an amount more than the amount calculated according to paragraphs (a) through (d) of this section, or more than the denied boarding compensation liability limit amounts effective at the time of denied boarding.

■ 5. Add § 250.7 to read as follows:

§ 250.7 Provision to implement the Transparency Improvements and Compensation to Keep Every Ticketholder Safe Act of 2018.

(a) *Boarded passengers.* A covered air carrier may not deny a revenue passenger traveling on a confirmed reservation permission to board, or involuntarily remove that passenger from the aircraft, once a revenue passenger has:

(1) Checked in for the flight prior to the check-in deadline; and

(2) Had their ticket or boarding pass collected or electronically scanned and accepted by the gate agent.

(b) *Limitations.* The prohibition pursuant to paragraph (a) of this section shall not apply when:

(1) There is a safety, security, or health risk with respect to that revenue passenger or there is a safety or security issue requiring removal of a revenue passenger; or

(2) The revenue passenger is engaging in behavior that is obscene, disruptive, or otherwise unlawful.

(c) *Rule of construction.* Nothing in this section may be construed to limit or otherwise affect the responsibility or authority of a pilot in command of an aircraft under 14 CFR 121.533, or limit any penalty under section 46504 of title 49, United States Code.

■ 6. Amend § 250.9(b) in the statement under ''AMOUNT OF DENIED BOARDING COMPENSATION'' by revising the entries for ''Domestic Transportation'' and ''International Transportation'' to read as follows:

§ 250.9 Written explanation of denied boarding compensation and boarding priorities, and verbal notification of denied boarding compensation.

* * * * *

(b) * * *

Amount of Denied Boarding Compensation

Domestic Transportation

Passengers traveling between points within the United States (including the territories and possessions) who are denied boarding involuntarily from an oversold flight are entitled to: (1) No compensation if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight; (2) at least 200 percent of the fare to the passenger's destination or first stopover, or $775, whichever is lower, if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than two hours after the planned

arrival time of the passenger's original flight; and (3) at least 400 percent of the fare to the passenger's destination or first stopover, or $1,550, whichever is lower, if the carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than two hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay	No compensation.
1 to 2 hour arrival delay	200% of one-way fare (carriers may limit this amount to $775 if it is higher than $775).*
Over 2 hours arrival delay	400% of one-way fare (carriers may limit this amount to $1,550 if it is higher than $1,550).*

* *Nothing in the Department of Transportation's regulation prohibits carriers from offering denied boarding compensations in an amount more than the amount calculated according to the chart above, or more than the denied boarding compensation liability limit amounts stated in the chart.*

International Transportation

Passengers traveling from the United States to a foreign point who are denied boarding involuntarily from an oversold flight originating at a U.S. airport are entitled to: (1) No compensation if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight; (2) at least 200 percent of the fare to the passenger's destination or first stopover, or $775, whichever is lower, if the carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and (3) at least 400 percent of the fare to the passenger's destination or first stopover, or $1,550, whichever is lower, if the carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay	No compensation.
1 to 4 hour arrival delay	200% of one-way fare (carriers may limit this amount to $775 if it is higher than $775).**
Over 4 hours arrival delay	400% of one-way fare (carriers may limit this amount to $1,550 if it is higher than 1,550).**

** *Nothing in the Department of Transportation's regulation prohibits carriers from offering denied boarding compensations in an amount more than the amount calculated according to the chart above, or more than the denied boarding compensation liability limit amounts stated in the chart.*

* * * * *

PART 254—DOMESTIC BAGGAGE LIABILITY

■ 7. The authority citation for 14 CFR part 254 continues to read as follows:

Authority: 49 U.S.C. 40113, 41501, 41504, 41510, 41702, and 41707.

§ 254.4 [Amended]

■ 8. Section 254.4 is amended by removing ''$3,500'' and adding ''$3,800'' in its place.

§ 254.5 [Amended]

■ 9. Section 254.5(b) is amended by removing ''$3,500'' and adding ''$3,800'' in its place.

■ 10. Section 254.6 is revised to read as follows:

§ 254.6 Periodic adjustments.

The Department of Transportation will review the domestic baggage liability limit prescribed in this part every two years. The Department will use the Consumer Price Index for All Urban Consumers as of July of each review year to calculate the revised domestic baggage liability limit amount. The Department will use the following formula: $2500 × (a/b) rounded to the nearest $100, where a = July CPI–U of year of current adjustment and b = the CPI–U figure in December 1999 when the inflation adjustment provision was added to this part.

Issued in Washington, DC, on this 15th day of December 2020, pursuant to authority delegated in 49 CFR 1.27(n).

Steven G. Bradbury,

General Counsel.

[FR Doc. 2020–28001 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–9X–P

FEDERAL TRADE COMMISSION

16 CFR Part 1

Adjustments to Civil Penalty Amounts

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') is implementing adjustments to the civil penalty amounts within its jurisdiction to account for inflation, as required by law.

DATES: Effective January 13, 2021.

FOR FURTHER INFORMATION CONTACT: Kenny A. Wright, Attorney (202–326–2907), or Marie Choi, Attorney (202–326–3368), Office of the General Counsel, FTC, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION: The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 [1] directs agencies to adjust the civil penalty maximums under their jurisdiction for inflation every January. Accordingly, the Commission issues annual adjustments to the maximum civil penalty amounts under its jurisdiction.[2]

Commission Rule § 1.98 sets forth the applicable civil penalty amounts for violations of certain laws enforced by the Commission.[3] As directed by the FCPIAA, the Commission is issuing adjustments to increase these maximum civil penalty amounts to address inflation since its prior 2020 adjustment. The following adjusted amounts will take effect on January 13, 2021:

- Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1) (premerger filing notification violations under the Hart-Scott-Rodino Improvements Act)—Increase from $43,280 to $43,792;
- Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*) (violations of cease and desist orders issued under Clayton Act section 11(b))—Increase from $22,994 to $23,266;
- Section 5(*l*) of the FTC Act, 15 U.S.C. 45(*l*) (unfair or deceptive acts or practices)—Increase from $43,280 to $43,792;
- Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A) (unfair or

[1] Public Law 114–74, sec. 701, 129 Stat. 599 (2015). The Act amends the Federal Civil Penalties Inflation Adjustment Act (''FCPIAA''), Public Law 101–410, 104 Stat. 890 (codified at 28 U.S.C. 2461 note).

[2] 81 FR 42476 (2016); 82 FR 8135 (2017); 83 FR 2902 (2018); 84 FR 3980 (2019), 85 FR 2014 (2020).

[3] 16 CFR 1.98.

deceptive acts or practices)—Increase from $43,280 to $43,792;

- Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B) (unfair or deceptive acts or practices)—Increase from $43,280 to $43,792;
- Section 10 of the FTC Act, 15 U.S.C. 50 (failure to file required reports)—Increase from $569 to $576;
- Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65 (failure by associations engaged solely in export trade to file required statements)—Increase from $569 to $576;
- Section 6(b) of the Wool Products Labeling Act, 15 U.S.C. 68d(b) (failure by wool manufacturers to maintain required records)—Increase from $569 to $576;
- Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e) (failure to maintain required records regarding fur products)—Increase from $569 to $576;
- Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2) (failure to maintain required records regarding fur products)—Increase from $569 to $576;
- Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a) (knowing violations of EPCA sec. 332, including labeling violations)—Increase from $468 to $474;
- Section 525(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) (recycled oil labeling violations)—Increase from $22,994 to $23,266;
- Section 525(b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(b) (willful violations of recycled oil labeling requirements)—Increase from $43,280 to $43,792;
- Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2) (knowing violations of the Fair Credit Reporting Act)—Increase from $4,063 to $4,111;
- Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Public Law 108–173, as amended by Public Law 115–263, 21 U.S.C. 355 note (failure to comply with filing requirements)—Increase from $15,301 to $15,482; and
- Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304 (violations of prohibitions on market manipulation and provision of false information to Federal agencies)—Increase from $1,231,690 to $1,246,249.

Calculation of Inflation Adjustments

The FCPIAA, as amended, directs Federal agencies to adjust each civil monetary penalty under their jurisdiction for inflation in January of each year pursuant to a cost-of-living adjustment.[4] The cost-of-living adjustment is based on the percent change between the U.S. Department of Labor's Consumer Price Index for all-urban consumers (''CPI–U'') for the month of October preceding the date of the adjustment, and the CPI–U for October of the prior year.[5] Based on that formula, the cost-of-living adjustment multiplier for 2021 is 1.01182. The FCPIAA also directs that these penalty level adjustments should be rounded to the nearest dollar. Agencies do not have discretion over whether to adjust a maximum civil penalty, or the method used to determine the adjustment.

The following chart illustrates the application of these adjustments to the civil monetary penalties under the Commission's jurisdiction.

CALCULATION OF ADJUSTMENTS TO MAXIMUM CIVIL MONETARY PENALTIES

Citation	Description	2020 Penalty level	Adjustment multiplier	2021 Penalty level (rounded to the nearest dollar)
16 CFR 1.98(a): 15 U.S.C. 18a(g)(1)	Premerger filing notification violations	$43,280	1.01182	$43,792
16 CFR 1.98(b): 15 U.S.C. 21(*l*)	Violations of cease and desist orders	22,994	1.01182	23,266
16 CFR 1.98(c): 15 U.S.C. 45(*l*)	Unfair or deceptive acts or practices	43,280	1.01182	43,792
16 CFR 1.98(d): 15 U.S.C. 45(m)(1)(A)	Unfair or deceptive acts or practices	43,280	1.01182	43,792
16 CFR 1.98(e): 15 U.S.C. 45(m)(1)(B)	Unfair or deceptive acts or practices	43,280	1.01182	43,792
16 CFR 1.98(f): 15 U.S.C. 50	Failure to file required reports	569	1.01182	576
16 CFR 1.98(g): 15 U.S.C. 65	Failure to file required statements	569	1.01182	576
16 CFR 1.98(h): 15 U.S.C. 68d(b)	Failure to maintain required records	569	1.01182	576
16 CFR 1.98(i): 15 U.S.C. 69a(e)	Failure to maintain required records	569	1.01182	576
16 CFR 1.98(j): 15 U.S.C. 69f(d)(2)	Failure to maintain required records	569	1.01182	576
16 CFR 1.98(k): 42 U.S.C. 6303(a)	Knowing violations	468	1.01182	474
16 CFR 1.98(*l*): 42 U.S.C. 6395(a)	Recycled oil labeling violations	22,994	1.01182	23,266
16 CFR 1.98(*l*): 42 U.S.C. 6395(b)	Willful violations	43,280	1.01182	43,792
16 CFR 1.98(m): 15 U.S.C. 1681s(a)(2)	Knowing violations	4,063	1.01182	4,111
16 CFR 1.98(n): 21 U.S.C. 355 note	Non-compliance with filing requirements	15,301	1.01182	15,482
16 CFR 1.98(o): 42 U.S.C. 17304	Market manipulation or provision of false information to Federal agencies.	1,231,690	1.01182	1,246,249

Effective Dates of New Penalties

These new penalty levels apply to civil penalties assessed after the effective date of the applicable adjustment, including civil penalties whose associated violation predated the effective date.[6] These adjustments do not retrospectively change previously assessed or enforced civil penalties that the FTC is actively collecting or has collected.

Procedural Requirements

The FCPIAA, as amended, directs agencies to adjust civil monetary penalties through rulemaking and to publish the required inflation adjustments in the **Federal Register**, notwithstanding section 553 of title 5, United States Code. Pursuant to this congressional mandate, prior public notice and comment under the APA and a delayed effective date are not required. For this reason, the requirements of the Regulatory Flexibility Act (''RFA'') also do not apply.[7] Further, this rule does not contain any collection of

[4] 28 U.S.C. 2461 note (4).

[5] *Id.* (3), (5)(b); Office of Management and Budget, Memorandum M–21–10, *Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 23, 2020), available at: *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

[6] 28 U.S.C. 2461 note (6).

[7] A regulatory flexibility analysis under the RFA is required only when an agency must publish a notice of proposed rulemaking for comment. *See* 5 U.S.C. 603.

information requirements as defined by the Paperwork Reduction Act of 1995 as amended. 44 U.S.C. 3501 *et seq.*

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 1

Administrative practice and procedure, Penalties, Trade practices.

Text of Amendments

For the reasons set forth in the preamble, the Federal Trade Commission amends title 16, chapter I, subchapter A, of the Code of Federal Regulations, as follows:

PART 1—GENERAL PROCEDURES

Subpart L—Civil Penalty Adjustments Under the Federal Civil Penalties Inflation Adjustment Act of 1990, as Amended

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

Authority: 28 U.S.C. 2461 note.

■ 2. Revise § 1.98 to read as follows:

§ 1.98 Adjustment of civil monetary penalty amounts.

This section makes inflation adjustments in the dollar amounts of civil monetary penalties provided by law within the Commission's jurisdiction. The following maximum civil penalty amounts apply only to penalties assessed after January 13, 2021, including those penalties whose associated violation predated January 13, 2021.

(a) Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)—$43,792;

(b) Section 11(*l*) of the Clayton Act, 15 U.S.C. 21(*l*)—$23,266;

(c) Section 5(*l*) of the FTC Act, 15 U.S.C. 45(*l*)—$43,792;

(d) Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)—$43,792;

(e) Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)—$43,792;

(f) Section 10 of the FTC Act, 15 U.S.C. 50—$576;

(g) Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65—$576;

(h) Section 6(b) of the Wool Products Labeling Act, 15 U.SC. 68d(b)—$576;

(i) Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e)—$576;

(j) Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2)—$576;

(k) Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a)—$474;

(l) Sections 525(a) and (b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a) and (b), respectively—$23,266 and $43,792, respectively;

(m) Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2)—$4,111;

(n) Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Public Law 108–173, as amended by Public Law 115–263, 21 U.S.C. 355 note—$15,482;

(o) Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304—$1,246,249; and

(p) Civil monetary penalties authorized by reference to the Federal Trade Commission Act under any other provision of law within the jurisdiction of the Commission—refer to the amounts set forth in paragraphs (c), (d), (e) and (f) of this section, as applicable.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

[FR Doc. 2021–00483 Filed 1–12–21; 8:45 am]

BILLING CODE 6750–01–P

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Parts 4071 and 4302

RIN 1212–AB45

Adjustment of Civil Penalties for Inflation

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: The Pension Benefit Guaranty Corporation is required to amend its regulations annually to adjust for inflation the maximum civil penalty for failure to provide certain notices or other material information and for failure to provide certain multiemployer plan notices.

DATES:

Effective date: This rule is effective on January 13, 2021.

Applicability date: The increases in the civil monetary penalties under sections 4071 and 4302 of the Employee Retirement Income Security Act provided for in this rule apply to such penalties assessed after January 13, 2021.

FOR FURTHER INFORMATION CONTACT: Gregory Katz (*katz.gregory@pbgc.gov*), Attorney, Regulatory Affairs Division, Pension Benefit Guaranty Corporation, 1200 K Street NW, Washington, DC 20005–4026; 202–229–3829. (TTY users may call the Federal relay service toll-free at 800–877–8339 and ask to be connected to 202–229–3829.)

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of the Regulatory Action

This rule is needed to carry out the requirements of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and Office of Management and Budget guidance M–21–10. The rule adjusts, as required for 2021, the maximum civil penalties under 29 CFR 4071 and 29 CFR 4302 that the Pension Benefit Guaranty Corporation (PBGC) may assess for failure to provide certain notices or other material information and certain multiemployer plan notices.

PBGC's legal authority for this action comes from the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 and from sections 4002(b)(3), 4071, and 4302 of the Employee Retirement Income Security Act of 1974 (ERISA).

Major Provisions of the Regulatory Action

This rule adjusts as required by law the maximum civil penalties that PBGC may assess under sections 4071 and 4302 of ERISA. The new maximum amounts are $2,259 for section 4071 penalties and $301 for section 4302 penalties.

Background

PBGC administers title IV of ERISA. Title IV has two provisions that authorize PBGC to assess civil monetary penalties.[1] Section 4302, added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980, authorizes PBGC to assess a civil penalty of up to $100 a day for failure to provide a notice under subtitle E of title IV of ERISA (dealing with multiemployer plans). Section 4071, added to ERISA by the Omnibus Budget Reconciliation Act of 1987, authorizes PBGC to assess a civil penalty of up to $1,000 a day for failure to provide a notice or other material information under subtitles A, B, and C of title IV and sections 303(k)(4) and 306(g)(4) of title I of ERISA.

[1] Under the Federal Civil Penalties Inflation Adjustment Act of 1990, a penalty is a civil monetary penalty if (among other things) it is for a specific monetary amount or has a maximum amount specified by Federal law. Title IV also provides (in section 4007) for penalties for late payment of premiums, but those penalties are neither in a specified amount nor subject to a specified maximum amount.

Adjustment of Civil Penalties

On November 2, 2015, the President signed into law the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015,[2] which requires agencies to adjust civil monetary penalties for inflation and to publish the adjustments in the **Federal Register**. An initial adjustment was required to be made by interim final rule published by July 1, 2016, and effective by August 1, 2016. Subsequent adjustments must be published by January 15 each year after 2016.

On December 23, 2020, the Office of Management and Budget issued memorandum M–21–10 on implementation of the 2021 annual inflation adjustment pursuant to the 2015 Act.[3] The memorandum provides agencies with the cost-of-living adjustment multiplier for 2021, which is based on the Consumer Price Index (CPI–U) for the month of October 2020, not seasonally adjusted. The multiplier for 2021 is 1.01182. The adjusted maximum amounts are $2,259 for section 4071 penalties and $301 for section 4302 penalties.

Compliance With Regulatory Requirements

The Office of Management and Budget has determined that this rule is not a ''significant regulatory action'' under Executive Order 12866 and therefore not subject to its review. As this is not a significant regulatory action under E.O. 12866, it is not considered an E.O. 13771 regulatory action.

The Office of Management and Budget also has determined that notice and public comment on this final rule are unnecessary because the adjustment of civil penalties implemented in the rule is required by law. See 5 U.S.C. 553(b).

Because no general notice of proposed rulemaking is required for this rule, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 4071

Penalties.

29 CFR Part 4302

Penalties.

In consideration of the foregoing, PBGC amends 29 CFR parts 4071 and 4302 as follows:

[2] Sec. 701, Public Law 114–74, 129 Stat. 599–601 (Bipartisan Budget Act of 2015).

[3] See M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.*

PART 4071—PENALTIES FOR FAILURE TO PROVIDE CERTAIN NOTICES OR OTHER MATERIAL INFORMATION

■ 1. The authority citation for part 4071 continues to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1371.

§ 4071.3 [Amended]

■ 2. In § 4071.3, the figures ''$2,233'' are removed and the figures ''$2,259'' are added in their place.

PART 4302—PENALTIES FOR FAILURE TO PROVIDE CERTAIN MULTIEMPLOYER PLAN NOTICES

■ 3. The authority citation for part 4302 continues to read as follows:

Authority: 28 U.S.C. 2461 note, as amended by sec. 701, Pub. L. 114–74, 129 Stat. 599–601; 29 U.S.C. 1302(b)(3), 1452.

§ 4302.3 [Amended]

■ 4. In § 4302.3, the figures ''$297'' are removed and the figures ''$301'' are added in their place.

Issued in Washington, DC, by:

Gordon Hartogensis,

Director, Pension Benefit Guaranty Corporation.

[FR Doc. 2021–00297 Filed 1–12–21; 8:45 am]

BILLING CODE 7709–02–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 1

[Docket No. PTO–P–2019–0009]

RIN 0651–AD33

Small Entity Government Use License Exception

Correction

In rule document 2020–27049 appearing on pages 82917–82923 in the issue of Monday, December 21, 2020, make the following correction:

On page 82917, in the third column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27049 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Part 42

[Docket No. PTO–P–2019–0011]

RIN 0651–AD34

Rules of Practice To Allocate the Burden of Persuasion on Motions To Amend in Trial Proceedings Before the Patent Trial and Appeal Board

Correction

In rule document 2020–28159 appearing on pages 82923–82936 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 82924, in the first column, in the **DATES** section, in the second line under the heading, change ''January 20, 2021'' to read ''January 21, 2021.''

(2) On page 82924, in the first column, in the **DATES** section, in the sixth line under the heading, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28159 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[EPA–HQ–OAR–2013–0495; FRL–10019–30–OAR]

RIN 2060–AT56

Pollutant-Specific Significant Contribution Finding for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, and Process for Determining Significance of Other New Source Performance Standards Source Categories

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final action, the U.S. Environmental Protection Agency (EPA) is finalizing a significant contribution finding (SCF) for purposes of regulating source categories for greenhouse gas (GHG) emissions, under section 111(b) of the Clean Air Act (CAA) for electric generating units (EGUs), and in doing so, reaffirming that EGUs remain a listed source category. The EPA has reached that conclusion by articulating a framework under which source categories are considered to contribute

significantly to dangerous air pollution due to their GHG emissions if the amount of those emissions exceeds 3 percent of total U.S. GHG emissions. The EPA is applying the 3-percent threshold to the EGU source category to demonstrate that GHG emissions from the EGU source category would contribute significantly to dangerous air pollution. While EGU GHG emissions exceed this threshold by a sufficient magnitude to warrant an SCF without more ado, the EPA has also, for completeness, analyzed EGU emissions under a secondary criteria framework, which also demonstrates the propriety of the SCF.

DATES: The final rule is effective on March 15, 2021.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–OAR–2013–0495. All documents in the docket are listed on the *https://www.regulations.gov/* website. Although listed, some information is not publicly available, *e.g.,* Confidential Business Information 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. With the exception of such material, publicly available docket materials are available electronically through *https://www.regulations.gov/.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: For questions about this final action, contact Mr. Christopher Werner, Sector Policies and Programs Division (D243–01), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number: (919) 541–5133; fax number: (919) 541–4991; and email address: *werner.christopher@epa.gov.*

SUPPLEMENTARY INFORMATION:

Preamble acronyms and abbreviations. The EPA uses multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

AEO Annual Energy Outlook
BSER best system of emission reduction
°C degrees Celsius
CAA Clean Air Act
CFR Code of Federal Regulations
CH_4 methane
CO carbon monoxide
CO_2 carbon dioxide
D.C. Cir. United States Court of Appeals for the District of Columbia Circuit
DOE Department of Energy
EGU electric utility generating unit
EIA U.S. Energy Information Administration
EPA Environmental Protection Agency
°F degrees Fahrenheit
GHG greenhouse gas
HAP hazardous air pollutant(s)
HFC hydrofluorocarbon
km kilometers
M million
N_2O nitrous oxide
NAICS North American Industry Classification System
NGCC natural gas combined cycle
NO_X nitrogen oxides
NSPS new source performance standards
OMB Office of Management and Budget
PC pulverized coal
PFC perfluorocarbon
PM particulate matter
SF_6 sulfur hexafluoride
SO_2 sulfur dioxide
U.S. United States
U.S.C. United States Code

Organization of this document. The information in this preamble is organized as follows:

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G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
H. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks
I. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. National Technology Transfer and Advancement Act (NTTAA)
K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
L. Congressional Review Act (CRA)

I. General Information

A. Does this action apply to me?

Categories and entities potentially impacted by this rule include sources subject to new source performance standards (NSPS) requirements under section 111 of the CAA. While this rule informs all NSPS source categories, the EPA is finalizing a SCF specific to electric generating units regulated under 40 CFR part 60, subpart TTTT. The North American Industry Classification System (NAICS) code for the industrial, federal government, and state/local government electric generating units is 221112. The NAICS code for tribal government electric generating units is 921150.

B. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this final action is available on the internet. Following signature by the EPA Administrator, the EPA will post a copy of this final action at *https://www.epa.gov/stationary-sources-air-pollution/nsps-ghg-emissions-new-modified-and-reconstructed-electric-utility.* Following publication in the **Federal Register**, the EPA will post the **Federal Register** version of the final rule and key technical documents at this same website.

C. Judicial Review

Under section 307(b)(1) of the Clean Air Act (CAA), judicial review of this final rule is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) by March 15, 2021. Moreover, under

section 307(b)(2) of the CAA, the requirements established by this final rule may not be challenged separately in any civil or criminal proceedings brought by the EPA to enforce these requirements. The Administrator has determined that this action is subject to section 307(d) of the CAA (42 U.S.C. 7607(d)(1)(V)). Section 307(d)(7)(B) of the CAA further provides that ''[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.'' This section also provides a mechanism for the EPA to convene a proceeding for reconsideration ''[i]f the person raising an objection can demonstrate to the EPA that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment, (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.'' Any person seeking to make such a demonstration to us should submit a Petition for Reconsideration to the Office of the Administrator, U.S. Environmental Protection Agency, Room 3000, WJC South Building, 1200 Pennsylvania Ave. NW, Washington, DC 20460, with a copy to both the person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

II. Executive Summary

A. What is the purpose of this regulatory action?

In Executive Order 13783 (Promoting Energy Independence and Economic Growth), all executive departments and agencies, including the EPA, were directed to ''immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.'' [1] Moreover, the Executive Order directed the EPA to undertake this process of review with regard to the ''Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,'' 80 FR 64510 (October 23, 2015) (2015 Rule).

In a document signed the same day as Executive Order 13783 and published in the **Federal Register** at 82 FR 16330 (April 4, 2017), the EPA announced that, consistent with the Executive Order, it was initiating a review of the 2015 Rule and providing notice of a forthcoming proposed rulemaking consistent with the Executive Order. After due deliberation, the EPA issued a proposed rulemaking, ''Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units—Proposed Rule,'' 83 FR 65424 (December 20, 2018) (2018 Proposal). Here the EPA is finalizing a rulemaking with respect to whether GHG emissions from EGUs contribute significantly to dangerous air pollution, in reliance on a methodology articulated herein for determining whether GHG emissions from other NSPS source categories contribute significantly to dangerous air pollution. Any action regarding the proposal to revise the standards of performance, including the underlying determinations of the BSER, for new, reconstructed, and modified coal-fired EGUs, including certain technical issues, is beyond the scope of this final rule and comments received on the 2018 Proposal will be addressed in a separate future action.

B. What is the summary of the major provisions in this action?

The EPA is finalizing a pollutant-specific SCF for GHG emissions from EGUs. That finding is based on an emissions threshold framework for determining significance, as well as secondary criteria to be applied in certain circumstances, for other NSPS source categories.

C. What are the costs and benefits?

In 2015, the EPA promulgated ''Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,'' 80 FR 64510 (October 23, 2015) (2015 Rule). When the EPA promulgated the 2015 Rule, it took note of both utility announcements and U.S. Energy Information Administration (EIA) modeling and, based on that information, concluded that even in the absence of this rule, (1) existing and anticipated economic conditions are such that few, if any, coal-fired EGUs will be built in the foreseeable future, and that (2) utilities and project developers are expected to choose new generation technologies (primarily natural gas combined cycle (NGCC)) that would meet the final standards and also renewable generating sources that are not affected by these final standards. *See* 80 FR 64515 (October 23, 2015). The EPA, therefore, projected that the 2015 Rule would ''result in negligible CO_2 emission changes, quantified benefits, and costs by 2022 as a result of the performance standards for newly constructed EGUs.'' *Id.* The Agency went on to say that it had been ''notified of few power sector new source performance standards (NSPS) modifications or reconstructions.'' Based on that additional information, the EPA said it ''expects that few EGUs will trigger either the modification or the reconstruction provisions'' of the 2015 Rule. *Id.* at 64516.

The EPA has concluded that the projections described in the 2015 Rule remain generally correct.[2] In the period of analysis,[3] the EPA expects there to be few, if any, newly constructed, reconstructed, or modified sources that will trigger the provisions the EPA is promulgating in this action. Consequently, the EPA projects that there will be no significant changes in carbon dioxide (CO_2) emissions or in compliance costs as a result of this final rule.

III. Summary of Previous Rulemaking Actions

On December 20, 2018, the EPA published a proposal to revise certain parts of the 2015 Rule; ''Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units.'' 83 FR 65424 (2018 Proposal). The majority of that proposal was dedicated to the issue of the best system of emission reduction (BSER) for newly constructed, modified, and reconstructed coal-fired EGUs. Comments received on that issue are not being addressed in this rule and will be addressed in any future EPA action. In that proposal, the EPA solicited comment on whether to make a pollutant-specific significant contribution determination for GHG emissions from EGUs, 83 FR 65432 n. 25, which is the subject of this action.

[1] Executive Order 13783, Section 1(c), 82 FR 16093, March 31, 2017.

[2] In the reference case for the most recent Annual Energy Outlook (AEO2020), the EIA projected no additions of new planned or unplanned coal capacity through 2050 (*www.eia.gov/aeo2020;* Table 9. Electricity Generating Capacity).

[3] Standards developed under the NSPS program must, by statutory requirement, be reviewed, at least, every 8 years.

IV. Pollutant-Specific Significant Contribution Finding (SCF)

A. Background

CAA section 111(b)(1)(A) states that ''[The Administrator] shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.''

In the 2015 Rule, the EPA promulgated standards for GHG (measured CO_2 emissions) from fossil fuel-fired steam generating EGUs and combustion turbines, a pollutant that the Administrator had not considered when he listed the categories of those sources—fossil fuel-fired steam generators [4] and stationary gas turbines.[5] *See* 80 FR 64510. Similarly, in 2016, the EPA promulgated an NSPS for GHG (measured by methane (CH_4) emissions) from oil and gas sources, a pollutant that the Administrator had not considered when he listed the category for those sources—the Crude Oil and Natural Gas Production source category.[6] *See* 81 FR 35824 (June 3, 2016) (2016 Oil & Gas Rule).

In each rule, the EPA interpreted CAA section 111(b) to require that an SCF and endangerment finding be made only with respect to the source category, at the time the EPA lists the category, and to authorize the EPA to promulgate NSPS for GHG, as long as the EPA provides a rational basis for doing so. However, in each rule, the EPA acknowledged that some stakeholders had argued that the EPA first needed to make a pollutant-specific SCF, that is, a finding that GHG from the source category contributes significantly to dangerous air pollution. In each rule, the EPA stated that it disagreed with those stakeholders, but nevertheless, in the alternative, did make a pollutant-specific SCF for GHG, supported by the same reasons that the EPA had used to determine that it had a rational basis to regulate GHG. *See* 80 FR 64529 through 64531 (2015 EGU Rule); 81 FR 35840 through 35843 (2016 Oil & Gas Rule).

In the 2018 Proposal, in which the EPA proposed to revise the 2015 Rule, the EPA solicited comment on whether to adopt the interpretation that it was required to make an SCF for GHG from the EGU source category before it could promulgate an NSPS for CO_2. Some commenters stated that the EPA must make pollutant-specific findings of endangerment and significant contribution in order to establish an NSPS for that pollutant. These commenters explained that in their view, CAA section 111(b)(1)(A) requires the EPA to make two specific findings: (1) The specific ''air pollution'' to be regulated is ''reasonably . . . anticipated to endanger public health or welfare;'' and (2) the specific source category ''causes or contributes significantly to'' that air pollution. Commenters asserted that CAA section 111(b)(1)(A) is not ambiguous in this respect, and, therefore, the Agency's interpretation in the 2015 Rule directly contradicts the plain language of that section.

Other commenters stated that the EPA's approach in the 2015 Rule, that it needs to determine only that it has a rational basis to regulate GHGs emitted by this source category as a prerequisite to regulation, is sound. They said in the context of CAA section 111, the SCF and endangerment finding are made with respect to the source category, and not as to specific pollutants. These commenters supported the conclusion in the 2015 Rule that the EPA possesses authority to regulate GHG emissions from fossil fuel-fired EGUs under CAA section 111 because there was no new evidence calling into question its determination that GHG air pollution may reasonably be anticipated to endanger public health and welfare and fossil fuel-fired EGUs have a high level of GHG emissions. The commenters stated that these considerations hew closely to the statutory factors that inform the decision whether to list a source category in the first place—namely, whether the category ''causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,'' under CAA section 111(b)(1)(A). The commenters added that this approach, which closely parallels the listing analysis but does not require a formal endangerment finding or SCF, is legally sound. They also added that the statute is clear that a formal endangerment finding is required to initially list a sector to be regulated under CAA section 111; but it is also clear that such a finding is not required before regulating additional harmful pollutants from a previously-listed sector.[7]

Similarly, in a 2019 proposal to revise the 2016 Oil & Gas Rule, the EPA solicited comment on whether to adopt the interpretation that it was required to make an SCF for GHG from the Oil and Gas source category before it could promulgate a CH_4 NSPS. Recently, the EPA completed the final rule to revise the 2016 Oil & Gas Rule, ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review: Final Rule,'' 85 FR 57018 (September 14, 2020) (2020 Oil & Gas Rule). There, the EPA determined that a pollutant-specific SCF is required. In addition, the EPA further determined that the pollutant-specific SCF in the 2016 Oil & Gas Rule was invalid on grounds, in part, that the EPA had not established a threshold or criteria by which to determine whether an amount of emissions contributes significantly to dangerous air pollution, and to distinguish from an amount of emissions that simply contributes to dangerous air pollution. The EPA stated

[4] *See* ''List of Categories of Stationary Sources,'' 36 FR 5931 (March 31, 1971) (listing source category); ''Standards of Performance for New Stationary Sources,'' 36 FR 24376 (December 31, 1971) (promulgating NSPS for source category).

[5] *See* ''Standards of Performance for New Stationary Sources; Gas Turbines,'' 44 FR 52792 (September 10, 1979) (listing and promulgating NSPS for source category).

[6] *See* ''Priority List and Additions to the List of Categories of Stationary Sources,'' 49 FR 49222 (August 21, 1979) (listing source category); ''Standards of Performance for New Stationary Sources; Equipment Leaks of VOC From Onshore Natural Gas Processing Plants,'' 50 FR 26124 (June 23, 1985), and ''Standards of Performance for New Stationary Sources; Onshore Natural Gas Processing SO_2 Emissions,'' 50 FR 40160 (October 1, 1985) (promulgating standards of performance).

[7] Some commenters on the 2018 Proposal also said that, in the 2009 Endangerment Finding, the EPA specifically defined air pollution, as referred to in section 202(a) of the CAA, to be the mix of six well-mixed, long-lived, and directly emitted GHGs: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6. 74 FR 66497. They commented that the EPA needs to make, but has never made, a separate finding that CO_2 alone is reasonably anticipated to endanger the public health or welfare. The Agency disagrees with commenters. The air pollutant that the 2015 Rule regulates is GHG, and that air pollutant contributes to the same GHG air pollution that was addressed by the Endangerment Finding. The standards of performance adopted in the 2015 Rule take the form of an emission limitation on only one constituent gas of this air pollutant, CO_2. *See* 40 CFR 60.5515(a) (''The pollutants regulated by this subpart are greenhouse gases. The greenhouse gas standard in this subpart is in the form of a limitation on emission of carbon dioxide.''). This is reasonable, given that CO_2 is the constituent gas emitted in the largest volume by the source category and for which there are available controls that are technically feasible and cost effective. There is no requirement that standards of performance address each component of an air pollutant. CAA section 111(b)(1)(B) requires the EPA to establish ''standards of performance'' for listed source categories, and the definition of ''standard of performance'' in CAA section 111(a)(1) does not specify which air pollutants must be controlled. Moreover, as the EPA noted in the 2015 Rule, the information considered in the 2009 Endangerment Finding and its supporting record, together with additional discussion of GHG impacts in the 2015 Rule, makes clear that GHG air pollution may reasonably be anticipated to endanger public health or welfare. *See* 80 FR 64517, 64530 and 31. Because the 2015 Rule followed the same approach as in the 2009 findings and regulated the same pollutant as contributing to the same air pollution (to reiterate, both the air pollutant and the air pollution are GHG as the group of six well-mixed gases, including CO_2), it was not necessary to evaluate CO_2 separately. The EPA took the same position in the 2016 Oil & Gas Rule in response to a similar comment concerning CH_4. *See* 81 FR 35843.

that section 111(b) of the CAA requires, or at least authorizes, a pollutant-specific SCF, and such an SCF must be based on defined criteria or thresholds. *Id.* at 57033–40.

B. What is a Significant Contribution Finding (SCF)?

1. Significant Contribution Finding and Key Comments Received

CAA section 111 directs the EPA to regulate, through a multi-step process, air pollutants from categories of stationary sources. CAA section 111(b)(1)(A) requires the initial action, which is that the Administrator must ''publish . . . a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' Therefore, the first action that the EPA must take, specified in CAA section 111(b)(1)(A), is to list a source category for regulation on the basis of a determination that the category contributes significantly to dangerous air pollution. This provision makes clear that although Congress designed CAA section 111 to apply broadly to source categories of all types wherever located, Congress also imposed a constraint: The EPA is authorized to regulate only sources that it finds cause or contribute significantly to air pollution that the EPA finds to be dangerous. Because CAA section 111(b)(1)(A) refers to air *pollution,* the EPA's determination that a source category should be listed for regulation can be based on all pollutants emitted by the category (*i.e.,* collective contribution), or for a specific pollutant.

After the EPA lists a source category, CAA section 111(b)(1)(B) then directs the EPA to propose regulations ''establishing Federal standards of performance'' for new sources within the source category, to allow public comment, and to ''promulgate . . . such standards with such modifications as he deems appropriate.'' CAA section 111(a)(1) defines the term ''standard of performance'' as ''a standard for emissions of air pollutants which [the Administrator is required to determine through a specified methodology].'' These provisions read together make clear that the standards of performance that CAA section 111(b)(1)(A) directs the Administrator to promulgate must concern air pollutants emitted from the sources in the source category. However, industrial sources of the type subject to CAA section 111(b)(1)(A) invariably emit more than one air pollutant, and neither CAA section 111(b)(1)(B) nor CAA section 111(a)(1), by their terms, specifies for which of those air pollutants the EPA must promulgate standards of performance.

In the past, the EPA has interpreted CAA section 111(b)(1)(B) to authorize it to promulgate standards of performance for any air pollutant that the EPA identified in listing the source category and any additional air pollutant for which the EPA has identified a rational basis for regulation. 81 FR 35843 (2016 Oil & Gas Rule); 80 FR 64510 (2015 Rule). Inherent in this approach is the recognition that CAA section 111(b)(1)(A) does not, by its terms, necessarily require the EPA to promulgate standards of performance for all air pollutants emitting from the source category. The EPA could list a source category on grounds that it emits numerous air pollutants that, taken together, significantly contribute to air pollution that may reasonably be anticipated to endanger public health or welfare, and proceed to regulate each of those pollutants, without ever finding that each (or any) of those air pollutants by itself causes or contributes significantly to—or, in terms of the text of other provisions, causes or contributes to—air pollution that may reasonably be anticipated to endanger public health or welfare.

As described in the 2020 Oil and Gas Policy Rule, CAA section 111(b)(1)(A) does not provide or suggest any criteria to define the rational basis approach, the EPA has not articulated any criteria in its previous applications in the EGU CO_2 NSPS and the 2016 40 CFR part 60, subpart OOOOa rules, and in instances before those rules in which the EPA has relied on the ''rational basis'' approach, the EPA has done so to justify not setting a standard for a given pollutant, rather than to justify setting such a standard. 85 FR 77037, December 1, 2020. Thus, the rational basis test allows the EPA virtually unfettered discretion in determining which air pollutants to regulate. As a result, the rational basis standard creates the possibility that the EPA could seek to promulgate NSPS for pollutants that may be emitted in relatively minor amounts.

In contrast, CAA section 111(b)(1)(A) is clear that the EPA may list a source category for regulation only if the EPA determines that the source category ''causes or contributes *significantly*'' (emphasis added) to dangerous air pollution. As described in the 2020 Oil and Gas Policy Rule, in light of the stringency of this statutory requirement for listing a source category, it would be unreasonable to interpret CAA section 111(b)(1)(B) to allow the Agency to regulate air pollutants from the source category merely by making an administrative determination under the open-ended and undefined rational basis test. The EPA, therefore, determined it is logical to interpret CAA section 111(b)(1)(B) to require that the Agency apply the same degree of rigor in determining which air pollutants to regulate as it does in determining which source categories to list for regulation, and, therefore, must make a pollutant-specific SCF. *Id.*

Requiring a pollutant-specific SCF necessitates the establishment of a clearer framework for assessing which air pollutants merit regulatory attention that will require sources to bear control costs. The establishment of such a framework or criteria promotes regulatory certainty for stakeholders and consistency in the EPA's identification of which air pollutants to regulate and reduces the risk that air pollutants that do not merit regulation will nevertheless become subject to regulation due to an unduly vague standard.

As previously described, CAA section 111(b)(1)(B) requires the EPA to establish an NSPS for a source category listed under CAA section 111(b)(1)(A). For a source category previously listed under CAA section 111(b)(1)(A), in order to subsequently promulgate an NSPS for a pollutant that the EPA did not evaluate the source category for at the time of listing, the EPA must make a pollutant-specific SCF for the reasons described above. As part of making an SCF, the EPA concluded in the 2020 Oil and Gas Policy Rule that, ''a standard or an established set of a criteria, or perhaps both, are necessary to identify what is significant and what is not.'' 85 FR 57039. The EPA did not finalize or take a position in the 2020 Oil and Gas Policy Rule on potential criteria, stating that it was deferring the identification of such criteria to a future rulemaking. *Id.* CAA section 111(b) itself does not specify what the criteria for a pollutant-specific SCF.

The ''contributes significantly'' provision in CAA section 111(b)(1)(A) is ambiguous as to what level of contribution is considered to be significant. *See* 84 FR 50267 and 50268, September 24, 2019 (citing *EPA* v. *EME Homer City Generation, L.P.,* 572 U.S. 489 (2014) (holding that a similar provision in CAA section 110(a)(2)(D)(i), often termed the ''good neighbor'' provision, is ambiguous)). Accordingly, the EPA has authority to interpret that provision. *Id.* at 50268. As noted above, the EPA reads CAA section 111(b)(1)(B) in light of CAA sections 111(b)(1)(A) and 111(a)(1) to incorporate the ''contributes significantly'' standard in

connection with promulgating NSPS for particular air pollutants. The EPA has concluded that to allow the EPA to distinguish between a *contribution* and a *significant contribution* to dangerous pollution, some type of (reasonably explained and intelligible) standard and/or established set of criteria that can be consistently applied is necessary.

A supporting basis for this conclusion can be found by looking at the EPA's interpretation of the similarly worded ''contribute significantly'' provisions of CAA section 189(e), concerning major stationary sources of particulate matter with a diameter of 10 micrometers or less (PM_{10}). This provision requires that the control requirements applicable to major stationary sources of PM_{10} also apply to major stationary sources of PM_{10} precursors ''except where the Administrator determines that such sources [of precursors] do not contribute significantly to PM_{10} levels which exceed the standard in the area.'' As the EPA noted in the 2019 Oil and Gas Policy Rule proposal, in CAA section 189(e), Congress intended that, in order to be subject to regulation, the emissions must have a greater impact than a simple contribution not characterized as a significant contribution. However, Congress did not quantify how much greater. Therefore, the EPA developed criteria for identifying whether the impact of a particular precursor would ''contribute significantly'' to a NAAQS exceedance. 84 FR 50268. These criteria included numerical thresholds. *Id.* The EPA concluded similarly that, under CAA section 111(b), a standard or an established set of a criteria, or perhaps both, are necessary to identify what is significant and what is not.

These criteria help ensure that the EPA's decision-making is well-reasoned and consistent. The EPA considers it particularly important to develop a set of criteria and/or a standard in order to determine when a *significant* contribution occurs, in order, as noted above, to distinguish it from a simple contribution. A contribution can be greater or lesser and remain a contribution, but a significant contribution determination necessarily involves a judgment about the degree of the contribution that rises to the level of significance. For such a judgment to be meaningful (and, of critical importance, to be understood by regulated parties and by the public), the Agency must identify the criteria it will use to determine significance.

2. Other Comments Received on the EPA's Basis for Regulating GHG Emissions from EGUs

Comment: Commenters stated that the EPA must make the specific pollutant findings of endangerment and significant contribution that are required in listing a source category in order to establish a NSPS for that pollutant. Commenters stated they are not arguing that the EPA could not or should not make these findings. Rather, that the Clean Air Act (CAA) requires the EPA to make two specific findings: (i) The specific ''air pollution'' to be regulated is ''reasonably . . . anticipated to endanger public health or welfare''; and (ii) the specific source category ''causes or contributes significantly to'' that endangering air pollution. CAA section 111(b)(1)(A). The commenters said section 111(b)(1)A) is not ambiguous at all in this respect, and therefore the Agency's interpretation in the 2015 Rule directly contradicts the plain language of this section. Additionally, they said that in the 2009 Endangerment Finding, the EPA specifically defined air pollution, as referred to in section 202(a) of the CAA, to be the mix of six long-lived and directly emitted GHGs: CO_2, CH_4, N_2O, HFCs, PFCs, and SF_6 (74 FR 66497, December 15, 2009). They commented that the EPA did not make a separate finding then, or now, that CO_2 alone is a danger to the public health or welfare and the EPA has argued that because CO_2 is the ''dominant anthropogenic GHG,'' it is not required to ''make an endangerment finding with respect to a particular pollutant.'' (*Id*). They argued that this view does not satisfy the statutory standard and said the GHG endangerment determination in section 111(b)(1)(A) is fundamentally different than that in section 202(a) and other CAA sections, in part because it: (i) Is source-category based; and (ii) requires a finding of significance.

These commenters stated that in the 2015 Rule, the EPA made three arguments as to why it believed it had met its statutory obligations. The commenters stated that none of these arguments are correct as a legal matter for the following primary reasons: (1) The EPA was wrong in claiming that new CO_2-specific findings were unnecessary, as the 2015 Rule was for a new category of electric utility generating unit (EGUs) emitting CO_2—a specific pollutant for which an endangerment finding had not been made. EPA's prior listings of ''steam generators'' and ''stationary gas turbines'' covered only emissions of NO_X, SO_2, and particulate matter. Because EPA's findings in earlier listings addressed different pollutants, those listings triggered and authorized only regulation of NO_X, SO_2, and particulate matter. *Cf. Nat'l Asphalt Pavement Ass'n* v. *Train,* 539 F.2d 775 (D.C. Cir. 1976). EPA has asserted the authority to regulate under section 111 any pollutant for which EPA believes it has a ''rational basis'' to regulate (see 83 FR 65432; 80 FR 64530). But this ''rational basis'' standard is not the one authorized by section 111; the endangerment and significant contribution standard governs section 111 regulation. EPA cannot rewrite the statute to circumvent the endangerment and significant contribution standard that Congress prescribed for section 111 regulation.; (2) the EPA cannot rely on its 2009 finding regarding GHG emissions from automobiles which determined that ''six well-mixed GHGs'' in the ''aggregate'' endanger public health or welfare, as this ''combined mix'' is different air pollutant than the single pollutant controlled here (CO_2 alone). EPA has never found that CO_2 alone endangers public health or welfare, much less that CO_2 from fossil fuel-fired steam generating units (as opposed to motor vehicles) has that effect; and (3) the EPA's attempt to rely on ''information and conclusions'' contained in the 2015 Rule does not satisfy the CAA. Simply identifying the evidence that might support a finding is not the same as completing the administrative process of distilling and analyzing that data in the context of the Agency's statutory obligations and its failure to make the requisite findings of endangerment and significant contribution in the 2015 Rule violated the CAA. They said the CAA grants the EPA narrowly bounded authority to regulate stationary sources that emit pollutants that may reasonably be anticipated to endanger public health or welfare *for those pollutants* which led to the endangerment finding and to which the source category significantly contributes. The CAA does not grant the Agency unlimited authority to regulate any pollutant emitted by that source. Accordingly, before the EPA finalizes the 2018 Proposal, it must make a specific and supportable finding that CO_2 emissions from fossil fuel-fired EGUs pose a danger to public health and welfare. They said the EPA should reject its ill-founded ''rational basis test'' for imposing performance standards without endangerment and contribution findings. The Agency's rational basis test is not in the CAA. They argued that section 111 never uses the term and the case law on which the EPA relied for

this test addresses agency authority under a different statute, the Administrative Procedure Act (APA). The APA does not define the scope of the EPA's authority to undertake this rulemaking.

Commenters added that as a textual matter, the endangerment requirement modifies, and relates back to, ''air pollution,'' not ''sources'': The provision requires the EPA to determine whether a source causes or contributes significantly to ''air pollution which may reasonably be anticipated to endanger public health or welfare.'' 42 United States Code (U.S.C.) section 7411(b)(1)(A). Only after the EPA determines that a pollutant poses a threat to ''public health or welfare'' must it inquire whether the particular category of sources ''contributes significantly'' to that pollution. *Id.* The idea that an endangerment finding is ''one and done'' on a source level also cannot be squared with the surrounding statutory requirements. Section 111(b)(1)(B) provides that the EPA may issue performance standards after a source category is listed pursuant to section 111(b)(1)(A). *Id.* section 7411(b)(1)(B). Yet by definition, a ''standard of performance'' is tied to specific pollutants for which an endangerment finding has been made. *Id.* section 7411 (a)(1) (defining a ''standard of performance'' as ''a standard for emissions of air pollutants). Commenters said that as such, the approach in the 2015 Rule would give the EPA unfettered authority to regulate any air pollutant emitted by a source regardless of whether it endangers health or welfare and the 2015 Rule's approach of mixing and matching elements of endangerment findings would allow the EPA to impose stringent regulations on sources that do not ''contribute significantly'' to emissions of a pollutant. In summary, the commenters argued that if the EPA ''retain[s]'' the ''statutory interpretation'' of section 111 as set out in the 2015 Rule, 83 FR 65432 n. 25, it will once again be setting standards beyond the scope of its authority and it may be that the EPA can make the findings section 111(b)(1)(A) requires for CO_2 emissions from fossil-fuel-fired electricity generating units, but unless and until the EPA makes those determinations under the proper legal standard, the Proposed Rule will rest on a flawed foundation.

Commenters stated that the previous endangerment findings the EPA listed in the 2015 Rule did not relate to ''fossil fuel-fired electricity generating units.'' (80 FR 64527 nn.86 & 87). Rather, one related to ''steam generators,'' (36 FR 5931, March 31, 1971,—cited at 80 FR 64527 n.86), and the other to ''stationary gas turbines,'' (42 FR 53657. October 3, 1977,—cited at 80 FR 64527 n.87). The commenters stated that this failing should prevent the EPA's ability to move forward with proposed regulation because the Agency has not issued the required endangerment finding for the specific source category, it becomes irrelevant whether it may rely on that (nonexistent) finding to justify setting standards of performance for different emissions from sources in the category.

Commenters stated that in the 2016 subpart OOOOa rulemaking, the EPA established NSPS for CH_4 without making an endangerment finding for CH_4 emissions from oil and gas sources. Commenters and other industry groups filed comments pointing out the EPA's omission in failing to make a section 111(b) endangerment finding for the new pollutant subject to regulation under NSPS. By imposing NSPS requirements for a new pollutant without first establishing that that pollutant ''may reasonably be anticipated to endanger public health or welfare'' *(i.e.,* making an endangerment finding), commenters urged the EPA to reject and withdraw the interpretation that the EPA may skip the endangerment finding step in this context. The commenters further urged the EPA to clarify that a statutory prerequisite for regulation of a new pollutant under the NSPS program is an endangerment finding for that particular pollutant. Finally, and as a separate matter, the commenters urged the EPA to revisit the legal underpinnings for the subpart OOOOa standards as the commenters asserted the EPA did not follow the statutory prerequisites for the adoption of such standards. According to the commenters, those standards are illegal as being outside of the agency's authority, and as such should now be withdrawn.

Other commenters stated that the EPA's previous approach in the 2015 Rule to determining that it has a rational basis to regulate GHGs emitted by this source category is sound. The Agency has correctly not reopened this approach, nor has it proposed any alternatives to it. They said in the context of section 111, the endangerment finding is made with respect to the source category, and not as to specific pollutants (80 FR 64530). It would be unlawful for the Agency to finalize any alternative approach. In 2015, the EPA concluded that it possesses authority to regulate GHG emissions from fossil fuel-fired EGUs under section 111 for two reasons: (1) There was no new evidence calling into question its determination that ''GHG air pollution may reasonably be anticipated to endanger public health and welfare''; and (2) fossil fuel-fired EGUs have a ''high level of GHG emissions.'' These considerations hew closely to the statutory factors that inform the decision whether to list a source category in the first place—namely, whether the category ''causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.'' In fact, in 2015 the Agency confirmed that, even if it were required to issue endangerment and significant contribution findings under this provision in order to regulate GHGs emitted by EGUs, the same information that underpinned its rational basis conclusion would support such findings (80 FR 64530). This approach, which closely parallels the listing analysis but does not require formal endangerment or cause-or-contribute findings, is legally sound. The statute is clear that a formal endangerment finding is required to initially list a sector to be regulated under section 111—and is also clear that such a finding is not required before regulating additional harmful pollutants from a previously-listed sector. Because Congress did not provide specific criteria for regulating additional pollutants from a source category that is already listed under section 111, it is reasonable to look to the statutory factors that trigger regulation initially when deciding whether to require reductions of other pollutants. They said the statutory factors for listing a source category—the endangerment and cause-or-contribute findings—provide a floor for when EPA *must* regulate an additional pollutant from a listed source category under the rational basis inquiry. It would be irrational to fail to regulate an additional pollutant simply because a source category was already listed, if the same evidence regarding that pollutant would have triggered a formal listing of that source category had the source category not previously been listed. Thus, it would be arbitrary for the agency to decline to regulate a pollutant on the basis of considerations wholly unrelated to the harms that pollutant poses or the quantities in which it is emitted from a particular source category.

Other commenters also stated that any effort to reverse the EPA's decision to regulate CO_2 from power plants would require, among other things, that the EPA fully contend with each step of the statutory and legal analysis of section 111 it undertook in the 2015 Rule, and

explain why each of them has become invalid. They said promulgating a final rule contrary to the 2015 Rule without the requisite record-based, factual analysis and reasoned explanation would yield ''an unexplained inconsistency in agency policy'' that is arbitrary, capricious, and unlawful. Commenters stated that that while the most comprehensive approach to sensible GHG regulation remains through congressional action, and while the CAA is far from the perfect tool for regulating GHGs, it is preferable to protracted legal battles and to the potential patchwork of judicial and regulatory outcomes. As a result, the Agency should retain the existing endangerment finding. They said that if the EPA fails to regulate GHG emissions from new coal-fired EGUs it would be wholly unreasonable and contrary to the endangerment finding.

Response: The EPA addressed the substance of these comments in a lengthy discussion in ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review: Final Rule,'' 85 FR 57018, 57033–40, 57052–58 (September 14, 2020). That discussion is incorporated by reference here. That discussion further elaborates the rationale for EPA's determination that a pollutant-specific significant contribution determination is appropriate, and EPA's related determinations. That discussion also responds in full to the comments on the present rule.

It should be noted that in the 2015 Rule, EPA combined the steam generating source category and combustion turbine source category into a single source category for purposes of GHG emission regulation, 80 FR 64510, 64521–32 (October 23, 2015), and determined, in the alternative, that GHG emissions from the combined source category contribute significantly to dangerous air pollution. *Id.* at 64531. In today's rulemaking, the EPA is not revising the source category determination in the 2015 Rule and, by the same token, the significant contribution finding that EPA is making in the present rulemaking for GHG emissions concerns emissions from the same, combined source category.

Comment: Commenters stated that if the Endangerment Finding is overturned, the electric power sector could be broadly exposed to tort and nuisance suits brought by citizens and states—as was the case prior to the EPA regulation of GHGs (*e.g., American Electric Power Co.* v. *Connecticut,* 564 U.S. 610 (2011)). Accordingly, these efforts would create more uncertainty about the future of GHG regulations applicable to new EGUs—uncertainty that likely would not be resolved for years and could undermine any potential for generation owners and operators to consider new coal-based generation as a viable option. They said as a result, the Agency should retain the existing endangerment finding.

Response: The Agency has not proposed to overturn the existing Endangerment Finding and is not overturning it in this final rule.

Comment: Commenters stated that to the extent that emissions of CO_2 from new, modified, or reconstructed electric utility generating units are to be subjected by the EPA to regulation under the CAA, the proper path would be to regulate such emissions as part of a broader effort to regulate CO_2 emissions from ''numerous or diverse'' sources under sections 108–110 of the CAA. Alternatively, if the EPA is adamant in engaging in regulating such emissions under section 111(b), at the very least the EPA must complete a specific endangerment finding for CO_2 emissions from such facilities under the applicable criteria set forth in section 111(b), which the EPA has failed to do to date. Either way, commenters stated that the proposed rule amendment is beyond the legal authority of the CAA.

Response: EPA is making a pollutant-specific significant contribution finding in this action.

Comment: Commenters quoted the NSPS proposal as stating that ''the Agency will consider comments on the correctness of the EPA's interpretations and determinations, and whether there are alternative interpretations that may be permissible, either as a general matter or specifically as applied to GHG emissions'' (83 FR 65242, 65432 n.25). Commenters then stated that they filed a petition in 2017 contending that the EPA should commence a new rulemaking on the subject of the Agency's 2009 endangerment finding. They provided the following arguments of the 2017 petition: (1) There had been no statistically significant atmospheric warming despite a continued increase in atmospheric CO_2 levels; (2) changes in global temperatures in recent decades were far from unusual; (3) new balloon and satellite data showed that the atmosphere was far less sensitive to CO_2 forcing than the climate models had predicted; and (4) there was mounting evidence that the EPA's GHG rules would have no discernible climate impact. For these reasons, they said there was a need to reexamine both the three lines of evidence for the EPA's endangerment finding as well as its underlying rationale. Regarding the proposal, the commenters stated that in addition to their still pending petition, they are providing new evidence for why the Agency should proceed with this petition and with similar petitions pending before it. They submitted references (titles, weblinks, and synopses) to nine research papers published since filing their initial petition which they argue add additional support. They stated that given the points and data outlined in this newer research, in addition to those set forth in their 2017 petition, the EPA should commence a new proceeding to reexamine its 2009 endangerment finding.

Response: The Agency is retaining the existing endangerment finding. The submitted material is out of scope for this rulemaking. With regards to the claim that EPA was soliciting comments on this subject, the footnote quoted by the commenters goes on to specifically outline examples of the kind of comments referred to: This further elaboration made clear that EPA was not soliciting comments on the science of climate change but rather regarding interpretation of statutory language and legal opinion as to whether the Agency would need to make an endangerment finding for previously listed source categories (''For example, the Agency will consider comments on the issue of whether it is correct to interpret the ''endangerment finding'' as a finding that is only made once for each source category at the time that the EPA lists the source category or whether the EPA must make a new endangerment finding each time the Agency regulates an additional pollutant by an already-listed source category. Further, the EPA will consider comments on the issue of whether GHG emissions are different in salient respects from traditional emissions such that it would be appropriate to conduct a new ''endangerment finding'' with respect to GHG emissions from a previously listed source category. In addition, the EPA solicits comment on whether the Agency does have a rational basis for regulating CO_2 emissions from new coal-fired electric utility steam generating units and whether it would have a rational basis for declining to do so at this time'' 83 FR 65242, 65432 n.25).

Comment: Commenters also said that the Agency suggestion in footnote 25 of the Proposal is unreasonable in that the Agency seems to presume that it might not be appropriate to regulate GHGs from new coal-fired power plants because the Agency projects that few such plants will be built in coming years. They said this approach asks the

wrong question. The question should be whether there is a rational basis to regulate GHGs from power plants—not just new coal-fired plants. This is because, once new sources are regulated under section 111(b), the obligation to regulate existing sources under section 111(d) is triggered. If new sources in a source category could not be regulated under section 111(b), no sources in the category could be regulated. Commenters further stated that the EPA cannot reverse its position merely by asking for comments on whether it should adopt a new position diametrically opposed to both current law and the position it maintains in the Proposed Rule.

Commenters stated that using footnote 25 as a means of requesting public comment is misleading and violates administrative procedures. They said that it appears that the EPA is seeking rationale or justification to under the legal basis for this rule while claiming that is retaining its legal basis. The EPA cannot have it both ways: either EPA is using its legal basis, or it is looking for alternatives. If it is looking for alternatives, then EPA has not met its responsibilities under the Administrative Procedures Act for fair notice of the nature and scope of this rulemaking.

Commenters stated that in the endangerment finding footnote of the 2018 Proposal (83 FR 65432 n 25), the EPA suggests that it may consider whether it would have a rational basis to decline to regulate given that ''no more than a few new coal-fired EGUs can be expected to be built.'' The commenters said this suggestion is not legally or factually sound and does not provides a valid reason not to regulate GHGs from fossil fuel-fired EGUs under section 111. They said the statute is unambiguous: The EPA must consider pollution from both new and existing sources when deciding whether to regulate a pollutant within a source category. To the extent that the statute contains any ambiguity, a decision not to regulate based solely on projected levels of emissions from new sources would be disallowed as an impermissible construction. They argued that section 111(b) unambiguously expresses Congress's concern with pollution emitted from a source category as a whole, not just new sources and 111(b) directs the Administrator to base decisions about whether to list a source category on an analysis of the entire category, including existing sources. Section 111(b)(1)(A) does not distinguish between ''new'' and ''existing'' sources but rather conveys Congress's directive to address pollution across the source category.

The commenters also stated that Footnote 25 of the proposal raises the prospect that, on the question of regulating a pollutant from a listed source category, Congress inexplicably intended for the EPA to consider pollution from new sources only, irrespective of the harm caused by pollution from existing sources—and even though Congress directed the EPA to consider the air pollution from the sector as a whole, that plain language should be ignored. They said the Agency presents no support for this theory, which is contrary to both the clear terms and the evident objective of the statute. The commenters argued that Footnote 25's suggested interpretation disregards statutory language in other ways as well. For example, section 111(b)(1) provides that the Administrator ''shall include a category of sources in such list if in his judgment it *causes, or contributes significantly to,* air pollution which may reasonably be anticipated to endanger public health or welfare.'' (42 U.S.C. 7411(b)(1)(A)). Yet as of the date of when the EPA determines to list a source category, there are no ''new'' sources in existence. Section 111(a)(2) provides: ''The term ''new source'' means any stationary source, the construction or modification of which is commenced *after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section* which will be applicable to such source.'' (*Id.* section 7411(a)(2)). They said under section 111, listing *precedes* promulgation of standards. So, when the EPA decides whether to list a category, by definition it has not yet *proposed* section 111 standards for that category and because it has not proposed such standards, no sources qualify as ''new'' sources under section 111(a)(2). Basing a decision not to list (and therefore not to regulate) a source category solely on the absence of emissions from as yet nonexistent ''new'' sources—while ignoring sources that already exist and are emitting pollutants that threaten harm to public health and welfare—is not a tenable reading of the statutory language.

Response: In this rule, EPA takes the position that GHG emissions from new and existing EGUs contribute significantly to dangerous air pollution. While EPA proposed to retain the position that it stated in the 2015 Rule that a pollutant-specific significant contribution finding is not required, it solicited comment on whether such a finding is required, and that comment solicitation provided adequate notice.

Comment: Commenters stated that though the EPA notes that it is not proposing to revisit its 2009 endangerment finding for greenhouse gases, the proposed NSPS revisions request comment on whether recent and projected power sector trends present a rational basis to decline to regulate CO_2 emissions from the power sector. The suggested comment area, presented in footnote 25, cites power sector trend projections from the Energy Information Administration's (EIA's) 2018 Annual Energy Outlook and findings from the EPA's proposed Affordable Clean Energy (ACE) rule as potential support for this position. Commenters also stated that the EIA's 2018 Annual Energy Outlook does not indicate that power sector CO_2 emissions will decline significantly in the future. Instead, the estimates referenced by the EPA in the proposal project that CO_2 emissions from the power sector will remain the single largest sector-based source of CO_2 emissions over the long term, totaling 1.72 billion tons in 2020, 1.71 billion tons in 2030, and 1.78 billion tons in 2050. Commenters said though the EPA found that the transportation sector overtook the power sector as the largest sector-based source of GHG emissions in 2017, the 2018 Annual Energy Outlook projects that power sector emissions will regain the top ranking in 2026 and maintain a lead over the transportation sector by growing modestly through 2050. Commenters stated while newer EIA projections that were unavailable at the time of the EPA's proposal indicate slightly lower power sector CO_2 emissions, EIA still projects significant and sustained power sector GHG emissions through 2050, not a steady decline. Commenters said a report from the Rhodium Group based on preliminary EIA data for 2018 and released a few weeks after the EPA's proposal estimates that power sector-related GHG emissions increased 3.4 percent in 2018, breaking a three-year trend of decreases. Commenters added still more recent EPA data reveals the same pattern. Commenters stated preliminary 2018 emissions data compiled by EPA's Clean Air Markets Division (CAMD), also released after the proposed NSPS revisions were published in the **Federal Register**, show power sector CO_2 emissions rising from 1.92 billion tons in 2017 to 1.93 billion tons in 2018. Commenters said prior to the 2018 release, EPA's CAMD data had shown flat or declining CO_2 emissions for every year since 2013.

Commenters stated it would be unlawful and arbitrary for the EPA to use declining power sector emissions as

reason for not regulating. They argued that even if power sector emissions are declining—which is not at all clear—they are far higher than levels necessary to keep CO_2 concentrations from rising further, let alone to achieve the necessary net-zero balance. CO_2 pollution accumulates in the atmosphere, where it lingers for centuries, such that a year-to-year decline in emissions does not prevent atmospheric concentrations from continuing to rise, exacerbating the impacts of climate change. ''[T]he urgency of reducing emissions now,'' (80 FR 64520) which the EPA acknowledged in the 2015 Rule, has only increased in recent years. Commenters said reliance on recent emission trends is even more unfounded because U.S. climate pollution significantly increased in 2018, including a 1.9 percent increase in power sector carbon pollution. Even before the 2018 data were available, U.S. Energy Information Administration (EIA) had recognized long-term market and economic uncertainty, which could potentially drive some shift back to coal generation. EIA projections now show that the general trend toward declining carbon pollution from the power sector is likely to flatten out in the early 2020s. Commenters stated standards that even if pollution levels were declining more steadily, that would not authorize the EPA to ignore its obligation to protect the public from what will continue to be a major threat to public health and the environment. The CAA is not concerned merely with whether pollution levels are currently below their historic peak. To the contrary, the Agency must ensure that pollution is controlled to the degree the statute requires—*i.e.,* in accordance with a standard of performance that reflects the best system of emission reduction (BSER) (42 U.S.C. 7411(a)(1)).

The commenters also said that there may be other reasons why a developer would be willing to pay a premium to build a new coal-fired plant that the models do not consider (80 FR 64559–64562). Thus, it is unreasonable not to establish standards of performance on the assumption that coal-fired power plants will never again be built (or modified). They said that the Agency does not even consider the fact that the source category includes not only new sources but also existing sources that undergo certain ''modifications,'' and that such modified sources have significant CO_2 emissions.

Commenters said that by asking whether the Agency has a rational basis for regulating CO_2 emissions from new coal-fired EGUs ''in light of'' the projections cited in footnote 25, the EPA is setting itself up to conduct continual market evaluations for all the EPA regulations for which regulation is premised on a similar type of prerequisite determination. An interpretation of section 111 that leads to that result is unreasonable and impractical. They said that there is no indication in the CAA that Congress intended the Agency to undertake a continual market assessment of this nature.

Commenters stated that the endangerment finding footnote of the 2018 Proposal (83 FR 65432 footnote 25) contains a fatal factual deficiency in that it suggests that the rational basis finding might be reversed because ''no more than a few new coal-fired EGUs can be expected to be built, which raises questions about whether new coal-fired EGUs contribute significantly to atmospheric CO_2 levels.'' The commenters said that not only does this suggestion disregard the EPA's 2015 acknowledgment that ''the CO_2 emissions from even a single new coal-fired power plant may amount to millions of tons each year,'' but it entirely ignores natural gas-fired power plants, which are also included in the source category. In making the 2015 determination, the EPA specifically observed that ''the CO_2 emissions from even a single natural gas combined cycle (NGCC) unit may amount to one million or more tons per year.'' They said natural gas-fired power plants continue to be built at a steady clip as evidenced by the first ten months of 2018 in which 14.9 gigawatts (GW) of natural gas-fired EGU capacity was added to the grid. New gas plants must be accounted for and by failing to do so, the Agency would forfeit any ''rational connection between the facts found and the choice made,'' and would fail to provide ''a reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy.'' Each of those flaws would render the decision arbitrary and capricious. Commenters said that even if the EPA legally could regulate CO_2 emissions from new natural gas plants without regulating CO_2 emissions from new coal-fired power plants, the EPA should not do so because such partial regulation would provide an inadvertent subsidy to new coal-fired plants.

Response: In this rule, the EPA is determining that GHG emissions from EGUs contribute significantly to dangerous air pollution and is promulgating revised standards of performance for EGU GHG emissions. To the extent it is useful or necessary in this rulemaking for the EPA to further address whether long-term emission trends, or related considerations, are relevant for a significant contribution determination, the EPA does so elsewhere in this document.

C. Primary Criteria for Determining Significance

In this section, the EPA describes criteria for determining when GHG emissions from a source category contribute significantly to dangerous air pollution in response to comments submitted on this rule. The EPA indicated in the 2020 Oil and Gas Policy Rule that it would finalize these criteria in a separate rulemaking. 85 FR 57039.

1. GHG Emissions

The criteria discussed herein only apply to GHG in the context of the EPA's SCF under CAA section 111(b)(1)(B). This action does not discuss criteria for pollutants other than GHGs. Under this framework, the EPA is determining that the quantity of GHG emissions from a source category is the primary criterion in determining significance for purposes of regulation of GHGs from a source category under CAA section 111(b). Gross GHG emissions are important for this set of pollutants because GHGs are global long-lived pollutants and do not have the local, near-term ramifications found with other pollutants (*e.g.,* criteria pollutants). Unlike other pollutants where both the location and quantity of pollution emissions are factors in determining the impact of the emissions, GHGs' impact (*i.e.,* climate change) is based on a cumulative global loading and the location of emissions is not nearly as important a factor as it is for assessing local, near-term impacts associated with criteria pollutants. It is for this reason that, when the EPA is assessing GHGs impact in contributing significantly to air pollution which may reasonably be anticipated to endanger public health and welfare, the quantity of emissions should be the primary criterion that the EPA should evaluate.

The GHG emissions are the best, but not necessarily only, indicator of significance because the quantity of emissions emitted from a source category correlates directly with impacts. Calculations using the Model for the Assessment of Greenhouse Gas Induced Climate Change (MAGICC model) to investigate the impact of including or eliminating a single sector's emissions from 2020 through 2100 have shown that the magnitude of emissions from that single sector is very close to being linearly related to the projected temperature change in 2100 resulting from eliminating that sector's emissions. This is consistent with the

results of a number of peer reviewed publications in the past decade: *e.g.,* Matthews *et al.* found that the temperature change is roughly proportional to the total quantity of CO_2 emissions over a wide range of potential scenarios.[8]

A threshold of GHG emissions from the source category compared to the rest of the U.S. GHG emissions (*i.e.,* the percent of total U.S. GHG emissions) can be used to demonstrate significance. Emissions can be large enough from a source category that the evaluation of GHG emissions in isolation is sufficient for making a finding of significance for the source category. Conversely, the EPA believes that some source categories are sufficiently small in GHG emissions that a finding of insignificance can be made by only evaluating the GHG emissions from the source category. For many source categories, the evaluation of GHG emissions alone will be sufficient for determining whether there is significant contribution.

It should be noted that under section 111(b)(1)(A), the EPA is required to make a significance finding on a category-by-category basis. That provision requires the Administrator to list ''*a* category of sources'' for regulation if he determines that ''*it* causes or contributes significantly to'' dangerous air pollution. Section 111(b)(1)(A) (emphasis. added). As a result, the text of 111(b)(1)(A) compels or is at least best read to require the EPA to make the significance determination for a particular source category on the basis of the emissions (or other relevant attributes) of that particular source category. In contrast, the EPA may not combine source categories that individually would not meet the significance criteria and determine that, when combined, the source categories do meet the significance criteria.[9]

2. Using a Threshold in Significance Determination

Under this framework, the EPA is determining a threshold for the evaluation of significance of GHG emissions from source categories. The use of a clear threshold provides certainty regarding the EPA's process and allows the regulated entities to have insight into how the EPA will make determinations on significance for their respective source category. The threshold introduced in this rulemaking is a reflection of the EPA's best understanding of the landscape of the U.S. GHG emissions from stationary sources. The EPA is introducing a methodology to evaluate significance with respect to the U.S. GHG emissions that can be applied for any source category, and that application of the methodology is only being directly applied to the EGU source category in this action as further introduction of this approach. It is important to note that a significance determination for the U.S. GHG emissions will be needed before the EPA may regulate any other source category under CAA section 111(b) for GHG emissions.

As Table 1, below, makes clear, there are at least two natural breakpoints between groups of emitting source categories. The first natural breakpoint is between EGUs and all other source categories. EGUs stand out as by far the largest stationary source of the U.S. GHG emissions, emitting over 25 percent of all the U.S. GHG emissions. Based on available data, the next largest source category, Oil and Natural Gas, emits just under 3 percent of U.S. GHG emissions. Two other source categories, Boilers and Petroleum Refineries, also fall between 2.5 percent and 3.0 percent of U.S. emissions. Between 1.5 percent and 2.5 percent of U.S. GHG emissions there is another natural breakpoint and all of the remaining source categories fall below 1.5 percent of the U.S. GHG emissions. Note that source category emissions in Table 1 are an estimate of what the Agency currently understands about the emissions from CAA section 111 source categories. If the EPA were to do a rulemaking and a significance determination for a specific source category, the EPA would do a thorough analysis of the available and attributable GHG emissions data to ensure appropriate determinations and assessments.

TABLE 1—EXAMINATION OF GHG EMISSIONS FROM LARGE STATIONARY SOURCES OF GHG EMISSIONS

% of total U.S. GHG emissions	Emissions in that range (MMT CO_2e) *	Source categories affected at different thresholds	Percent of U.S. GHG emissions from stationary sources covered at given threshold (%)
Above 25%	>1670 MMT	EGUs (1778 MMT/27% of total US GHG Emissions, 3.6% of Global emissions).	43
3% to 25%	200 MMT–1670 MMT	No categories identified	43
2.5% to 3.0%	167–200 MMT	Oil/Gas Production and Processing; ^ Refineries; Boilers	56
2.0% to 2.5%	134–167 MMT	No categories identified	56
1.5% to 2.0%	100–134 MMT	No categories identified	56
1.0% to 1.5%	67–100 MMT	Landfills; ǂ Iron and Steel	60

* MMT CO_2e = Million metric tons of carbon dioxide equivalent

^ Note that the oil and gas production and processing GHG emissions are very close to the 3% value and thus there is a possibility that this source category may be above the threshold in the near term.

ǂ Note that the Landfills source category has already been regulated under CAA section 111 and the level of the emissions in Table 1. reflects reductions in GHG emissions as a result of that regulation as a co-benefit.

The EPA is introducing a threshold of 3 percent of U.S. GHG emissions to evaluate a source category's emissions to determine significance for purposes of CAA section 111(b). The EPA is also determining that source categories that

[8] H. Damon Matthews, Nathan P. Gillett, Peter A. Stott & Kirsten Zickfeld, The Proportionality of Global Warming to Cumulative Carbon *E*missions. Nature 459, 829–832 (2009), available at *https://www.nature.com/articles/nature08047.*

[9] By the same token, as the EPA explained in the 2020 Oil & Gas Rule, there are limits to the EPA's ability to expand a source category to include other sources. As the EPA stated in that rule, ''the authority to revise the scope of a source category must be exercised within reasonable boundaries and cannot be employed in a way that results in an unreasonable expansion of an existing source category. . . . [T]he EPA is not authorized to expand the scope of a listed source category to cover a new set of sources that are not sufficiently related to the sources in the pre-existing category. . . '' 85 FR 57027.

are less than this value (*i.e.,* 3 percent or less) are necessarily insignificant without consideration of any other factors. The reasoning for choosing this threshold is presented later in this document.

The EPA acknowledges that, when interpreting other CAA provisions, the EPA has used different thresholds to define ''significant contribution,'' but it is appropriate to select a threshold based on the nature of the problem being addressed. For example, to address the problem of interstate transport under CAA section 111(a)(2)(D)(i)(I)—which concerns criteria pollutants, *i.e.,* pollutants that affect the NAAQS—the EPA selected a threshold of 1 percent based on analysis of air quality modeling specific to the criteria pollutant at issue. 76 FR 48208, 48236 (August 8, 2011) (Cross-State Air Pollution Rule (CSAPR)). For criteria pollutants, both the location and quantity of emissions are factors in determining their impact. In contrast, the impact of GHGs (*e.g.,* climate change) is based on a cumulative global loading, and the location of emissions is not nearly as important a factor as it is for assessing local impacts associated with criteria pollutants. Because GHGs do not have the local near-term impacts that criteria pollutants tend to have, a larger value is appropriate to use in determining significance as it still addresses the health and welfare impacts of GHG emissions without specifically evaluating local near-term impacts, which is analytically unreasonable to do given the global nature of GHGs. While the 3 percent threshold will be applied against domestic emissions, source categories exceeding that threshold represent a much smaller fraction of global GHG emissions.[10]

By determining a threshold, the EPA is setting a clear indication of how source categories will be evaluated for significance based on GHG emissions. For those source categories that are below the 3 percent threshold, the EPA would make a determination (through future rulemaking) of insignificance. This means that if a source category collectively emits 3 percent or less of the total U.S. GHG emissions, it will be considered to be insignificant. For those source categories that are above the threshold, a more detailed evaluation of other criteria can be used to make a determination of significance. This is described in section IV.D below. It is important for the EPA to make this clear indication as it allows source categories and the general public a level of transparency as to how the EPA will be evaluating source categories for significance. The threshold in this action will provide a degree of certainty regarding whether a source category will later be found significant or insignificant based on the threshold.[11]

After evaluating the two natural break points in GHG emissions, the EPA determined that 3 percent of the U.S. GHG emissions was the best threshold for determining significance. As noted above, there is currently only one source category above this threshold, EGUs, and the evaluation of significance for the EGU source category has been a topic explored and discussed by the Agency in great detail over the course of the last decade.[12] Just below the 3 percent threshold are three source categories: Oil and Natural Gas, Petroleum Refineries, and Industrial-Commercial-Institutional Steam Generating Units (*i.e.,* ''Boilers''). There are no other source categories with GHG emissions between 1.5 percent and the 3 percent. By using a threshold of 3 percent of the U.S. GHG emissions (*i.e.,* only including EGUs above the threshold), the EPA will effectively be covering 43 percent of the U.S. stationary source GHG emissions via regulation of a single source category. If the EPA were to instead set a threshold between the other identified breakpoint—between 1.5 percent and 2.5 percent of U.S. GHG emissions—the EPA observes that this threshold would lead to a relatively modest increase in the stationary source U.S. GHG emissions that would be regulated of an additional 13 percent (for a total of 56 percent of U.S. stationary source GHG emissions).[13] In addition, regulation of the additional source categories that comprise 13 percent of U.S. emissions would eliminate only a portion of those emissions. With an even lower threshold of significance set at 1.0 percent of U.S. GHG emissions, there would be significantly more source categories covered (about 10 based on the EPA estimates) above the threshold but likely would include an even more modest increase in stationary source GHGs that would cover 60 percent of U.S. stationary source GHGs. Under this framework, the EPA is basing a decision to apply a threshold of 3 percent on the relative contribution of regulating source categories that contribute significantly to the overall impact of climate change. To that end, the temperature impact associated with the hypothetical elimination of all source categories above a 3 percent threshold corresponds to a hypothetical global mean temperature reduction of 0.049 degrees Celsius (°C) (approximately 0.1 degree Fahrenheit, the calculated effect in 2100 of removing 1,780 million metric tons (MMT) of CO_2 emissions each year from 2020 through 2100) from source categories above that threshold (*i.e.,* just EGUs). Eliminating the next largest source category (*i.e.,* Oil and Gas Processing and Production) would only generate an additional hypothetical global mean temperature reduction of less than 0.01°C and even smaller source categories correspondingly contribute less to global temperature. The EPA is making the decision that the threshold for a significance determination for U.S. GHG emissions to be in the form of a percentage. A percentage is a metric that measures the relative contribution to the whole and, in this action, the EPA believes that it is appropriate to measure and evaluate significant contribution of U.S. GHG emissions as a relative contribution to the whole of GHG emissions in the U.S. The EPA is determining that a threshold in the form of a percentage is both reasonable and more appropriate for making the significance determination in this rule based on a percent's relative nature. This is important because the trajectory of U.S. GHG emissions is trending down. As overall emissions decrease over the course of time, a source category's relative contribution to GHGs may not have changed or may have even increased based on GHG reductions in other source categories and sectors. A relative percentage threshold recognizes that the EPA may later determine a source category is significant based on these circumstances, because a source category's emissions may eventually exceed the threshold even though it is currently below the threshold.

[10] The EPA recognizes that in the 2016 Oil & Gas Rule, it determined that GHG emissions from the oil and natural gas source category contribute significantly to dangerous air pollution, in part, on the grounds that those emissions exceeded the total amount of emissions from various foreign countries. 81 FR 35824, 35840 (June 3, 2016). The EPA believes that its current approach of identifying a threshold for significance based on a percentage of U.S. emissions is better reasoned than the 2016 Oil & Gas Rule's approach of drawing comparisons to the absolute emissions of other countries.

[11] The EPA does not currently have a comprehensive inventory of the U.S. GHG emissions for all of the NSPS source categories. For the EPA to make determinations of significance for a source category, a more comprehensive emissions profile of a source category should be used. The EPA will make determinations of significance for other source categories in the future.

[12] *See* 79 FR 34960 and 80 FR 64510.

[13] Note that one of those ''next three largest'' source categories is oil and natural gas. In the recently finalized policy package, the EPA found that regulation of GHGs from this source category is unnecessary as it is currently being controlled by regulation of volatile organic compounds. See 85 FR 57018, 57030 (September 14, 2020).

Accordingly, a percentage threshold allows the EPA, over time, to always focus on the source categories with the potential to have the greatest impact. The framework on which EPA bases its decision today is, therefore, amenable to future use, which augurs in favor of the framework's use to make today's finding.

The EPA is introducing in this action that a threshold in the form of a percentage is both reasonable and more appropriate for making a significance determination for GHGs based on a percent's relative nature. A tonnage threshold is a static metric that would not change over time. As previously described, the trajectory of U.S. GHG emissions is trending down. As emissions decrease over the course of time, it is likely that source categories that were once above any static threshold will fall below such a threshold. Even though a source category may reduce overall U.S. GHG emissions, that source category's relative contribution to GHGs may not have changed or may have even increased based on GHG reductions in other source categories and sectors. Additionally, if emissions do decrease over time, the use of a tonnage threshold potentially results in no source category meeting the criteria for significance, even if collectively the U.S.GHG emissions continue to pose a danger to public health or welfare.

It should be noted that the U.S. GHG emissions of the EGU source category are more than an order of magnitude larger than the emissions threshold in the framework, representing 43 percent of U.S. stationary source GHG emissions. The EPA believes that it is possible for source categories with GHG emissions substantially larger than the threshold to be deemed significant on the basis of the primary criterion alone (*i.e.,* magnitude of emissions) and without consideration of the secondary criteria described elsewhere in this notice.

3. Tiers of Source Categories Based on GHG Emissions

As noted previously, the primary criterion in evaluating the significance of a source category is, again, the relative magnitude of the U.S. GHG emissions. The EPA believes that NSPS source categories may be grouped into three tiers on the basis of magnitude of the U.S. GHG emissions, as follows:

(1) *Source category with GHG emissions substantially above the threshold.* This source category has emissions of a large enough magnitude that a determination of significance can be made on the basis of the magnitude of emissions alone. As discussed later in this document, this tier is comprised solely of the EGUs source category; in other words, EGUs do not require consideration of the secondary criteria in order to determine significance.

(2) Source categories with an intermediate magnitude of the U.S. GHG emissions (i.e., those with emissions above the threshold but less than the quantity emitted by the EGU source category). For source categories with emissions above the threshold, evaluation of the magnitude of the U.S. GHG emissions is inconclusive. Rather, a significance determination requires an examination of the source category's magnitude of emissions combined with a more detailed look at the secondary criteria discussed elsewhere in this document.

(3) *Source categories with a small magnitude of GHG emissions (i.e., those with emissions below the threshold).* Source categories with a small magnitude of emissions will be deemed insignificant based on evaluation of the primary criterion alone, without detailed consideration of any secondary criteria.

D. Secondary Criteria for Determining Significance

As described above, the EPA is determining that the U.S. GHG emissions from a source category are the primary and most important criterion for making a determination of significance for a source category. However, there may be instances where the U.S. GHG emissions from a source category do not give a comprehensive enough picture to make a determination of significance. The threshold that the EPA has described above in Section IV.B would provide a clear indication that the U.S. GHG emissions from source categories below that threshold are necessarily insignificant. However, under this framework, for any source category that is above that threshold, there are other source-category specific considerations that should be evaluated in addition to GHG emissions when making a determination of significance.[14] For that reason, the EPA will consider other, secondary, criteria in the evaluation of significance for certain source categories. These other criteria are described in the subsequent subsections. It is important for the EPA to consider secondary criteria in the evaluation of significance for certain source categories because the criteria provide unique context to the source category beyond the information provided by the magnitude of the source category's GHG emissions.

[14] Although there is no source category other than EGUs above the 3% threshold, because the threshold is a percentage and as previously described, other source categories may move into this tier as overall GHG emissions decrease and other source category emissions increase.

1. Evaluation and Context of GHG Emissions

Under the introduced framework, the evaluation of the magnitude of the U.S. GHG emissions from a source category is a substantial indicator of whether a source category is significant, but in the specific instance of source categories that have greater GHG emissions than the threshold, an evaluation based on the magnitude of the U.S. GHG emissions may be inconclusive. Within the introduced framework, there are other emissions-based metrics that must be evaluated to clarify and make a significance determination for these source categories.

a. Source Category Trends

An important criterion that can help illuminate and contextualize a significance determination is an evaluation of the trends in emissions and number of designated facilities within a source category. Primarily, the EPA is evaluating whether a source category is on a trajectory of the U.S. GHG emission decline. If the source category, as a whole, is decreasing its GHG emissions, an explanation for why it is on the decline may aid in making a significance determination. In one scenario, if the source category is decreasing emissions because the source category is declining in production or other output (*e.g.,* due to decreasing demand for goods or other market conditions, due to relocation overseas, or due to the cumulative effect of regulations), it may lend towards an insignificance determination as the emissions are already declining and expected to continue to decline even without further regulation. In a separate scenario, if a source category's GHG emissions are declining due to increased efficiency and updated technology, it may lend towards a determination of significance. This would allow the EPA the ability to regulate the source category in order to ensure that efficiency and technology improvements become standard across the source category through both an NSPS (111(b) regulation) for new, modified and reconstructed sources and an emission guidelines (111(d) regulation) for existing sources.

In a scenario in which the EPA were to find a source category to be growing in either emissions or number of designated facilities (or both), it could lend towards that source category being found to be significant. This would allow EPA to regulate and mitigate emissions from new, modified and/or reconstructed designated facilities

within that source category under CAA section 111(b) (*i.e.,* via a NSPS).

If the EPA were to evaluate the trend in the number of designated facilities and emissions of a source category, it might show a static number of existing facilities with a constant or slightly increasing quantity of the U.S. GHG emissions. In this scenario, there may be little utility in determining significance for that source category and consequentially developing a NSPS as there are little to no emissions that would be subject to such a standard. However, creating a NSPS for a source category and pollutant is a necessary predicate to regulating existing sources under CAA section 111(d). Hence, in the scenario of a static number of existing facilities, a finding of significance for the source category may be warranted as it would allow eventual regulation of a group of existing source categories. Under this framework, the EPA expects the prospect of regulating a source category under CAA section 111(d) for existing sources to be a compelling reason for determining significance.

b. Source Category Emissions With Global Context

Another important criterion that the EPA considers, as a secondary factor, is the relative contribution of GHG emissions from the U.S. in a specific source category compared to worldwide emissions of similar sources. As previously described, Section 111(b)(1)(A) of the CAA states that the Administrator shall include source categories that contribute significantly to endangerment of health and welfare. When evaluating a global pollutant such as GHGs, the EPA views the impact of domestic emissions from domestic sources as a more germane consideration when determining whether a pollutant contributes significantly to endangerment of health or welfare. Because every ton of GHG contributes to the global problem, a domestic ton will still have some impact in the U.S. Accordingly, it is reasonable for the EPA to evaluate whether a source category is well-regulated internationally and whether the U.S. emissions from that sector make up a relatively large share of GHG emissions on a worldwide scale, as such evaluation in turn would inform whether U.S. emissions are significantly contributing to domestic impacts. If the emissions from the U.S. are comparatively a large contribution to source category/sector emissions worldwide, it may lend towards a finding of significance for the source category based on the U.S.'s substantial global contribution to the source category. If, however they are relatively small, it would suggest less benefit from the EPA regulation of that source category.

The EPA also considers, as one of the secondary criteria, an evaluation of whether a source category is vulnerable to being trade exposed (*i.e.* whether the source category is constrained in the sources' ability to pass through carbon costs due to actual or potential international competition). The EPA evaluates whether regulation of the source category would create a financial incentive for that source category/industry to move into, or increase production in, another country. This could be manifested as either a shift in production to facilities internationally or a complete closure of existing designated facilities in the U.S. It is not the EPA's intention in regulating source categories to drive production from the U.S. to other countries, and there is an environmental concern in pushing industries to other international locations. This concern is based on the potential for these new international emissions to increase compared to the corresponding displaced U.S. emissions.[15] While this is always a concern for the EPA in the regulation of industry within the U.S., it even more pronounced with the consideration of GHG emissions. As discussed, previously, the U.S. GHG emissions are a global pollutant that also have domestic impacts. As such, if a smaller quantity of domestic GHG emissions would be displaced, due to a regulation, by a greater quantity of international GHG emissions it may support a finding of insignificance for a given source category. This would occur if the U.S. sources are already significantly lower emitting in GHG emissions than sources in other countries. It should also be noted that source categories whose sources in the U.S. make up a relatively smaller proportion of the world's emissions from corresponding international sectors may be particularly vulnerable to being trade exposed as there is likely a greater international capacity to absorb the displaced U.S. production.

Given the global nature of GHG emissions, assessing and understanding the estimated potential net emissions impact of GHG control technologies provides useful context in which to consider the significance of a given set of GHG emissions In addition, there may also be value in evaluating and considering the technology with the associated source category (*i.e.,* intrinsic to the process of the source category)—a prime example of reductions associated with this evaluation might be assessing the likely impacts of efficiency improvements. From a public welfare and human health perspective, targeting source categories that provide the largest overall possible scope for emissions reductions could be an intrinsic part of determining the significance of a given magnitude of emissions. Thus, the EPA is determining that it is appropriate in a given instance to consider feasible technologies (including efficiency improvements) for further context in the Agency's determination of significance of a source category's overall emissions. Here, the magnitude of GHG emissions from EGUs coupled with the reductions available through efficiency improvements supports the EPA's determination of significance.

d. Temporal Evaluation of Criteria

As introduced in this framework, the evaluation of the secondary criteria is not intended to be performed in isolation. Rather, the EPA considers the weight of evidence of all the factors (both primary and secondary) to make an informed and comprehensive decision as to whether a source category that exceeds the 3-percent threshold contributes significantly to the U.S. GHG emissions. The consideration of criteria also has a temporal consideration to a significance determination. A source category's determination can be reevaluated in the future as the status and criteria described here may have changed for that source category. For example, the technology to adequately regulate GHGs from a source category may not be readily available at this time, but in the future that technology may become more broadly available causing the EPA to then make a SCF.

E. Significant Contribution Finding for EGUs

As noted above, the Agency is finalizing a determination that GHG emissions from EGUs[16] contribute significantly to dangerous air pollution. The primary criterion in determining

[15] If U.S. production shifted overseas to a jurisdiction that has laxer environmental regulations, for a global pollutant such as mercury or GHGs, there could be both increased local environmental and health impacts at the new overseas location and domestic impacts to the U.S. resulting from the increased U.S. GHG emissions.

[16] For this purpose, EGUs include the affected sources in the combined source category for boilers and turbines. In the 2015 Rule, the EPA "combine[d] the two categories of EGUs—steam generators and combustion turbines—into a single category of fossil fuel-fired EGUs for purposes of promulgating standards of performance for CO_2 emissions." 80 FR 64529 (2015 Rule).

whether to make a SCF is the magnitude of GHG emissions from a given source category. It is readily apparent that EGUs emit a uniquely large amount of GHGs compared to all other categories of stationary sources. The EPA made this clear in the 2015 Rule, quoted above, and reiterated it in the 2020 Oil & Gas Rule: ''the unique CO_2 emissions profile of fossil fuel-fired EGUs should be noted: the volume of emissions from EGUs dwarfs the amount of GHG emissions from every other source category.'' 85 FR 57039, n.49.

Although GHG emissions from EGUs have fallen since the EPA promulgated the 2015 Rule, they still remain uniquely large among stationary source categories. The EPA's Inventory of U.S. Greenhouse Gas Emissions [17] indicates that, as of 2018, the Electric Power sector directly emitted 1,778.5 MMT of GHGs.[18] This amount was more than twice the amount of GHGs emitted by all other industrial sources combined and more than all other industrial, commercial, and residential stationary combustion sources combined.[19] In addition, direct GHG emissions from EGUs account for approximately 27 percent of total U.S. GHG emissions and 43 percent of U.S. stationary source emissions. The direct GHG emissions from EGUs account for approximately 4 percent of total worldwide GHG emissions and are greater than the emissions of all but four countries.[20] These facts confirm that at current emission levels, EGUs have measurable impacts on both the U.S. contribution to GHG emissions and the worldwide total GHG emissions and continue to be uniquely large stationary source emitters of GHGs. It should be noted that if domestic EGUs no longer emitted any GHG emissions, there would be a measurable impact on worldwide GHG emissions and between 2020 and 2100, there would be a reduction in the projected increase in global temperatures by 0.049 degrees Celsius (° C).

Because EGUs represent by far the largest stationary source of GHGs from combustion of fossil fuels, the EPA believes that this is the most appropriate place for the EPA, states, and sources to devote resources to reducing GHGs from stationary sources. Indeed, this uniquely large magnitude of emissions is the reason over the last 8 years, the Agency has devoted significant effort to determine how to best reduce GHGs from EGUs. Because EGUs are a relatively large U.S. source of emissions in an overall large pool of international EGU sources, regulation over time could help produce practices and technologies that have application to EGUs worldwide.

It is noteworthy that GHG emissions from EGUs are approximately an order of magnitude greater than the estimated emissions of the second largest stationary source category of GHGs attributed to combustion, industrial boilers. Because the magnitude of GHG emissions from EGUs is large compared to other stationary sources, this makes them clearly significant even without detailed consideration of other factors. As mentioned earlier, the EPA is also introducing a framework under which a source category that emits above a threshold of 3 percent of U.S. stationary source GHG emissions may contribute significantly to dangerous GHG air pollution. For those source categories above that threshold, the EPA is also determining that consideration of certain secondary criteria may, collectively, also inform the evaluation of whether a source category should be considered to significantly contribute. However, within this framework, that analysis of secondary criteria is not necessary in the case of EGUs, due to the overwhelmingly large emissions of the source category; it is clear that controlling GHG emissions from the EGU source category will be necessary to appropriately address dangerous air pollution. This conclusion is consistent with the EPA's 2018 Proposal where the Agency explained that if the EPA was required to evaluate significance, EGUs would be considered significant.

1. Secondary Criteria

The EPA is determining that the uniquely large GHG emissions from EGUs makes a finding of significant contribution and regulation appropriate by itself. Under the introduced framework, while the EPA does not think it is necessary to consider secondary criteria because of the uniquely large emissions from the EGU source category, as explained below, the EPA would make the same determination even if it did consider those criteria.

a. Source Category Trends

As mentioned earlier, an important criterion is the evaluation of the trends in emissions and number of designated facilities within a source category, such that the EPA can evaluate whether a source category is on a trajectory of U.S. GHG emission decline.

While electricity demand is projected to increase the U.S., due to the increased use of less carbon intensive generation technologies and more efficient generation, GHG emissions from the power sector are projected to remain relatively steady for the foreseeable future. However, EGUs are projected to remain the single largest stationary source of GHG emissions, and while the Agency expects few, if any, new coal-fired EGUs will be built to meet the demand for electricity, coal-fired EGUs are expected to continue to supply electricity and emit significant GHG emissions for the foreseeable future.[21] The EGU source category also includes stationary combustion turbines. The EPA expects new simple cycle and combined cycle combustion turbine EGUs will be built in the future and that the existing fleet of combustion turbines will continue to operate.[22] Therefore, efficient generation technology could eventually become standard for all new and existing EGUs. Consequently, the EPA would consider the source category trends as supporting the regulation of GHG emissions from EGUs.

b. Source Category Emissions With Global Context

The EPA is also determining that it can consider, as a secondary criterion, the relative contribution of GHG emissions from the U.S. in the specific source category compared to worldwide emissions of similar sources. Accordingly, the EPA evaluates whether a source category is well-regulated internationally and whether the U.S. emissions from that sector make up a relatively large share of global GHG emissions, as such evaluation in turn would inform whether U.S. emissions are significantly contributing to

[17] *See* Table 3–9, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2018, Report 430–R–20–002, April 13, 2020, *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2018*.

[18] The global warming potential (GWP) of a greenhouse gas is defined as the ratio of the accumulated radiative forcing within a specific time horizon relative to that of the reference gas CO_2. Total GHG emissions are the GWP-weighted emissions of all GHG emissions and reported in million metric tons of CO_2 equivalent (MMT CO_2e.).

[19] See Table 3–9, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2018, Report 430–R–20–002, April 13, 2020, *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2018*.

[20] In 2016, worldwide GHG emissions were estimated to have been 49.4 gigaton (Gt) CO_2e. The GHG emissions of China, India, Russia, and Indonesia are 11,577, 3,235, 2,391, and 2,229 MMT CO_2e respectively. *https://www.wri.org/blog/2020/02/greenhouse-gas-emissions-by-country-sector*.

[21] According to Table 8 of the Annual Energy Outlook (AEO) 2020, while coal fired generation will decline between 2019 and 2025 from 959 billion kWh to 709 billion kWh, generation from coal-fired EGUs is projected to subsequently remain relatively steady through 2050.

[22] According to Table 8 of the AEO 2020, natural gas fired generation is projected to increase from 1,322 billion kWh to 1,629 billion kWh.

domestic impacts. In this instance, this criteria points towards a finding of significance given that U.S. EGUs make up a sizeable portion (13 percent of the emissions) from EGUs worldwide.[23]

As mentioned earlier in this notice, the EPA is also introducing that one of the secondary criteria is an evaluation of whether a source category is vulnerable to being trade exposed (*i.e.,* whether the source category is constrained in its ability to absorb regulatory costs due to actual or potential international competition). Concerns about international competition would not impact the Agency's decision to regulate EGUs because electricity must be transported over power lines and it is not as easy to relocate or shift production locations as it is for other source categories. The ability to locate generation in Mexico and Canada and transmit the power to the U.S. is limited because of constraints on existing transmission lines and the expense to build additional transmission capacity. The only additional transmission capacity currently being considered is for electricity generated from hydroelectric power in Canada to supply power to New England. Since this electricity has a low carbon intensity, it would not contribute to an overall increase in GHG emissions. Furthermore, the emission standards in this rule will not increase the costs of electricity from a new coal-fired EGU such that it might be financially advantageous to locate new production internationally to countries with less stringent regulations. If international competition were a concern, the Agency would compare the forecast GHG emissions from international sources (in this case, EGUs in Canada and Mexico) against the forecast GHG emissions from domestic sources (in this case domestic EGUs) in both the absence of and implementation of the NSPS. In addition, since few, if any, new coal-fired EGUs are forecast to be built in the U.S., the standards in this final rule will not impact electricity prices to end users to an extent that other industries would be incentivized to relocate internationally due to increased electricity costs. Therefore, domestic reductions in GHG emissions from regulating EGUs will not be offset by increased international GHG emissions. In contrast, for source categories that supply raw materials to other domestic source categories, the impact of international competition on those source categories and the resultant GHG impacts could be considered when determining an appropriate NSPS. It is conceivable that an overly stringent NSPS could result in an increase in global GHG emissions, if the increase in international emissions is greater than the reduction in domestic emissions.

V. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected facilities?

This rule takes final action affecting fossil fuel-fired EGUs. These EGUs take two forms that are relevant for present purposes: Steam generating units (utility boilers and gasification units) and stationary combustion turbines. Fossil fuel-fired steam generating units can burn natural gas, oil, or coal. However, coal is the dominant fuel for electric utility steam generating units. Coal-fired steam generating units are primarily either PC or fluidized bed (FB) steam generating units.[24] At a PC steam generating unit, the coal is crushed (pulverized) into a powder to increase its surface area. The coal powder is then blown into a steam generating unit and burned. In a fossil fuel-fired steam generating unit using FB combustion, the solid fuel is burned in a layer of heated particles suspended in flowing air. Power can also be generated from coal or other fuels using gasification technology. An Integrated Gasification Combined Cycle (IGCC) unit gasifies coal or petroleum coke to form a synthetic gas (or syngas) composed of carbon monoxide (CO) and hydrogen (H_2), which can be combusted in a combined cycle system to generate power. Stationary combustion turbines include both fossil fuel-fired simple cycle and combined cycle combustion turbine EGUs.

B. What are the air quality impacts?

The EPA does not anticipate that this final rule for fossil-fuel-fired EGUs will result in significant CO_2 emission changes.

C. What are the energy impacts?

This final rule for fossil-fuel-fired EGUs is not anticipated to have an effect on the supply, distribution, or use of energy.

D. What are the cost impacts?

The EPA does not believe that this final rule for fossil-fuel-fired EGUs will have compliance costs associated with it.

E. What are the economic impacts?

The EPA does not anticipate that this final rule for fossil-fuel-fired EGUs will result in economic or employment impacts. Likewise, the EPA believes this rule will not have any impacts on the price of electricity, employment or labor markets, or the U.S. economy.

F. What are the benefits?

The EPA does not anticipate emission changes resulting from the final rule for fossil-fuel-fired EGUs.

VI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

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

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review because it raises novel legal or policy issues. Any changes made in response to OMB recommendations have been documented in the docket.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not expected to be an Executive Order 13771 regulatory action. There are no quantified cost estimates for this final rule because the EPA does not anticipate this action to result in costs or cost savings.

C. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing parts 75 and 98 regulations and has assigned OMB control numbers 2060–0626 and 2060–0629, respectively.

D. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a

[23] U.S. EGU emissions from the Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2018, Report 430–R–20–002, April 13, 2020, *https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2018.* Worldwide EGU emissions from the International Energy Agency estimates IEA (2020), CO_2 Emissions from Fuel Combustion, *https://www.iea.org/subscribe-to-data-services/co2-emissions-statistics.*

[24] Fossil fuel-fired utility steam generating units (*i.e.,* boilers) are most often operated using coal as the primary fuel. However, some utility boilers use natural gas and/or fuel oil as the primary fuel.

substantial number of small entities if the rule relieves regulatory burden, has no net burden, or otherwise has a positive economic effect on the small entities subject to the rule. The EPA expects there to be few, if any, new, modified, or reconstructed coal-fired EGUs. As such, this final rule would not impose significant requirements on those sources, including any that are owned by small entities. The EPA has, therefore, concluded that this action will have no net regulatory burden for all directly regulated small entities.

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. This action imposes no enforceable duty on any state, local, or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action 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.

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

This action does not have tribal implications, as specified in Executive Order 13175. It would neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. The EPA is aware of three coal-fired EGUs located in Indian Country but is not aware of any EGUs owned or operated by tribal entities. The EPA notes that this action would affect only existing sources such as the three coal-fired EGUs located in Indian Country if those EGUs were to take actions constituting modifications or reconstructions as defined under the EPA's NSPS regulations. However, as previously stated, the EPA expects there to be few, if any, new, reconstructed, or modified EGUs. Thus, Executive Order 13175 does not apply to this action.

Consistent with the EPA Policy on Consultation and Coordination with Indian Tribes, the EPA offered consultation with tribal officials during the development of this action; however, the Agency did not receive a request for consultation. The EPA held meetings with tribal environmental staff during the public comment period to inform them of the content of the proposed rule and to encourage them to submit comments on the proposed rule.

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

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of ''covered regulatory action'' in section 2–202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health or safety risk.

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

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy and has not otherwise been designated as a significant energy action by the Administrator of the Office of Information and Regulatory Affairs (OIRA). This final action is not anticipated to have impacts on emissions, costs, or energy supply decisions for the affected electric utility industry.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

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

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specific in Executive Order 12898 (59 FR 7629, February 16, 1994), because it does not affect the level of protection provided to human health or the environment. As previously stated, the EPA expects that few, if any, coal-fired EGUs would be affected by this action.

L. Congressional Review Act (CRA)

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

Andrew Wheeler,

Administrator.

[FR Doc. 2021–00389 Filed 1–12–21; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket ID FEMA–2021–0003; Internal Agency Docket No. FEMA–8661]

Suspension of Community Eligibility

AGENCY: Federal Emergency Management Agency, DHS.

ACTION: Final rule.

SUMMARY: This rule identifies communities where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP) that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If the Federal Emergency Management Agency (FEMA) receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur. Information identifying the current participation status of a community can be obtained from FEMA's CSB available at *www.fema.gov/flood-insurance/work-with-nfip/community-status-book.* Please note that per Revisions to Publication Requirements for Community Eligibility Status Information Under the National Flood Insurance Program, notices such as this one for scheduled suspension will no longer be published in the **Federal Register** as of June 2021 but will be available at *www.fema.gov.* Individuals without internet access will be able to contact their local floodplain management official and/or State NFIP Coordinating Office directly for assistance.

DATES: The effective date of each community's scheduled suspension is the third date (''Susp.'') listed in the third column of the following tables.

FOR FURTHER INFORMATION CONTACT: If you want to determine whether a particular community was suspended on the suspension date or for further

information, contact Adrienne L. Sheldon, PE, CFM, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 400 C Street SW, Washington, DC 20472, (202) 674–1087. Details regarding updated publication requirements of community eligibility status information under the NFIP can be found on the CSB section at *www.fema.gov.*

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase Federal flood insurance that is not otherwise generally available from private insurers. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives, new and substantially improved construction, and development in general from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits the sale of NFIP flood insurance unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with NFIP regulations, 44 CFR part 59. Accordingly, the communities will be suspended on the effective date listed in the third column. As of that date, flood insurance will no longer be available in the community. FEMA recognizes communities may adopt and submit the required documentation after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue to be eligible for the sale of NFIP flood insurance. Their current NFIP participation status can be verified at anytime on the CSB section at *fema.gov.*

In addition, FEMA publishes a Flood Insurance Rate Map (FIRM) that identifies the Special Flood Hazard Areas (SFHAs) in these communities. The date of the published FIRM is indicated in the fourth column of the table. No direct federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year on FEMA's initial FIRM for the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment procedures under 5 U.S.C. 553(b), are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. FEMA has determined that the community suspension(s) included in this rule is a non-discretionary action and therefore the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) does not apply.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, Section 1315, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Executive Order 13132, Federalism. This rule involves no policies that have federalism implications under Executive Order 13132.

Executive Order 12988, Civil Justice Reform. This rule meets the applicable standards of Executive Order 12988.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for Part 64 continues to read as follows:

Authority: 42 U.S.C. 4001 *et seq.;* Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region IV				
Tennessee:				
Charlotte, Town of, Dickson County	470434	N/A, Emerg; September 27, 2010, Reg; January 15, 2021, Susp.	January 15, 2021.	January 15, 2021.
Clarksville, City of, Montgomery County	470137	July 31, 1975, Emerg; June 15, 1984, Reg; January 15, 2021, Susp.	.....do *	Do.
Dover, Town of, Stewart County	470237	August 19, 1988, Emerg; February 1, 1990, Reg; January 15, 2021, Susp.	.....do	Do.
Stewart County, Unincorporated Areas	470180	N/A, Emerg; November 17, 2010, Reg; January 15, 2021, Susp.	.....do	Do.
Tennessee Ridge, City of, Houston County.	470337	N/A, Emerg; May 22, 2012, Reg; January 15, 2021, Susp.	.....do	Do.

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
Region VI				
Texas: Palacios, City of, Matagorda County	485495	August 7, 1970, Emerg; November 17, 1970, Reg; January 15, 2021, Susp.	.....do	Do.
Region VII				
Iowa:				
Ames, City of, Story County	190254	July 25, 1974, Emerg; January 2, 1981, Reg; January 15, 2021, Susp.	.....do	Do.
Cambridge, City of, Story County	190255	July 29, 1974, Emerg; June 15, 1981, Reg; January 15, 2021, Susp.	.....do	Do.
Collins, City of, Story County	190719	N/A, Emerg; December 12, 2007, Reg; January 15, 2021, Susp.	.....do	Do.
Huxley, City of, Story County	190597	N/A, Emerg; May 5, 2008, Reg; January 15, 2021, Susp.	.....do	Do.
Maxwell, City of, Story County	190257	July 24, 1975, Emerg; February 15, 1984, Reg; January 15, 2021, Susp.	.....do	Do.
McCallsburg, City of, Story County	190315	N/A, Emerg; September 6, 2013, Reg; January 15, 2021, Susp.	.....do	Do.
Nevada, City of, Story County	190258	November 25, 1974, Emerg; August 3, 1981, Reg; January 15, 2021, Susp.	.....do	Do.
Slater, City of, Story County	190659	N/A, Emerg; February 15, 2008, Reg; January 15, 2021, Susp.	.....do	Do.
Story City, City of, Story County	190259	June 25, 1975, Emerg; January 16, 1981, Reg; January 15, 2021, Susp.	.....do	Do.
Zearing, City of, Story County	190260	September 28, 1976, Emerg; May 1, 1987, Reg; January 15, 2021, Susp.	January 15, 2021.	January 15, 2021.
Region VIII				
Colorado:				
Arvada, City of, Adams and Jefferson Counties.	085072	April 30, 1971, Emerg; June 23, 1972, Reg; January 15, 2021, Susp.	.....do	Do.
Berthoud, Town of, Larimer County	080296	October 28, 1977, Emerg; May 26, 1978, Reg; January 15, 2021, Susp.	.....do	Do.
Jefferson County, Unincorporated Areas.	080087	July 5, 1973, Emerg; August 5, 1986, Reg; January 15, 2021, Susp.	.....do	Do.
Johnstown, Town of, Larimer and Weld Counties.	080250	August 22, 2003, Emerg; December 19, 2006, Reg; January 15, 2021, Susp.	.....do	Do.
South Dakota: Union County, Unincorporated Areas.	460242	April 23, 1975, Emerg; February 1, 1987, Reg; January 15, 2021, Susp.	.....do	Do.

*-do- = Ditto.
Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Katherine B. Fox,
Assistant Administrator for Mitigation, Federal Insurance and Mitigation Administration—FEMA Resilience, Department of Homeland Security, Federal Emergency Management Agency.

[FR Doc. 2021–00609 Filed 1–12–21; 8:45 am]
BILLING CODE 9110–12–P

FEDERAL MARITIME COMMISSION

46 CFR Part 506

[Docket No. 21–01]

RIN 3072–AC85

Inflation Adjustment of Civil Monetary Penalties

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission (Commission) is publishing this final rule to adjust for inflation the civil monetary penalties assessed or enforced by the Commission, pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act). The 2015 Act requires that agencies adjust and publish their civil penalties by January 15 each year.

DATES: This rule is effective January 15, 2021.

FOR FURTHER INFORMATION CONTACT: Rachel E. Dickon, Secretary; Phone: (202) 523–5725; Email: *secretary@fmc.gov.*

SUPPLEMENTARY INFORMATION: This rule adjusts the civil monetary penalties assessable by the Commission in accordance with the 2015 Act, which became effective on November 2, 2015. Public Law 114–74, section 701. The 2015 Act further amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), Public Law 101–410, 104 Stat. 890 (codified as amended at 28 U.S.C. 2461 note), in order to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect.

The 2015 Act requires agencies to adjust civil monetary penalties under their jurisdiction by January 15 each year, based on changes in the consumer price index (CPI–U) for the month of October in the previous calendar year. On December 23, 2020, the Office of Management and Budget published guidance stating that the CPI–U multiplier for October 2020 is 1.01182.[1] In order to complete the adjustment for

[1] Office of Management and Budget, M–21–10, Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, at 1 (Dec. 23, 2020) (M–21–10).

January 2021, the Commission must multiply the most recent civil penalty amounts in 46 CFR part 506 by the multiplier, 1.01182.

Rulemaking Analyses and Notices

Notice and Effective Date

Adjustments under the FCPIAA, as amended by the 2015 Act, are not subject to the procedural rulemaking requirements of the Administrative Procedure Act (APA) (5 U.S.C. 553), including the requirements for prior notice, an opportunity for comment, and a delay between the issuance of a final rule and its effective date.[2] As noted above, the 2015 Act requires that the Commission adjust its civil monetary penalties no later than January 15 of each year.

Congressional Review Act

The rule is not a ''major rule'' as defined by the Congressional Review Act, codified at 5 U.S.C. 801 *et seq.* The rule will not result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based companies to compete with foreign-based companies. 5 U.S.C. 804(2).

Regulatory Flexibility Act

The Regulatory Flexibility Act (codified as amended at 5 U.S.C. 601–612) provides that whenever an agency promulgates a final rule after being required to publish a notice of proposed rulemaking under the APA (5 U.S.C. 553), the agency must prepare and make available a final regulatory flexibility analysis describing the impact of the rule on small entities or the head of the agency must certify that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 604–605. As indicated above, this final rule is not subject to the APA's notice and comment requirements, and the Commission is not required to either conduct a regulatory flexibility analysis or certify that the final rule would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11. This final rule does not contain any collection of information, as defined by 44 U.S.C. 3502(3) and 5 CFR 1320.3(c).

Regulation Identifier Number

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The public may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at *http://www.reginfo.gov/public/do/eAgendaMain.*

List of Subjects in 46 CFR Part 506

Administrative practice and procedure, Claims, Penalties.

For the reasons stated in the preamble, 46 CFR part 506 is amended as follows:

PART 506—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

■ 1. The authority citation for part 506 continues to read as follows:

Authority: 28 U.S.C. 2461.

■ 2. Amend § 506.4 by revising paragraph (d) to read as follows:

§ 506.4 Cost of living adjustments of civil monetary penalties.

* * * * *

(d) *Inflation adjustment.* Maximum civil monetary penalties within the jurisdiction of the Federal Maritime Commission are adjusted for inflation as follows:

TABLE 1 TO PARAGRAPH (d)

United States Code citation	Civil monetary penalty description	Maximum penalty as of January 15, 2020	Maximum penalty as of January 15, 2021
46 U.S.C. 42304	Adverse impact on U.S. carriers by foreign shipping practices	$2,140,973	$2,166,279
46 U.S.C. 41107(a)	Knowing and Willful violation/Shipping Act of 1984, or Commission regulation or order.	61,098	61,820
46 U.S.C. 41107(a)	Violation of Shipping Act of 1984, Commission regulation or order, not knowing and willful.	12,219	12,363
46 U.S.C. 41108(b)	Operating in foreign commerce after tariff suspension	122,197	123,641
46 U.S.C. 42104	Failure to provide required reports, etc./Merchant Marine Act of 1920	9,639	9,753
46 U.S.C. 42106	Adverse shipping conditions/Merchant Marine Act of 1920	1,927,676	1,950,461
46 U.S.C. 42108	Operating after tariff or service contract suspension/Merchant Marine Act of 1920.	96,384	97,523
46 U.S.C. 44102, 44104	Failure to establish financial responsibility for non-performance of transportation.	24,346 812	24,634 822
46 U.S.C. 44103, 44104	Failure to establish financial responsibility for death or injury	24,346 812	24,634 822
31 U.S.C. 3802(a)(1)	Program Fraud Civil Remedies Act/making false claim	11,665	11,803
31 U.S.C. 3802(a)(2)	Program Fraud Civil Remedies Act/giving false statement	11,665	11,803

[2] FCPIAA section 4(b)(2); M–21–10 at 3.

By the Commission.

Rachel Dickon,

Secretary.

[FR Doc. 2021–00323 Filed 1–12–21; 8:45 am]

BILLING CODE 6730–02–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CG Docket No. 20–93; FCC 20–171; FRS 17291]

Protecting Consumers From One-Ring Scams

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) implements section 12 of the TRACED Act in order to enable voice service providers to block calls from numbers associated with a type of illegal robocall known as a one-ring scam. The Commission also, pursuant to the TRACED Act, expands collaborative law enforcement and consumer education activities to stop one-ring scams and other fraudulent and abusive robocalling practices. The measures adopted by the Commission empower voice service providers to stop these illegal robocalls and will give consumers substantial additional protection from these scams.

DATES: Effective February 12, 2021.

FOR FURTHER INFORMATION CONTACT: Mika Savir of the Consumer Policy Division, Consumer and Governmental Affairs Bureau, at *mika.savir@fcc.gov* or (202) 418–0384.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, FCC 20–171, CG Docket No. 20–93, adopted on November 24, 2020, and released on November 30, 2020. The full text of this document is available online at *https://docs.fcc.gov/public/attachments/FCC-20-171A1.docx.* To request this document in accessible formats for people with disabilities (*e.g.,* Braille, large print, electronic files, audio format) or to request reasonable accommodations (*e.g.,* accessible format documents, sign language interpreters, CART), send an email to *fcc504@fcc.gov* or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY).

Congressional Review Act

The Commission sent a copy of document FCC 20–171 to Congress and the Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

Final Paperwork Reduction Act of 1995 Analysis

The Report and Order does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. It, therefore, 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).

Synopsis

1. In the Report and Order, the Commission implements section 12 of the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement Act (TRACED Act), Public Law 116–105, 12, December 30, 2019, 133 Stat. 3286 (codified at 47 U.S.C. 227 note). Section 12 of the TRACED Act directs the Commission to consider taking additional steps to protect called parties from a type of illegal call known as the one-ring scam. In the Report and Order, the Commission adopts the proposal in the Notice of Proposed Rulemaking (NPRM), published at 85 FR 30672, May 20, 2020, with some minor modifications. The Commission adds a new paragraph (k)(2)(iv) to 47 CFR 64.2400 to allow voice service providers to block all calls from a telephone number that the provider identifies, based on reasonable analytics, as highly likely to be associated with a one-ring scam. The Commission also adopts a definition of one-ring scam in paragraph (f)(8) that is consistent with the definition set forth in the proposed rule: The term one-ring scam means a scam in which a caller makes a call and allows the call to ring the called party for a short duration, in order to prompt the called party to return the call, thereby subjecting the called party to charges.

2. Based on the record, the Commission concludes that these rule changes will help protect consumers from the scam and, consistent with section 12(b)(4) of the TRACED Act, will incentivize voice service providers to stop calls made to perpetrate one-ring scams from being received by called parties. This rule amendment is also consistent with the congressional directive in the same section of the statute regarding the addition of identified one-ring scam type numbers to the Commission's existing list of permissible categories for carrier-initiated blocking. In addition, pursuant to section 12(b)(5) of the TRACED Act, this rule takes into account and relies, in part, on the work of entities that provide call-blocking services to address one-ring scams.

3. One-ring scam calls serve no beneficial purpose, and thus no reasonable consumer would want to receive them. Accordingly, the Commission does not require terminating providers to give their customers an opportunity to opt out of the blocking of such calls. The Commission encourages voice service providers to implement call-blocking measures that will help eliminate or reduce the number of one-ring scam calls that reach consumers.

4. The Commission also extends to one-ring scam blocking the safe harbor for inadvertent blocking of wanted robocalls using reasonable analytics. This safe harbor gives voice service providers assurance that blocking of one-ring scam calls based on reasonable analytics will not result in liability if they inadvertently block wanted calls, and it thus strengthens their ability and incentive to protect consumers from such scams. For this reason, the Commission is adding a reference to reasonable analytics—a term that was not included in the rule text proposed in the NPRM—to paragraph (k)(2)(iv) of the final rule.

5. While voice service providers already have authority to block illegal one-ring scam calls, the rule adopted herein will remove any doubt that voice service providers may lawfully use reasonable analytics to identify and block calls that appear to be one-ring scam calls, even if such identification proves to be erroneous in any particular instance; that they may do so without fear of liability for inadvertently blocking wanted calls; and that they may do so on a network-wide basis. The Commission believes this will strongly encourage voice service providers to take a more aggressive approach to blocking one-ring scam calls and thus will further protect consumers from such scams.

6. Some commenters recommended that the Commission focus on combatting one-ring scam calls that fraudulently induce consumers to place calls to premium-rate numbers under a foreign government's national numbering plan, subject to analytics that suggest reasonable cause to treat such inbound calls as scam calls. The Commission agrees that voice service providers could block such inbound calls if they satisfy the applicable criteria in the rules.

7. Section 12(b)(6) of the TRACED Act directs the Commission to consider requiring international gateway providers to verify the nature or purpose of calls but does not require the Commission to adopt such a rule. The Commission stated that it would consider this proposal in the context of another pending proceeding, in which it sought comment on adopting a broader set of safeguards that would require voice service providers to take affirmative, effective measures to prevent new and renewing customers from using their networks to originate illegal calls and would hold them responsible for doing due diligence on their high-volume customers. *See* Advanced Methods to Target and Eliminate Unlawful Robocalls, published at 85 FR 46063, July 31, 2020, paragraph 13.

8. Pursuant to section 12(b)(1) of the TRACED Act, the Commission is working with federal and state law enforcement agencies to protect consumers from one-ring scams by participating in an interagency working group, convened by the Attorney General, in consultation with the Chairman of the Commission, to study Government prosecution of violations of 47 U.S.C. 227(b), and will ensure that the group addresses one-ring scams. Pursuant to section 12(b)(2) of the TRACED Act, the Commission intends to expand and enhance its enforcement coordination and cooperation with foreign governments aimed at combatting unlawful cross-border schemes such as one-ring scams. And pursuant to section 12(b)(3) of the TRACED Act, the Commission will continue and expand its proactive consumer outreach efforts, in conjunction with the Federal Trade Commission, to better educate consumers about how to avoid one-ring scams as well as other fraudulent and abusive robocalling practices.

Final Regulatory Flexibility Analysis

9. As required by the Regulatory Flexibility Act of 1980, as amended, (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the NPRM in this docket. The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA. The Final Regulatory Flexibility Analysis FRFA conforms to the RFA.

10. *Need for, and Objectives of, the Rules.* In the Report and Order, the Commission adopts, with some modification, the proposal in the NPRM to include numbers that are likely to be associated with the one ring scam as a category of numbers that voice service providers can block. This will implement section 12 of the TRACED Act, to prevent consumers from a type of scam called a one-ring scam. The TRACED Act defines ''one-ring scam'' as ''a scam in which a caller makes a call and allows the call to ring the called party for a short duration, in order to prompt the called party to return the call, thereby subjecting the called party to charges.''

11. Section 12 of the TRACED Act requires the Commission to initiate a proceeding to protect consumers from one-ring scams and to consider the following ways: Work with federal and state law enforcement agencies; work with the governments of foreign countries; in consultation with the FTC, better educate consumers about how to avoid one-ring scams; encourage voice service providers to stop one-ring scam calls, including adding identified one-ring scam-type numbers to the list of permissible categories for carrier-initiated blocking; work with entities that provide call-blocking services to address one-ring scams; and establish obligations on international gateway providers, including potential requirements that such providers verify with the foreign originator the nature or purpose of calls before initiating service.

12. *Summary of Significant Issues Raised by Public Comments in Response to the IRFA.* There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

13. *Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration.* 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. The Chief Counsel did not file any comments in response to the proposed rules in this proceeding.

14. *Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements.* Voice service providers may implement reporting or recordkeeping in order to accomplish blocking of one-ring scam calls, but it is not required in the rule.

15. *Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered.* The RFA requires an agency to describe any significant alternatives that it has considered in reaching its 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 or reporting requirements under the rule for 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 small entities.

16. The Commission's rule allows, but does not require, voice service providers to block calls from numbers that they identify, using reasonable analytics, as likely to be associated with one-ring scams. The rule is permissive, not mandatory; it allows all voice service providers, including small businesses, to block such calls, but it does not impose any new compliance obligations or reporting obligations. To the extent this new rule has any economic impact on voice service providers that are small entities, the impact will likely be beneficial because they will be shielded from liability if they opt to block calls in the manner described in the Report and Order.

List of Subjects in 47 CFR Part 64

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

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

Final Rules

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

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

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

Authority: 47 U.S.C. 151, 152, 154, 201, 202, 217, 218, 220, 222, 225, 226, 227, 227b, 228, 251(a), 251(e), 254(k), 262, 276, 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 § 64.1200 by redesignating paragraphs (f)(8) through (f)(17) as (f)(9) through (f)(18), and adding paragraphs (f)(8) and (k)(2)(iv), to read as follows:

§ 64.1200 Delivery Restrictions.

* * * * *

(f) * * *

(8) The term *one-ring scam* means a scam in which a caller makes a call and allows the call to ring the called party for a short duration, in order to prompt the called party to return the call,

thereby subjecting the called party to charges.

* * * * *

(k) * * *

(2) * * *

(iv) A telephone number that the provider identifies, based on reasonable analytics, as highly likely to be associated with a one-ring scam.

* * * * *

[FR Doc. 2020–27652 Filed 1–12–21; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 106, 107, 171, 172, 173, 174, 175, 176, 177, 178, 179, and 180

[Docket No. PHMSA–2018–0082 (HM–260A)]

RIN 2137–AF43

Hazardous Materials: Editorial Corrections and Clarifications

Correction

In rule document 2020–23353 appearing on pages 83366 through 83403 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83366, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

(2) On page 83366, in the second column, on line twenty-nine change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–23353 Filed 1–12–21; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2018–0082; FF09E22000 FXES11130900000 201]

RIN 1018–BC11

Endangered and Threatened Wildlife and Plants; Removal of the Interior Least Tern From the Federal List of Endangered and Threatened Wildlife

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are removing the inland population of the least tern (Interior least tern) (*Sterna* (now *Sternula*) *antillarum*), from the Federal List of Endangered and Threatened Wildlife due to recovery. This determination is based on a thorough review of the best available scientific and commercial data, which indicates that the Interior least tern has recovered and the threats to the Interior least tern have been eliminated or reduced to the point that the species no longer meets the definition of an endangered species or threatened species under the Endangered Species Act of 1973, as amended (Act). Accordingly, the prohibitions and protections provided by the Act will no longer apply to the Interior least tern.

DATES: This rule is effective February 12, 2021.

ADDRESSES: The proposed and final rules, supporting documents, and the comments received on the proposed rule are available on the internet at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0082, at *https://www.fws.gov/mississippiES/,* or at *https://ecos.fws.gov.*

FOR FURTHER INFORMATION CONTACT: Stephen Ricks, Field Supervisor, U.S. Fish and Wildlife Service, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; telephone (601) 321–1122. Individuals who use a telecommunications device for the deaf (TDD), may call the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. Under the Act, a species may be removed from the Federal List of Endangered and Threatened Wildlife (List) if it is determined that the species has recovered and no longer meets the definition of an endangered or threatened species. Removing a species from the List can only be completed by issuing a rule.

What this document does. This rule removes the Interior least tern (*Sterna* (now *Sternula*) *antillarum*) from the List in title 50 of the Code of Federal Regulations (50 CFR 17.11(h)) based on its recovery.

The basis for our action. Under the Act, we determine that a species is an endangered species or a threatened species based on any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We must consider the same factors when removing a species from the List (*i.e.,* ''delisting'' a species). We may delist a species if we find, after conducting a status review based on the best scientific and commercial data available, that: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species (*e.g.,* because it has recovered); or (3) the listed entity does not meet the statutory definition of a species (50 CFR 424.11(e)). We have determined that the Interior least tern is not in danger of extinction now nor likely to become so in the foreseeable future based on a comprehensive review of its status and listing factors. Accordingly, we have determined that the species may be delisted based on recovery as a result of: (1) A range extension; (2) an increase in abundance and number of breeding sites; (3) resiliency to existing and potential threats; (4) the implementation of beneficial management practices; and (5) changes in existing regulatory mechanisms that are more protective of migratory bird habitats.

Peer review and public comment. We evaluated the species' needs, current conditions, and future conditions to prepare our October 24, 2019, proposed rule (84 FR 56977). We sought and evaluated comments from independent specialists to ensure that our determination is based on scientifically sound data, assumptions, and analyses. We also invited these peer reviewers to comment on the draft post-delisting monitoring (PDM) plan. We considered all comments and information we received during the public comment period on the proposed delisting rule and the draft PDM plan when developing this final rule.

Previous Federal Actions

On October 24, 2019, we published a proposed rule to remove the Interior least tern from the Federal List of Endangered and Threatened Wildlife (84 FR 56977). Please refer to that proposed rule for a detailed description of previous Federal actions concerning this species. The proposed rule and supplemental documents are provided at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0082 or at *https://www.fws.gov/mississippiES/.*

Species Information

Taxonomy and Genetics

Least terns within the Interior Basin of North America were described as *Sterna antillarum athalassos,* a subspecies of the eastern least tern (*S. antillarum antillarum*) (Burleigh and

Lowery 1942, pp. 173–177). In 2006, the American Ornithologist's Union recognized least terns under a previously published genus (*Sternula*) based on mitochondrial DNA phylogeny (Bridge *et al.* 2005, p. 461). Interior least tern was one of three subspecies of New World (North and South America) least terns previously recognized by the American Ornithologists' Union (1957, p. 239), including the eastern least tern and the California least tern (*S. antillarum browni*). However, due to taxonomic uncertainty surrounding least tern subspecies at the time of listing (50 FR 21784; May 28, 1985), we treated the Interior least tern as a population of eastern least tern.

Since that time, genetic analyses of North American populations of least tern found no evidence of differentiation warranting subspecies recognition (*e.g.,* Whittier 2001, p. 10; Draheim *et al.* 2010, pp. 813–815; Draheim *et al.* 2012, p. 146). Genetic exchange between eastern least terns and Interior least terns is occurring at a rate greater than three migrants per generation between populations (Whittier *et al.* 2006, p. 179). After reviewing the best available scientific information regarding the taxonomy of the Interior least tern, we continue to conclude that it is a distinct population segment of the eastern least tern (*Sternula antillarum*).

Species Description

Least terns are the smallest members of the family Laridae, measuring 21 to 23 centimeters (cm) (8 to 9 inches (in)) long with a 56-cm (22-in) wingspan (Thompson *et al.* 1997, pp. 1–2). Sexes look alike, characterized in the breeding plumage by a black crown, white forehead, grayish back and dorsal wing surfaces, snowy white undersurfaces, orange legs, and a black tipped yellow bill. Immature birds have darker plumage, a dark bill, and dark eye stripes on their white heads. Least terns are distinguished from all other North American terns by their small size. Interior least terns can only be separated from eastern and California least terns by the geographic area used for nesting.

Life Span

Interior least terns are potentially long-lived, with records of recapture more than 20 years following banding (Thompson *et al.* 1997, p. 15); however, the average life span is probably less.

Nesting Habitat and Behavior

Least terns begin breeding and nesting in their second or third year and breed annually throughout their lives (Thompson *et al.* 1997, p. 15). Prior to nesting, young birds exhibit some level of prospecting behavior (exploratory dispersal) across the landscape (*e.g.,* Boyd and Thompson 1985, p. 405; Lott 2012, p. 12; Shigeta *in litt.* 2014, entire).

Interior least terns generally nest on the ground, in open areas, and near appropriate feeding habitat (Lott and Wiley 2012, pp. 9–11). Nests are simple scrapes in the sand, and nesting sites are characterized by coarser and larger substrate materials, more debris, and shorter and less vegetation compared to surrounding areas (Smith and Renken 1993, p. 501; Stucker 2012, p. 49). Typical least tern clutch size is reported as two to three eggs (Thompson *et al.* 1997, p. 15); however, clutch size may vary by location and year (*e.g.,* Szell and Woodrey 2003, p. 37; Jones 2012, p. 3).

Natural nesting habitat features are maintained and influenced by magnitude and timing of riverine flood events (Sidle *et al.* 1992, p. 134; Renken and Smith 1995, pp. 194–195; Pavelka *in litt.* 2012, p. 2). The Interior least tern prefers vegetation-free sand or gravel islands for nesting, although sand banks, point bars, salt flats or plains, and beaches may also be used. Interior least terns prefer areas remote from trees or other vegetation that may hide or support predators (Lott and Wiley 2012, pp. 9–11). Least terns also nest on anthropogenic sites (originating from human activity) (Jackson and Jackson 1985, p. 57; Lott 2006, p. 10) near water bodies that contain appropriate and abundant prey fishes. Anthropogenic sites used by the tern include industrial sites (Ciuzio *et al.* 2005, p. 102; Mills 2012, p. 2), dredge spoil (Ciuzio *et al.* 2005, p. 102), sand pits (Smith 2008, p. 2), constructed habitats (Stucker 2012, pp. 59–66), and rooftops (Boland 2008, entire; Watterson 2009, entire).

Lott and Wiley (2012, pp. 9–11) described five physical and biological conditions that are necessary for Interior least tern nest initiation and successful reproduction:

(1) Nest sites that are not inundated (flooded) during egg laying and incubation;

(2) Nesting sites that are not inundated until chicks can fly;

(3) Nesting sites with less than 30 percent ground vegetation;

(4) Nesting sites that are more than 76 meters (m) (250 feet (ft)) from large trees; and

(5) Availability of prey fishes to support chick growth until fledging.

Interior least terns are colonial nesters. Colony size may vary from a few breeding birds to more than 1,200 (Jones 2012, p. 3). Populations in some river drainages may be limited by annual availability of nesting habitat (*e.g.,* Missouri River; Stucker 2012, p. 104), while potential nesting habitat is generally abundant and underused in other drainages (*e.g.,* Mississippi River; U.S. Army Corps of Engineers (USACE) 2008, pp. 10–13). Nesting site conditions (*e.g.,* habitat suitability, flood cycles, prey fish abundance, predation pressure) can vary significantly from year to year in all drainages, resulting in wide fluctuations in bird numbers (Jones 2012, p. 14) and/or nesting success (Smith and Renken 1993, p. 41; Lott and Wiley 2012, p. 15). However, Interior least terns may re-nest, or relocate and re-nest, if nests or chicks are destroyed early in the season (Massey and Fancher 1989, pp. 353–354; Thompson *et al.* 1997, p. 15). Interior least tern chicks leave their nests within a few days of hatching (semiprecocial), but remain near the nests and are fed by their parents until fledging (Thompson *et al.* 1997, pp. 14–15).

Food and Foraging Habitat

Interior least terns are primarily piscivores (fish-eaters), and feed opportunistically on small fish species or the young of larger fish species. Prey species include native species such as shad (*Dorosoma* spp.), carps and minnows (Cyprinidae), freshwater drum (*Aplodinotus grunniens*), largemouth bass (*Micropterus salmoides*), white bass (*Morone chrysops*), sunfishes (*Lepomis* spp.), and top minnows (*Fundulus* spp.), as well as invasive species such as silver and bighead carp (*Hypophthalmichthys* spp.) (USACE 2008, pp. 16, 26). On the Missouri River, prey species include emerald shiner (*Notropis atherinoides*), sand shiner (*Notropis stramineus*), spotfin shiner (*Cyprinella spiloptera*), and bigmouth buffalo (*Ictiobus cyprinellus*) (Stucker 2012, p. 6). Least terns will also occasionally feed on aquatic or marine invertebrates (Thompson *et al.* 1997, pp. 6–7). Riverine foraging habitats and fish abundance may be influenced by stochastic (random) hydrological conditions and events (*i.e.,* flow, and flood timing and magnitude), and channel engineering (Schramm 2004, pp. 307, 321–323).

In the Missouri River drainage, Interior least terns forage for fish in shallow water habitats and within 12 kilometers (km) (7 miles (mi)) from colony sites (Stucker 2012, p. 24). In the Lower Mississippi River, foraging terns have been observed feeding in a variety of habitats within 3 km (2 mi) of colony sites (Jones 2012, pp. 5–6).

Migration and Winter Habitat

Interior least tern fall migrations generally follow major river basins to their confluence with the Mississippi River and then south to the Gulf of Mexico; however, late summer observations of least terns more than 150 km (93 mi) from major river drainages indicate that some birds migrate over land (Thompson *et al.* 1997, p. 16). Interior least terns gather in flocks in August prior to migration. Once they reach the Gulf Coast, they cannot be distinguished from other least tern populations en route to, or within, their winter habitats (*i.e.,* Gulf of Mexico, Caribbean islands, Central and South America); therefore, the limited information on migration and winter habitat is inclusive of other populations (*i.e.,* Caribbean, Gulf Coast, East Coast). Least terns appear to migrate in small, loose groups along or near shore, feeding in shallows and resting onshore (Thompson *et al.* 1997, pp. 4–6). Very little is known of least tern winter habitats, other than that the birds are primarily observed along marine coasts, in bays and estuaries, and at the mouths of rivers (Thompson *et al.* 1997, p. 6).

Breeding/Natal Site Fidelity and Dispersal

Breeding-site fidelity for least terns varies in different populations and breeding areas. Return rates of banded adults to the sites where they were banded was 36 to 86 percent in California colonies; 42 percent on the Mississippi River; 28 percent on the central Platte River, Nebraska; and 81 percent at Quivira National Wildlife Refuge in Kansas and on the Cimarron River in Oklahoma (Thompson *et al.* 1997, p. 16). Fidelity to natal site is also variable and difficult to estimate because re-sightings or recaptures of terns banded as chicks have been limited. Estimates of natal site fidelity have varied from 5 percent on the Mississippi River, to 82 percent in Kansas and Oklahoma (Thompson *et al.* 1997, p. 16).

Site fidelity in least terns may be affected by physical habitat variables or the extent and type of predation (Atwood and Massey 1988, p. 394). As noted above, least terns are strong fliers and can relocate if conditions on natal or previous-year nesting grounds become unfavorable. A study of eastern least terns found an average 22 percent turnover rate in nesting colony sites, primarily due to changes in habitat condition or disturbance (Burger 1984, p. 66).

Lott *et al.* (2013, pp. 3617–3618) found that 50 to 90 percent of reported recaptures occurred less than 26 km (16 mi) from the original banding sites, while more than 90 percent dispersed less than 96 km (59 mi), indicating a high degree of adult site fidelity and natal site philopatry (remaining near their point of origin). However, long distance dispersal (up to 1,000 km; 621 mi) has been documented (*e.g.,* Renken and Smith 1995, pp. 196–198; Boyd and Sexson 2004, p. 88; Lott *et al.* 2013, pp. 3617–3618), and may not be uncommon (Boyd and Thompson 1985, p. 405). Least tern nesting has also been documented in Brazil (Rodrigues *et al.* 2010, entire) and Hawaii (Conant *et al.* 1991, entire; Pyle *et al.* 2001, entire). During 2014, an Interior least tern banded in the Missouri River drainage was captured in Japan, along with another unbanded tern (Shigeta *in litt.* 2014).

Predation

Interior least tern eggs, chicks, and adults are prey for a variety of mammal and bird predators. Reported predators include birds (*e.g.,* crows, herons, owls, and hawks), mammals (*e.g.,* fox, coyote, racoon, and skunk), and catfish, as well as domesticated and feral dogs and cats (Thompson *et al.* 1997, pp. 10–11). The cryptic coloration of eggs and chicks, the secretive behavior of chicks, and the mobbing behavior (attack flights on potential predators) of adults, all serve to protect eggs and chicks from predators (Thompson *et al.* 1997, p. 11).

Location and size of nesting colonies also has a significant influence on degree of predation. Interior least tern reproductive success is higher on island colonies as compared to connected sandbar colonies, and when water levels maintain isolation of islands and nesting bars from mammalian predators (Smith and Renken 1993, p. 42; Szell and Woodrey 2003, p. 41). Additionally, significantly higher rates of predation were documented in larger colonies compared to smaller colonies (Burger 1984, p. 65).

Historical Distribution and Abundance

The Service defined the historical breeding range of the Interior least tern to include the Colorado (in Texas), Red, Rio Grande, Arkansas, Missouri, Ohio, and Mississippi Rivers systems from Montana south to Texas, and from New Mexico east to Indiana (50 FR 21784; May 28, 1985). However, in order to avoid confusion with eastern least tern, the Service excluded the Mississippi River south of Baton Rouge, Louisiana, the Texas Coast, and a 50-mile zone inland from the coast of Texas from the protected range of Interior least tern (50 FR 21784, May 28, 1985, p. 21789).

The historical distribution and abundance of the Interior least tern within this range is poorly documented. Hardy (1957, entire) provided the first information on least tern distribution on large interior rivers, documenting records of occurrence and nesting in the Mississippi, Ohio, Missouri, Arkansas, and Red River drainages. Downing (1980, entire) published results from a rapid aerial/ground survey of a subset of these rivers, identifying additional nesting populations within the range noted above, and estimated the Interior least tern population at approximately 1,250 adult birds. Ducey (1981, pp. 10–50) doubled the number of known nesting sites, including areas between the scattered observations reported in Hardy (1957, entire). Ducey also extended the northern distribution of the Interior least tern to include the Missouri River below Garrison Dam in North Dakota and Fort Peck Dam in Montana. These three publications (Hardy 1957, entire; Downing 1980, entire; Ducey 1981, entire) provide the primary historical sources of information about the Interior least tern's geographic range, and were used to reach the estimate of 1,400 to 1,800 adults rangewide in the listing rule (50 FR 21784; May 28, 1985).

Current Distribution and Abundance

The current east to west distribution of summer nesting Interior least terns encompasses more than 18 degrees of longitude, or 1,440 km (900 mi), from the Ohio River, Indiana and Kentucky, west to the Upper Missouri River, Montana. The north to south distribution encompasses over 21 degrees of latitude (more than 2,300 km (1,450 mi)) from Montana to southern Texas. Interior least terns currently nest along more than 4,600 km (2,858 mi) of river channels across the Great Plains and the Lower Mississippi Valley (Lott *et al.* 2013, p. 3623), with nesting colonies found in 18 States, including: Montana, North Dakota, South Dakota, Nebraska, Colorado, Iowa, Kansas, Missouri, Illinois, Indiana, Kentucky, New Mexico, Oklahoma, Arkansas, Tennessee, Texas, Louisiana, and Mississippi. As noted above, this does not include least tern colonies nesting along the coasts of Texas, Louisiana, and Mississippi.

Rangewide surveys in 2005 estimated an approximate minimum adult population size of 17,500, with nesting occurring in more than 480 colonies spread across 18 States, which is likely an underestimate given imperfect detection of adults and survey coverage of potential habitat (Lott 2006, pp. 10–21, 50). Lott (2006, pp. 13–15) also

provided counts for 21 populations or population segments that were unknown at the time of listing, which collectively support more than 2,000 terns.

Population Trends

The Interior least tern has demonstrated a positive population trend, increasing by almost an order of magnitude (or 10 times what it was prior) since it was listed in 1985. After it was listed, researchers increased survey effort and the geographical extent of the area surveyed, producing sufficient Interior least tern count data to analyze population trends for several river reaches that support persistent breeding colonies. Kirsch and Sidle (1999, p. 473) reported a rangewide population increase to over 8,800 adults in 1995, and found that 29 of 31 Interior least tern locations with multi-year monitoring data were either increasing or stable. Lott (2006, p. 50) reported an increase to over 17,500 adult birds in 2005, forming 489 colonies in 68 distinct geographic sites. While some proportion of the rangewide increase in adult bird counts and number of nesting colonies are likely attributable to increased survey efforts and improved survey techniques, both Kirsch and Sidle (1999, p. 473), and Lott and Sheppard (2017a, pp. 50–52) documented multiple drainage population increases using multi-year counts.

Lott (2006, p. 92) conceptualized the Interior least tern functioning as a large metapopulation (a regional group of connected populations of a species), which might also include least terns on the Gulf Coast. Using available information on dispersal of least terns, Lott *et al.* (2013, pp. 3616–3617) defined 16 discrete breeding populations of Interior least tern, with 4 major geographical breeding populations (population complexes) accounting for more than 95 percent of all adult birds and nesting sites throughout the range. Portions of these four population complexes have experienced multi-year monitoring to different degrees. While some local (colony, subpopulation) declines have been documented, the Interior least tern has experienced a dramatic increase in range and numbers since listing and development of the recovery plan (*e.g.,* Kirsch and Sidle 1999, p. 473; Lott 2006, pp. 10–49). There has been no reported extirpation of any population or subpopulation since the species was listed in 1985.

Recovery Criteria

Section 4(f) of the Act directs us to develop and implement recovery plans for the conservation and survival of endangered and threatened species unless we determine that such a plan will not promote the conservation of the species. Recovery plans must, to the maximum extent practicable, include ''objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions [of section 4 of the Act], that the species be removed from the list.''

Recovery plans provide a roadmap for us and our partners on methods of enhancing conservation and minimizing threats to listed species, as well as measurable criteria against which to evaluate progress towards recovery and assess the species' likely future condition. However, they are not regulatory documents and do not substitute for the determinations and promulgation of regulations required under section 4(a)(1) of the Act. A decision to revise the status of a species, or to delist a species is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

There are many paths to accomplishing recovery of a species, and recovery may be achieved without all of the criteria in a recovery plan being fully met. For example, one or more criteria may be exceeded while other criteria may not yet be accomplished. In that instance, we may determine that the threats are minimized sufficiently and the species is robust enough that it no longer meets the definition of an endangered species or a threatened species. In other cases, we may discover new recovery opportunities after having finalized the recovery plan. Parties seeking to conserve the species may use these opportunities instead of methods identified in the recovery plan. Likewise, we may learn new information about the species after we finalize the recovery plan. The new information may change the extent to which existing criteria are appropriate for identifying recovery of the species. The recovery of a species is a dynamic process requiring adaptive management that may, or may not, follow all of the guidance provided in a recovery plan.

The Service approved the Interior Least Tern Recovery Plan on September 19, 1990 (Service 1990, entire). The objective of the recovery plan was to establish standards for recovery that may lead to delisting the Interior least tern. Recovery criteria are the values by which it is determined that a recovery plan objective has been reached. Recovery criteria identified in the recovery plan were designed to assure the protection of essential habitat by removal of threats at that time and habitat enhancement, establish agreed-upon management plans, and attain a rangewide population of 7,000 birds at the levels listed below (for five major river drainages throughout the Interior least tern's range):

(1) Adult birds in the Missouri River system will increase to 2,100, and remain stable for 10 years.

(2) Current numbers of adult birds (2,200–2,500) on the Lower Mississippi River will remain stable for 10 years.

(3) Adult birds in the Arkansas River system will increase to 1,600, and remain stable for 10 years.

(4) Adult birds in the Red River system will increase to 300, and remain stable for 10 years.

(5) Current numbers of adult birds (500) in the Rio Grande River system will remain stable for 10 years.

Primary recovery tasks conducted to achieve the recovery objective and drainage population targets included:

(1) Determining the distribution and population trends of the Interior least tern;

(2) Determining habitat requirements and status;

(3) Protecting, enhancing, and increasing Interior least tern populations; and

(4) Preserving and enhancing the tern's habitats.

These are briefly reviewed below.

Rangewide Population Criterion to Delist

The Interior least tern rangewide numerical recovery criterion (7,000 birds) has been met and has been exceeded since 1994 (see Service 2013, pp. 7–127). Using rangewide seasonal count data from 1984 (722 terns) through 1995 (8,859 terns), Kirsch and Sidle (1999, pp. 473–477) demonstrated achievement of the numerical recovery criterion and a positive population growth trend. They noted that most of the Interior least tern increase had occurred on the Lower Mississippi River, observed that population increases were not supported by fledgling success estimates available at that time, and hypothesized that Interior least tern increases were possibly due to immigration surges from a more abundant least tern population inhabiting the Gulf Coast (Kirsch and Sidle 1999, p. 478).

Lott (2006, entire) organized, compiled, and reported a synchronized rangewide count for Interior least tern in 2005, finding tern numbers had doubled

since 1995 (17,591 birds rangewide; 62 percent occurring along the Lower Mississippi River), equaling or exceeding least tern population estimates along the U.S. Gulf Coast (Lott 2006, p. 50). Since 2006, the majority of Interior least terns continue to be reported from the Lower Mississippi River (Service 2013, p. 11). As did Kirsch and Sidle (1999, p. 478), Lott (2006, p. 52) also hypothesized a wider least tern metapopulation, which included Gulf Coast and interior subpopulations, and the possibility of a shift of birds from the Gulf Coast to inland habitats due to the presence of better nesting conditions, particularly on the Lower Mississippi River. However, there are few data directly supporting the Kirsch and Sidle (1999, pp. 473–477) or the Lott (2006, p. 52) immigration hypotheses as a factor in the 20-year increase in Interior least tern counts. There has not been a complete or organized rangewide count since 2005; however, some geographic segments continue to be annually monitored, including portions of the Missouri (USACE *in litt.* 2017, entire), Platte (Keldsen and Baasch 2016, entire), Red (Stinson *in litt.* 2017, entire), Arkansas (Cope *in litt.* 2017, entire; Nupp 2016, entire), and Wabash Rivers (Mills 2018, entire). These partial counts indicate that we continue to exceed the recovery goal of 7,000 birds (Service 2013, pp. 11–12).

Numerical Population Targets

In addition to the numerical population targets identified in the recovery plan for five major river drainages throughout the tern's range (see above), sub-drainage targets were also identified for the Missouri and Arkansas River drainages (Service 1990, pp. 28–29). Drainage and sub-drainage numerical targets were based upon the opinions of technical experts and State and Federal resource agencies of the potential for population increase at the time (Service 1990, p. 28). The drainage system population size targets have been exceeded in three of the five targeted drainages (Lower Mississippi (more than 25 years), Red (more than 15 years), and Arkansas Rivers (more than 10 years) (see Service 2013, pp. 22–26). As to the Rio Grande drainage, it is now recognized that the subpopulations found within the drainage represent recent exploitation of anthropogenic habitats (*i.e.,* salt flats and reservoirs) and are not historical habitats; thus, these areas were inappropriately designated as ''essential'' segments of the tern's ecosystem in the recovery plan (Service 2013, pp. 26–27). Therefore, numerical targets originally set for the Rio Grande drainage are no longer considered necessary for this species' recovery.

As to the Missouri River drainage, the Interior least tern population size has remained relatively stable (approximately 1,600 birds) over the 29 years since recovery criteria were identified (Service 2013, p. 11), and neither the drainage population target (2,100) nor many of the targets identified for Missouri River drainage segments have been consistently met (Service 2013, pp. 14–21). However, since the tern was listed, the Missouri River system has received a significant commitment of conservation attention and resources (USACE 2017a, pp. 1–17), particularly in comparison to other drainages that have experienced increases in tern populations. Based on the lack of increase in population, in light of the substantial commitment of resources, we conclude that that the Missouri River drainage is likely at the carrying capacity of the available habitat (Service 2013, pp. 14–21), and the recovery goal of 2,100 birds is not achievable. Periodic downward trends observed in a few Missouri drainage subpopulations have been reversed by habitat improvement following major floods (Pavelka 2012, p. 2), or offset by upward trends in other subpopulations (Pavelka 2012, pp. 7–8; Lott and Sheppard 2017a, pp. 49–53), indicating that the Missouri River drainage Interior least tern population is sustainable and recovered.

In short, some drainage population targets identified in the 1990 recovery plan have not been fully met, as the Rio Grande was inappropriately considered ''essential'' (see above) and the Missouri River drainage appears to be at carrying capacity and incapable of reaching the 2,100 target identified in the recovery plan. However, the inability to meet these drainage and sub-drainage targets have been offset by large increases in the Interior least tern populations within the Arkansas, Red, and Lower Mississippi Rivers, and by the discovery of numerous subpopulation segments throughout the Interior Basin that were either unrecognized or not occupied at the time of listing and recovery plan development, increasing the number of known breeding colonies from a few dozen at listing to more than 480 (Lott 2006, p. 10; also see Service 2013, pp. 31–33).

Habitat Criteria

Recovery plan delisting criteria required the protection, enhancement, and restoration of essential Interior least tern breeding habitats (Service 1990, pp. 28–29). Beyond the identification of specific river reaches as ''essential,'' habitat parameters were not defined, nor were specific objective and measurable criteria for their protection identified. The recovery plan outlined several tasks to protect and enhance Interior least tern habitats, including managing water flows, modifying construction activities, and protecting all areas identified as ''essential'' across the species' range through acquisition, easements, or agreements (Service 1990, pp. 29–50).

Recovery tasks identified for managing water flows are primarily relevant to portions of the Missouri, Red, and Arkansas River drainages, which cumulatively encompass about 20 percent of the Interior least tern breeding population. The majority of the remainder of the species' range occurs along unimpounded sections of the Mississippi River not subject to flow management. Over the past two decades, protective flow management actions have been identified and incorporated by USACE Northwest Division into their Missouri River Bank Stabilization and Navigation Project and operations of the Missouri River Reservoir System, including seasonal reservoir flow management to reduce nesting mortalities, and for sandbar augmentation and modification, vegetation management, predation control, human restriction measures, and water-level management for reservoir nesting areas (USACE 2017a, pp. 139–143). In the Southern Plains, USACE Southwest Division civil works projects in the Arkansas, Canadian, and Red River systems within Arkansas, Oklahoma, and Texas use reservoir storage and operation to reduce flooding; minimize land bridging, predation, and human disturbance during Interior least tern nesting season; and enhance nesting habitats at other times of the year (USACE 2002, pp. 3–4; 2016, pp. 18–20). These water management practices have been adopted by the respective USACE Divisions and Districts as best management practices (BMPs) and with commitments to continue into the future regardless of the future status of the Interior least tern under the Act (USACE 2016, pp. 2, 24; 2018, pp. 4–13–4–17).

Recovery tasks for modifying construction activities within river channels have been successfully implemented across Interior least tern habitats that are managed under USACE programs in jurisdictional waters (categories of waters defined under the Clean Water Act (33 U.S.C. 1251 *et seq.*) that include navigable waters, interstate waters, tributaries, impoundments, etc.). Construction practices critical to maintaining and protecting nesting

habitats have been incorporated into USACE river management programs as standard operating procedures (SOPs) or BMPs, including construction timing and work zone buffers to avoid disturbance of nesting colonies, dike modifications to protect and maintain habitat values, and dredge material disposal methods beneficial to maintaining nesting sand bars and islands (*e.g.,* USACE 2013, pp. 69–72; USACE 2016, p. 21). Other SOPs and BMPs incorporated into USACE programs promote ecosystem productivity important to tern foraging, including articulated concrete mat design, use of hardpoints in lieu of revetment, and strategic placement of woody debris within channels (*e.g.,* USACE 2013, p. 71). These existing management strategies and programs (USACE 2013, entire; 2016, entire; 2017a, entire) are protective of waters and habitats managed by USACE that support about 80 percent of the Interior least tern's range and have been a major factor in the recovery of the species. All USACE programs currently provide for adaptive management into the future, independent of the Federal listing status of the Interior least tern (USACE 2013, p. 71; 2016, pp. 2, 24; 2018, pp. 4–13–4–17).

New information developed over the past three decades relative to the ecology of Interior least tern and its habitats indicate that recovery tasks to protect ''essential'' habitats across the species' range through acquisition or easements are neither cost-effective nor necessary. Riverine habitat for Interior least terns is not static, and clearly experiences dramatic local or regional annual (at times, daily) variation in location, quantity, and quality. Describing and quantifying habitat quality is difficult, given the wide variety of conditions the bird is known to exploit (*e.g.,* rivers, reservoirs, rooftops).

The Interior least tern adjusts to habitat variation and change over its range through metapopulation dynamics (Hanski and Gilpin 1991, entire; Lott *et al.* 2013, p. 3620; Lott and Sheppard 2017, entire). A metapopulation consists of a network of populations with similar dynamics that are buffered against extinction by abandoning areas as habitats degrade, and dispersing and exploiting suitable habitats as they become available. Therefore, the importance of specific habitat segments to the species is likely to change with time. Within large metapopulations of mobile species, small subpopulations (or colonies within subpopulations) may occur in habitats where recruitment is inconsistent or may not exceed mortality (*i.e.,* population sinks), but which are maintained by immigration from colonies where recruitment exceeds mortality (*i.e.,* population sources). While exploitation of anthropogenic habitats by Interior least terns may indicate a lack of suitable habitat in an area, it may also indicate an overall population or subpopulation expansion. Sink colonies also play important roles in large metapopulations by providing opportunities for range expansion, and/or redundancy from episodic stochastic impacts to preferred natural habitats. While some colony sites may be periodic or consistent population sinks, there is no evidence that they are detracting from the Interior least tern's rangewide survival (*e.g.,* Lott and Sheppard 2017a, p. 51), particularly in consideration of the substantial increase in the known number and size of tern colonies over the past two decades, and the expansion of the species' distribution outside of its historical range (*i.e.,* Illinois, New Mexico, central Texas, Colorado; see Service 2013, pp. 31–33).

Based upon this understanding of Interior least tern population dynamics and habitat use, the recovery task of protecting all areas identified in 1990 as ''essential'' across the species' range through acquisition or easements is not necessary for the conservation of the species. This conclusion is supported by the increase in the species' range and abundance over the past 30 years without protections achieved through such acquisition or easements. Although some Interior least tern nesting colonies occur on protected public lands such as National Wildlife Refuges, they represent only a small portion (less than 2 percent) of the rangewide population. Additionally, as noted above, existing management agreements, strategies, and programs within jurisdictional waters are protective of the habitats that support about 80 percent of the Interior least tern population (USACE 2013, entire; 2016, entire; 2017, entire).

While the majority (80 percent) of Interior least tern nesting colonies are known from jurisdictional waters with a strong Federal connection with navigation systems or reservoirs, the remaining nesting colonies occur along rivers with a more limited Federal nexus, or on mining and industrial sites adjacent to or near rivers and reservoirs. On about 10 percent of these, Federal, State, and/or private conservation partnerships have developed and implemented conservation agreements and management programs beneficial to Interior least tern as well as other at-risk or endangered species. These programs generally post or restrict access, control predators, and conduct monitoring during nesting season, as well as conduct vegetation control and public education as opportunities present.

In the Platte River drainage, the Tern and Plover Conservation Partnership was initiated in 1999, at the University of Nebraska, School of Natural Resources. This partnership consists of a group of State, industrial, Federal, and other cooperators having an interest in tern and plover conservation and management on and along the Platte, Loup, and Elkhorn Rivers, with emphasis on nesting areas associated with sand and gravel mines, lake shore housing developments, and dredging operations (University of Nebraska-Lincoln 2019, entire). Long-term management of Interior least tern habitats in the Platte River drainage is also assured by an adaptive management plan developed and implemented by a partnership of State and industrial water users in Nebraska, Colorado, and Wyoming under the Platte River Recovery Implementation Program (Platte River Recovery Implementation Program 2019, entire). This program, initiated in 1997, also targets management needs of the endangered pallid sturgeon (*Scaphirhynchus albus*) and whooping crane (*Grus americana*), and the threatened piping plover (*Charadrius melodus*). Since both programs target other listed species with similar habitat requirements, and the Interior least tern is State-listed as endangered, these conservation programs and efforts are expected to continue regardless of a change in the Federal status of this species.

Interior least tern management in the Wabash River drainage began with the 1986 discovery of a single nesting pair on Gibson Generating Station property, Gibson County, Indiana (Hayes and Pike 2011, entire; Mills 2018, pp. 2–5). This colonization led to site monitoring, predator control, and other protective measures, including vegetation control, water management, and habitat management and creation, resulting in increasing numbers of terns and expansion of nesting colonies to multiple sites on public and private properties in the vicinity (Hayes and Pike 2011, entire). In 1999, management was formalized by development of a habitat conservation plan, which was renewed and revised in 2004, 2011, and 2018, by Duke Energy Corporation (Hayes and Pike 2011, entire). The Indiana Nongame and Endangered Wildlife Program continues to coordinate conservation and monitoring efforts on industrial and river sites along

the Wabash River by Duke Energy, the Service, and other Indiana Department of Natural Resources personnel and contractors (Mills 2018, p. 14). Since the Interior least tern may continue to be protected by the State of Indiana, management and monitoring is expected to continue to some degree, regardless of a change in the Federal status of species.

To various degrees, a number of additional small, localized, and often temporary breeding colonies of Interior least tern and their habitats have been managed, protected, and monitored at industrial, municipal, and reservoir sites under the Act's conservation (sections 6, 7(a)(1), and 10) or consultation (section 7(a)(2)) requirements. Managed sites have included coal mines (*e.g.,* Tanner and Hart 1998, entire), rooftops (*e.g.,* Boylan 2008, entire), and small reservoirs (*e.g.,* Nelson 2010, entire). Such efforts may or may not continue when the tern is delisted; however, it is also likely that the tern will continue to exploit small areas of suitable habitats as they are available and encountered in its range. While such populations contribute some small benefit to the rangewide redundancy and representation of the tern (see discussion of Population Trends, above), they cumulatively represent less than 2 percent of the summer nesting population and their success or failure within individual sites has little impact on the rangewide conservation status of the Interior least tern.

In summary, the expansion of the numbers and distribution of the Interior least tern, and its adaptation to and exploitation of anthropogenic habitats over the past several decades, indicate that the species is no longer conservation-reliant. Potential threats identified at the time of listing have been removed or ameliorated by conservation actions of multiple conservation partners, most principally the USACE, for more than 20 years. These actions have assisted in recovery of the species as reflected in the large number of individuals rangewide, stable to increasing drainage populations since listing, and a high number of self-sustaining colonies in 18 States. Furthermore, our partners in USACE Divisions and Districts within the range of the Interior least tern have cooperatively modified their programs to provide for the long-term management of nesting and foraging habitats for about 80 percent of the rangewide population of the species (USACE 2013, entire; 2016, entire; 2017, entire). Another 10 percent of the population is managed by State and private partnerships, which are expected to continue based upon State status and regulations. Regarding the remaining 10 percent of the population that nest in habitats with minimal or no management, while these areas contribute to redundancy and representation for the species, their success or failure within these sites is not essential to the continued existence of the Interior least tern.

Summary of Factors Affecting the Species

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an ''endangered species'' or a ''threatened species.'' The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether any species is an ''endangered species'' or a ''threatened species'' because of any of the following factors:

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term ''threat'' to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term ''threat'' includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term ''threat'' may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an ''endangered species'' or a ''threatened species.'' In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species—such as any existing regulatory mechanisms or conservation efforts. The Secretary of the Interior (Secretary) determines whether the species meets the definition of an ''endangered species'' or a ''threatened species'' only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

We must consider these same five factors in delisting a species. We may delist a species according to 50 CFR 424.11(e) if the best available scientific and commercial data indicate that: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species; or (3) the listed entity does not meet the statutory definition of a species.

A recovered species is one that no longer meets the Act's definition of endangered species or threatened species. Determining whether a species is recovered requires consideration of the same five categories of threats specified in section 4(a)(1) of the Act. For species that are already listed as endangered or threatened, this analysis of threats is an evaluation of both the threats currently facing the species and the threats that are reasonably likely to affect the species in the foreseeable future following delisting or downlisting (*i.e.,* reclassification from endangered to threatened) and the removal or reduction of the Act's protections.

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Our implementing regulations at 50 CFR 424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term foreseeable future extends only so far into the future as we can reasonably determine that both the future threats and the species' responses to those

threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

In considering the foreseeable future as it relates to the status of the Interior least tern, we consider the factors affecting the species and historical abundance trends. Our period of record for monitoring the species and its associated habitat is over three decades, which, when combined with our knowledge of factors affecting the species, allows us to reasonably predict future conditions. We think it is reasonable to define the foreseeable future for the Interior least tern to be 30 years based on analysis of these factors and as presented in more detail under *Future Conditions and Species Viability,* below.

When the Interior least tern was listed as endangered in 1985, the identified threats (factors) influencing its status were the modification and loss of habitat and curtailment of range (Factor A), predation and disturbance of local colonies (Factor C), and the inadequacy of State or Federal mechanisms to protect its habitat at that time (Factor D). The following analysis, based on an assessment of the Interior least tern, evaluates these previously identified threats, any other threats currently facing the species, and those threats that are reasonably likely to affect the Interior least tern in the foreseeable future following the delisting and the removal of the Act's protections.

Habitat Loss and Curtailment of Range

The primary threats identified for the Interior least tern in the 1985 final listing rule were associated with the destruction and modification of habitat due to channel engineering practices on large rivers of the Interior Basin (*i.e.,* damming, channelization, and channel stabilization) (50 FR 21784, May 28, 1985, pp. 21789–21790; Service 1990, pp. 22–23). Reservoirs had inundated hundreds of miles of historical or potential tern riverine habitat in many Mississippi River Basin drainages, and reduced sediment input into channels below dams had caused channel degradation, constriction, and loss of potential nesting habitats. Channelization, channel training structures (dikes), and bank stabilization in the Missouri, Mississippi, and Ohio Rivers prevented natural geomorphic response to loss of sediments, resulting in deepened and narrowed channels, and loss or terrestrialization (vegetation encroachment) of potential nesting sandbars and islands. Reservoir releases for hydropower, navigation, and flood control also were found to adversely affect Interior least tern populations surviving below these same dams (Service 1990, p. 22). These trends of habitat degradation were also expected to continue throughout most of the tern's fragmented range (Smith and Stuckey 1988, entire).

New information on the species' response to the threats identified at the time of listing indicate that anthropogenic changes in some river channels supporting the Interior least tern have also benefited the Interior least tern in ways that may have compensated for historical impacts to its habitat. For example, in the Lower Mississippi River (where tern numbers have increased by an order of magnitude, and which currently supports more than 60 percent of the Interior least tern nesting population), channel engineering, including the construction of channel training dikes, resulted in higher sandbars as well as earlier and shorter spring and summer high water events in this portion of the range (Schramm 2004, pp. 306, 322; USACE 2013, p. 60). Such changes have reduced egg and chick flood-related mortality events, extended the nesting season, and increased re-nesting opportunities, all of which may explain the Interior least tern population increase in the Lower Mississippi River over the past four decades.

Anthropogenic habitats are also now known to provide significant opportunities for Interior least tern nesting and recruitment. High flows in the Platte River have historically peaked after most nesting has been initiated within the river channel, flooding nests and hatchlings, and limiting re-nesting opportunities (Farnsworth *et al.* 2017, p. 3587). Models now suggest least tern nesting success would only have occurred during 32 percent of years, an inadequate success rate to have maintained the species within the Platte River. It is now hypothesized that off-channel mining habitats were, and continue to be, critical to the success of the Interior least tern in the central and lower Platte River (Farnsworth *et al.* 2017, p. 3588). Similar observations have been proposed for some reaches of the Missouri River (*e.g.,* Jorgensen 2009, entire). In Texas and Colorado, foraging and nesting habitats created by dam construction have provided for Interior least tern colonization of arid regions historically unsuitable for the species (Service 2013, pp. 26–27).

Although river channel engineering, including reservoirs, channelization, channel training structures, and bank stabilization, continues to alter the Interior least tern's habitats, as outlined above, these habitat modifications have also created additional habitat opportunities for this species. The Interior least tern's known range has increased significantly; the reported numbers of nesting Interior least terns have expanded by almost an order of magnitude from fewer than 2,000 in 1985, to approximately 18,000 in 2005 (Lott 2006, p. 10), and currently more than 480 Interior least tern colonies are known to occur in four major drainages with 16 primary subpopulations (Lott *et al.* 2013, pp. 3616–3617). Most of these subpopulations have been stable or increasing over the past two decades (Lott *et al.* 2013, p. 3620; Lott and Sheppard 2017a, pp. 51–52). Thus, the negative impacts of river channel engineering on the tern appear to have been initially overestimated.

Loss of some historical Interior least tern summer nesting habitat likely occurred on a local or regional scale prior to listing; however, we have found no evidence that nesting habitat loss is currently limiting the Interior least tern on a rangewide scale. The Interior least tern continues to nest in all habitat types and drainages identified in 1985, and there is no evidence of significant regional decline or extirpation from any drainage since listing (Service 2013, p. 10). As previously noted, the Interior least tern uses a variety of anthropogenic habitats such as navigation systems, reservoirs, sand mines, and so forth, allowing the Interior least tern to not only survive, but also to thrive in some drainages, and even expand its range into areas without historical records.

While future conditions within some portion of the Interior least tern's range may deteriorate due to natural or anthropogenic changes (for example, climate change may increase the likelihood of heavy rainfall events) or human demands (*e.g.,* water extraction

or removal in the western plains), the wide range of the Interior least tern and its ability to relocate to areas with better conditions reduce the magnitude of any threat (see *Effects of Climate Change,* below). The Interior least tern is also well adapted to adjust to variability and changes in local habitat availability, quality, and quantity through metapopulation dynamics (see *Habitat Criteria,* above, for detail on metapopulation dynamics), enhanced by the species' longevity, dispersal capability, and ability to re-nest (*e.g.,* Lott *et al.* 2013, p. 3620; Lott and Sheppard 2017b, entire).

Predation

Interior least tern eggs, chicks, and adult individuals are susceptible to a wide variety of avian and terrestrial predators. During the 25-year monitoring period on the Missouri River, the greatest cause of egg loss has been predation (3 percent) (USACE 2017b, spreadsheet line 302). On the Mississippi River, predation was the second highest cause of Interior least tern egg, chick, and adult mortality (Smith and Renken 1993, pp. 41–42).

Interior least terns are adapted to avoid predation because: (1) Their eggs and chicks are cryptically colored to avoid detection; (2) chicks exhibit ''freeze'' behavior when threatened; and (3) adults cooperate in alarm calls and attack flights on potential predators to the colonies (Thompson *et al.* 1997, p. 11). Terns may also abandon and relocate colonies due to predation pressure (Atwood and Massey 1988, p. 394).

The level and effect of predation can be locally high and significant in some colonies and in some years; however, the Interior least tern's adaptation to high levels of predation is demonstrated by the exponential growth of rangewide breeding numbers since listing in 1985. Interior least tern are long-lived, and current population trends indicate that sporadic local breeding failure due to predation or other causes is natural, and unlikely to be significant to the long-term stability of the rangewide population.

Existing Regulatory Mechanisms

The Interior least tern is covered by the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703 *et seq.*). The MBTA makes it unlawful, at any time and by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof (16 U.S.C. 703(a)). 16 U.S.C. 704(a) states that the Secretary is authorized and directed to determine when, to what extent, if at all, and by what means, the take of migratory birds should be allowed, such as for educational, scientific, and recreational purposes, and to adopt suitable regulations permitting and governing the take. In adopting regulations, the Secretary is to consider such factors as distribution and abundance to ensure that any take is compatible with the protection of the species.

Since the publication of the proposed rule to delist the Interior least tern (84 FR 56977; October 24, 2019), the Service published a proposed rule to adopt a regulation that defines the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (85 FR 5915; February 3, 2020). This proposed regulation, if made final, will define the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs, and take that is incidental to otherwise lawful activities would no longer be prohibited. Therefore, Federal agencies, industries, or private parties that have avoided or mitigated for incidental take to migratory birds due to MBTA prohibitions will no longer be required to do so. The MBTA will continue to protect migratory birds, their parts, nests, and eggs from intentional take and trade. We have reviewed this information and have evaluated the potential effects of these proposed changes on the Interior least tern. Incidental take is not currently a primary threat to the rangewide status of the Interior least tern, but there is the potential that with removal of the protections of the Act and the proposed regulation that defines the scope of the MBTA, incidental take may increase in some nesting areas. However, as noted herein under *Habitat Criteria,* above, USACE Divisions and Districts within the range of the Interior least tern have cooperatively modified their programs to minimize take of Interior least terns, and to provide for the long-term management of the nesting and foraging habitats across about 80 percent of the range of the species (USACE 2013, entire; 2016, entire; 2017, entire). USACE has also committed to continue consideration and management of the Interior least tern and its habitats following delisting, because maintaining viable populations of Interior least tern is in their interest, and that of all Federal agencies. More than 10 percent of the Interior least tern population consists of small to moderately sized colonies that are managed on Federal or State conservation lands, or under State and private partnerships, many of which are expected to continue management based upon environmental management objectives or State status and regulations. The Service, therefore, finds that should the proposed regulation that defines the scope of the MBTA be adopted, BMPs and SOPs to avoid incidental take of the tern will continue to be implemented across more than 90 percent of the species' range.

The remaining portion of the Interior least tern population consists of numerous, small, scattered, often ephemeral colonies nesting in habitats with minimal or no management. Such colonies without management commitments may be impacted by the proposed regulation that defines the scope of the MBTA. While these areas contribute in some small degree to redundancy and representation of the species, their success or failure within specific sites is not essential to the continued existence of the Interior least tern.

In summary, incidental take is not currently a primary threat to the rangewide status of the Interior least tern, but there is the potential that with removal of the protections of the Act and the proposed regulation that defines the scope of the MBTA, incidental take may increase on some nesting areas. Any adoption of proposed changes to reduce the scope of the take provisions of the MBTA is not likely to affect management commitments currently in place, which are expected to continue following delisting of the Interior least tern, as BMPs and SOPs to avoid incidental take of the tern will continue to be implemented across more than 90 percent of the species' range. We also believe that Federal and State agencies, as well as private industries and individuals, recognize that it is in the public interest to minimize the impacts of lawful activities to Interior least tern and other migratory birds, and the Service shall continue to work with them to do so.

When the Interior least tern was listed in 1985, the listing rule (50 FR 21784; May 28, 1985) noted that while the MBTA protected migratory birds from harm or harassment, it did not provide a mechanism to address habitat threats.

It concluded, therefore, in the absence of protection under the Act, the MBTA and other existing regulatory mechanisms were inadequate to prevent deterioration to habitats of the Interior least tern due to channel engineering. As noted previously, however, the effects of channel engineering on the species may have been more beneficial than detrimental, at least in some portions of the range (see *Habitat Loss and Curtailment of Range,* above).

The protection, restoration, conservation, and management of ecological resources within the Interior least tern's range have been broadly enhanced through Executive Orders and Federal regulations since the species was listed. These include provisions emphasizing the protection and restoration of ecosystem function and quality in compliance with existing Federal environmental statutes and regulations (*e.g.,* under the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), Clean Water Act (CWA), and MBTA) and endorsing Federal efforts to advance environmental goals. Water resources authorizations have also enhanced opportunities for USACE and other Federal agency involvement in studies and projects to specifically address objectives related to the restoration of ecological resources (*e.g.,* section 1135 of the Water Resources Development Act of 1986, as amended, 33 U.S.C. 2201 *et seq.*) since the Interior least tern was listed.

Executive Order (E.O.) 13186 (Responsibilities of Federal Agencies to Protect Migratory Birds; 66 FR 3853, January 17, 2001) requires all Federal agencies to use their authorities and conduct their actions to promote the conservation of migratory bird populations. Actions authorized by E.O. 13186 include: (1) Avoiding and minimizing adverse impacts to migratory birds; (2) habitat restoration and enhancement, and preventing pollution or detrimental alteration of migratory bird environments; (3) designing habitat and population conservation principles, measures, and practices into agency plans and planning processes; (4) promoting research and information exchange, including inventorying and monitoring; and (5) ensuring full consideration under NEPA of migratory birds such as the Interior least tern. These concepts have been incorporated by the USACE into its Environmental Operating Principles (Bridges *et al.* 2018, entire; USACE 2019, entire), and are being implemented within the jurisdictional waters inhabited by the Interior least tern. In the absence of the Act's protections, E.O. 13186 and USACE operating principles and programs will continue to provide for protection and management of the Interior least tern and its habitats (see *Habitat Criteria,* above).

The Civil Works Ecosystem Restoration Policy of 1999 (CWERP) (USACE ER 1165–2–501) identifies ecosystem restoration as one of the primary missions of the USACE Civil Works program. This policy requires a comprehensive examination of the problems contributing to ecosystem degradation, and the development of alternative means for their solution, with the intent of partially or fully reestablishing the attributes of a naturalistic, functioning, and self-regulating system.

Implementation of actions authorized under E.O. 13186 and CWERP are discretionary, and contingent upon opportunity and annual appropriations and other budgetary constraints. However, many Federal action agencies now have an extensive history of managing and restoring Interior least tern habitats (some more than two decades) in compliance with non-discretionary requirements of section 7(a)(2) of the Act (in the Missouri, Red, Arkansas, and middle Mississippi Rivers), as well as discretionary components of section 7(a)(1) of the Act, E.O. 13186, and CWERP (in the Lower Mississippi River). As a result, many conservation measures have become standard operating practices (see Recovery Criteria, above).

Interior least terns are listed as endangered in 16 of the 18 States where they occur: Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Mexico, South Dakota, Tennessee, and Texas. Many of the States noted above actively manage Interior least terns, including seasonal posting to prevent disturbance of nesting areas (*e.g.,* Kentucky, Kansas); facilitating cooperative partnerships to protect and manage the bird (*e.g.,* Nebraska, Indiana); developing State management plans for the Interior least tern (*e.g.,* South Dakota; Aron 2005, entire); conducting site-specific research (*e.g.,* Mississippi); and participating in multi-agency planning, management, and monitoring programs (*e.g.,* Missouri River Recovery Implementation Committee).

The removal of the species from Federal protection might prompt some States to remove the Interior least tern from their endangered species lists. Regardless of Federal status, most State laws protect native wildlife (including the Interior least tern) from take and require State permits, in addition to Federal permits, to collect, harm, or harass migratory bird species, such as the Interior least tern.

Activities that may adversely affect the Interior least tern and/or its habitats will also continue to be subject to numerous regulatory mechanisms, including the MBTA, CWA, Fish and Wildlife Coordination Act (FWCA; 16 U.S.C. 661 *et seq.*), and NEPA. Federal actions to conserve and enhance Interior least tern habitats are now authorized by Executive Orders and Federal regulations enacted since the Interior least tern was listed in 1985. Additionally, post-delisting habitat management commitments by USACE encompass about 80 percent of the Interior least tern population (see Recovery Criteria, above). Therefore, we conclude that the existing regulatory mechanisms are adequate to protect the Interior least tern and address stressors to this species absent protections under the Act.

Effects of Climate Change

The distributions of many terrestrial organisms, including birds, are shifting in latitude or elevation in response to climate warming (Chen *et al.* 2011, pp. 1024–1025). Although population declines, apparently in response to climate change effects, have been reported for long distance migrant bird species in both Europe and North America, the negative effects of climate change at one life or migratory stage may be compensated at another stage, *e.g.,* by increased survival or reproduction on winter or breeding grounds (Knudson *et al.* 2011, p. 9).

The ability of migratory birds to cope with rapid climate change effects depends upon the rate of their adaptive response to the changes (Knudson *et al.* 2011, p. 12). Phenotypic plasticity (*i.e.,* the ability to shift dates of migration, breeding, fledgling, etc.) may allow rapid adaptation to climate change effects in some species (Charmantier *et al.* 2008, entire). While there is little information available on Interior least tern phenology (life cycle events and how they are influenced by climate variation), their adaptations to habitats controlled by stochastic events, along with high mobility and use of anthropogenic habitats, indicate that they will be resilient to predicted effects of climate changes.

Most climate change models predict increased extreme weather events (*i.e.,* floods and droughts) throughout the Interior least tern's breeding range (Lubchenco and Karl 2012, pp. 33–36). In the absence of clear knowledge of Interior least tern wintering

distributions, potential effects of climate change on the bird when it is away from its breeding range are unknown. The Interior least tern is well adapted to cope with extreme hydrologic changes, and its habitat and productivity are closely tied with stochastic weather events. For example, while extreme floods may result in annual recruitment loss, such events are also the primary factor in creating, scouring, and maintaining high-quality sandbars where Interior least terns nest (Sidle *et al.* 1992, p. 134). On the other hand, extreme drought events that connect nesting islands to the mainland and result in increased predation of some Interior least tern colonies may be offset by higher abundance of available nesting areas, increased dispersal of reproductive efforts, and higher local recruitment rates of some colonies during low flow periods. Rooftop nesting birds are susceptible to catastrophic recruitment failure due to high summer temperatures (see Watterson 2009, pp. 23–24; Nupp and Petrick 2010, pp. 5–7), and colonies on natural habitats may also become negatively affected by increasing summer temperatures. However, Interior least terns are dispersed along a wide latitudinal and longitudinal gradient of climate conditions and are unlikely to experience rangewide catastrophic recruitment failure due to high summer temperatures. Therefore, while Interior least tern colonies may be locally or regionally affected by changes in frequency and duration of extreme flood events and droughts, or high temperatures, the dispersal of the Interior least tern over a wide geographical area encompassing a variety of latitudinal and longitudinal gradients, its long life, and its ability to move long distances indicate the tern's resilience to future patterns of predicted effects of climate change (Lott *et al.* 2013, p. 3623).

Habitat Loss and Fragmentation and the Effects of Climate Change

Habitat destruction and fragmentation may reduce the likelihood of species surviving the effects of climate change, in part because smaller habitat patches sustain smaller populations (Hof *et al.* 2011, p. 2990). Habitat fragmentation can also impede the dispersal ability of species (Hof *et al.* 2011, pp. 2989–2990). While the Interior least tern has possibly been affected by loss of significant reaches of riverine habitat such as the lower Missouri River and lower Red River, it has also increased its longitudinal range by exploiting anthropogenic habitats such as reservoirs in central Texas, Colorado, and the Rio Grande, industrial sites in the Wabash River, and coal mines in Texas. Additionally, known population size has also increased by an order of magnitude since the range became fragmented, and genetic studies have demonstrated connectivity via gene flow within Interior least tern populations and between other least tern populations (*i.e.,* California least tern and eastern least tern; Whittier *et al.* 2006, p. 179).

Invasive salt cedar and willow growth, decreases in annual rainfall, and overuse and depletion of aquifers, coupled with increased human water demands, are occurring in the Southern and Northern Plains rivers, possibly to the future detriment of Interior least tern habitat and forage availability in those drainages. However, increases in impervious surfaces (*e.g.,* artificial structures or compacted soils associated with human developments) may offset the negative effects of climate change in some watersheds, while human demands such as urban or industrial use, and irrigation, could either offset or exacerbate climate change effects in others (Caldwell *et al.* 2012, p. 2854). Based on current data, the wide longitudinal and latitudinal distribution of the Interior least tern will likely offset any potential localized or regional reduction in habitat quantity or quality, at least in part, by new opportunities in other portions of its range.

Decline of Fish Prey

Starvation of California least tern chicks has been reported due to the detrimental effects of El Niño on fish abundance (Massey and Fancher 1989, p. 354; Massey *et al.* 1992, p. 980). Decreased fish prey availability has been locally linked to reduced Interior least tern egg weights, clutch size, and chick weights, and may have influenced chick survival and fledgling rates (Dugger 1997, pp. 94–95). Declines in fish prey have been noted on the Missouri River (Stucker 2012, p. 21) and in some years on the Mississippi River (Dugger 1997, pp. 113–114). Fish prey abundance has also been linked to cyclic river conditions (*e.g.,* river stage during nesting season; Dugger 1997, p. 26). However, Interior least terns are strong flyers and capable of exploiting a large variety of aquatic habitats and fish species, including exotic species that may invade rivers such as Asian carp. These characteristics, coupled with the bird's long life, its ability to re-nest, and its ability to relocate to more productive areas, enable it to cope with local periodic cycles of low fish prey abundance.

Other Factors

Thompson *et al.* (1997, pp. 15–17) and others have documented the mortality of least tern eggs, chicks, and adults due to a number of additional factors, including flooding of nesting areas during heavy summer rains and high water events, exposure to pesticides and other contaminants (of coastal least tern; Jackson and Jackson 1985, p. 58), burial of eggs by sand, hailstorms, heat, cold, sand spurs (a common grass in this habitat with prickly burrs that stick to passing animals), fire ants, fireworks, airboats, off-road vehicles (ORVs), and human recreationists. Cattle trampling of Interior least tern eggs and chicks has been documented in the Red River (Hervey 2001, pp. 7–8). Nupp (2012, pp. 7–8) documented mortality of eggs and chicks from heat exposure in rooftop colonies.

Sampling for contaminants in Interior least terns has been concentrated in the Missouri River drainage, where sub-lethal amounts of arsenic, mercury, chlorinated hydrocarbon, selenium, and polychlorinated biphenyl (PCBs) have been documented in individuals (Fannin and Esmoil 1993, pp. 153–157; Ruelle 1993, pp. 162–170; Allen *et al.* 1998, pp. 358–364); however, no incidences of death or decreased fitness of Interior least terns due to contaminants have been reported to date.

ORV impacts have been documented in most drainages where Interior least terns nest (Red, Mississippi, Arkansas, Ohio, and Missouri River drainages). However, ORV access to nesting areas occurs only occasionally because it is usually limited to situations where low flow conditions allow such access. While other threats (*i.e.,* sandstorms, hail storms, heat, cold, sand spurs, fire ants, fireworks, airboats, etc.) may increase in frequency and severity in some portions of the Interior least tern's range, most are site-specific and sporadic, or otherwise limited in scope.

Interior least tern mortality occurs locally throughout the range due to a variety of natural or manmade factors. However, the wide distribution of the species, its current high numbers, its long life span, and its ability to relocate and re-nest make the Interior least tern resilient to occasional or periodic local sources of mortality, as well as potential effects of climate change. The increase in range and population size since 1985 indicates that sources of mortality to localized colonies are compensated by these traits of resiliency, as well as by the potential of high recruitment rates in

other Interior least tern colonies or populations.

Cumulative Effects

Our analysis has identified no rangewide threats or stressors with significant effects to all breeding colonies or subpopulations. Monitoring data show some breeding colonies or subpopulation segments may decline or relocate due to localized stressors (*e.g.,* predation, disturbance), regional stressors (*e.g.,* droughts, floods), or their cumulative effects. Variations in colony locations, size, or subpopulation densities, however, are a characteristic of metapopulation dynamics, and have not been shown to threaten the rangewide status of the Interior least tern over an extended area. Additionally, the increases documented in the abundance and distribution of the Interior least tern, since it was listed in 1985, do not support a conclusion that any of these stressors cumulatively pose a threat to the Interior least tern.

Future Conditions and Species Viability

Species viability, or its ability to survive long term, is related to its ability to withstand catastrophic population and species-level events (redundancy), to adapt to changing environmental conditions (representation), and to withstand disturbances of varying magnitude and duration (resiliency). The viability of a species is also dependent on the likelihood of new stressors or continued threats now and in the future that act to reduce a species' viability.

Redundancy of populations is needed to provide a margin of safety for a species to withstand catastrophic events. Current information and observed trends since the species was listed in 1985 indicate that redundancy of the Interior least tern is currently ensured by the existence of hundreds of breeding colonies in multiple drainages across a wide latitudinal and longitudinal range (see *Current Distribution and Abundance,* above), and within a variety of natural and anthropogenic habitats (see *Nesting Habitat and Behavior,* above).

Representation is the ability of a species to adapt to both near-term and long-term changes in its physical (*e.g.,* climate conditions, habitat conditions, and habitat structure) and biological (*e.g.,* pathogens, competitors, and predators) environments. We can gauge representation by examining the breadth of genetic, phenotypic, and ecological diversity found within a species and its ability to disperse and colonize new areas. For the ILT, we evaluated representation across a breadth of historical ecological settings, and through preservation of the genetic diversity of the species. The Interior least tern was historically known from, and continues to occur in, two main natural habitat types: Large river sandbars and salt plains. While the salt plains populations were and continue to be historically localized in small portions of the Southern Plains, the sandbar populations occurred across a large latitudinal and longitudinal gradient, encompassing multiple river and stream orders, and a wide variety of climatic conditions. Little evidence of genetic structure has been found within the Interior least tern population (Draheim *et al.* 2010, p. 813), indicating high genetic connectivity between drainage subpopulations. There also appears to be high genetic connectivity between California, Interior, and eastern least terns (Draheim *et al.* 2010, p. 816). For these reasons, the Interior least tern appears to have adequate genetic and ecological representation to allow for adaptability to environmental changes.

Resiliency allows a species to recover from periodic or occasional disturbance. Resilience of individual and mated terns is demonstrated by their ability to relocate and re-nest when habitat conditions deteriorate, or when disturbance by humans or predators becomes severe. Interior least tern metapopulation dynamics allow subpopulations and colonies to respond to changing habitat conditions, including their ability to exploit a variety of anthropogenic habitats that were not historically available (Lott *et al.* 2013, p. 3623). This resilience is augmented by the long life span and strong flight abilities of Interior least terns, and by the prospecting behavior (exploratory dispersal) of young birds across the landscape (Boyd and Thompson 1985, p. 405; Lott 2012, p. 12; Shigeta *in litt.* 2014, entire).

In addition to this review of redundancy, representation, and resiliency, which indicates a high likelihood of future viability for the Interior least tern, the Service worked with multiple partners to develop a habitat-driven, rangewide population model for the tern in order to consider status and population dynamics with and without continued management at local, regional, and rangewide scales (Iglay *et al.* 2012, entire; Lott and Sheppard 2017a, b, entire). The model, known as TernPOP (Lott and Sheppard 2017a, b, entire), applied simulation analyses that were designed to explore stakeholder-defined scenarios of potential future habitat change or changes in management. Fifty-five discrete scenarios spanned the geographic range of the Interior least tern and covered the topics of (1) sandbar nesting habitat loss, (2) habitat degradation, (3) changes in predator management programs, and (4) deliberate efforts to create mid-channel nesting sandbars for the tern. All 55 scenarios were evaluated relative to a ''No Action'' scenario. Thirty replicates of the model were run for 30 years, and population growth (or decline) rates were calculated for each replicate (and then averaged across replicates) at the spatial scales of scenario area, subpopulation, drainage population, and the entire listed population of the Interior least tern. Nearly all scenarios of regional management or habitat loss, even some viewed as implausible in the foreseeable future (*e.g.,* loss of 50 percent of all sandbars on the Lower Mississippi River), had minimal effects on population growth rates calculated across the 30-year period at the spatial scales of subpopulation, population, and range (Lott and Sheppard 2017b, pp. 42–61). In most cases, severe habitat degradation in even relatively large areas was insufficient to change the baseline population increases observed during ''No Action'' scenarios to population declines, beyond very local areas. Therefore, quantitative evaluation of population model outputs are similar to and support prior qualitative observations that Interior least tern populations are resilient to many potential changes in habitat conditions across their large river network (Lott *et al.* 2013, pp. 3622–3623; Lott and Sheppard 2017b, pp. 59–62).

Based upon the analysis presented above, the Interior least tern cannot be considered to be conservation-reliant, because it has shown to be able to adapt to and exploit substantial habitat changes throughout its range. Although some (10 percent) local colonies and peripheral population segments of the Interior least tern may require management for long-term persistence, their success or failure within individual sites is not essential to the continued existence of the Interior least tern. Viability of the Interior least tern is assured by its resilience, representation, and redundancy throughout the remainder of its range. The Interior least tern will continue to be conserved by habitat management programs in more than 80 percent of its range (see *Habitat Criteria* under Recovery Criteria section, above).

Summary of Comments and Recommendations

In our proposed rule published on October 24, 2019 (84 FR 56977), we requested that all interested parties

submit written comments on the proposal by December 23, 2019. We also requested public comments on the draft post-delisting monitoring (PDM) plan. We contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. A newspaper notice inviting general public comment across the range of the species was published in USA Today on October 28, 2019. We did not receive any requests for a public hearing.

During the comment period, we received 25 letters or statements addressing the proposed action. These included comments from 2 peer reviewers, 4 State agencies in three States, 1 Federal agency, 1 nongovernmental organization, and 17 individuals. All comments are posted at *http://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0082.

In accordance with our policy, ''Notice of Interagency Cooperative Policy for Peer Review in Endangered Species Act Activities,'' which was published on July 1, 1994 (59 FR 34270) and our August 22, 2016, Director's Memorandum ''Peer Review Process,'', we solicited expert opinions from seven knowledgeable individuals with scientific expertise that included familiarity with this species, the geographic region in which it occurs, and conservation biology principles. We received responses from two peer reviewers.

The peer reviewers expressed support for the proposed delisting and generally agreed with our analysis in the proposed rule. Both expressed concerns with our PDM plan, particularly the 5-year time period. Peer reviewer comments are addressed in the following summary and incorporated into the final rule as appropriate.

We reviewed all comments for substantive issues and new information regarding the Interior least tern. Substantive comments we received during the comment period are addressed below and, where appropriate, are incorporated directly into this final rule. The majority of comments were related to the draft PDM plan and not the decision to delist the Interior least tern.

Peer Review Comments

(1) Comment: Both peer reviewers and a nongovernmental organization commented that the Interior least tern population increase and the achievement of the recovery goal are partially attributable to improved and increased survey efforts. One of the peer reviewers suggested that the Interior least tern abundance data used at the time of listing were in error, and that should be considered as a reason for delisting.

Our Response: The reported increase in rangewide numbers since the Interior least tern was listed is partially attributable to increased survey efforts over a wider geographical range and, in some areas, improved survey techniques. This conclusion was stated in our 2013 5-year review of the Interior least tern (Service 2013) and in several places in our October 24, 2019, proposed delisting rule (84 FR 56977; see *Population Trends* under Species Information (p. 84 FR 56981) and *Numerical Population Target*s under Recovery (p. 84 FR 56982)). In addition, we also acknowledged the hypothesis that some proportion of the increase in rangewide least tern counts within the Interior Basin may be attributable to immigration of least terns from the Gulf Coast. We have retained these statements in those discussions in this final rule, and we have added an additional clarifying statement under *Population Trends.*

When the Interior least tern was listed as endangered (50 FR 21784; May 28, 1985), we acknowledged the difficulty in assessing population size of a species with a widely scattered distribution and poorly known historical trends. At that time, the best available information, including multiple surveys conducted over the previous decade, indicated a significant decline in the range of the Interior least tern, low population numbers, low reproductive success, and significant threats to remnant breeding habitats. This conclusion was endorsed, and listing was supported by 13 State wildlife or conservation agencies within the range of the species. While the Interior least tern may have been more abundant and widespread than recognized at the time the species was listed, the best available scientific and commercial information supported our decision to list this species as endangered under the Act, and there is no evidence that the original data used at that time were in error.

(2) Comment: One peer reviewer and a nongovernmental organization commented that the Service used limited and flawed information (Jorgensen 2009, entire; Farnsworth *et al.* 2017, entire) to minimize the importance of the Missouri and Platte Rivers in the recovery of the Interior least tern. They stated that the Service overlooked that both studies were conceptually and analytically problematic, and that editorials identifying key shortcomings were subsequently peer-reviewed and published in the same journals (Caitlan *et al.* 2010, entire; Alexander *et al.* 2018, entire). They expressed concern that the use of this information reverses the Service's decades-long position that naturally flowing and dynamic river systems are critically important to the Interior least tern, other listed species, and the ecosystems as a whole.

Our Response: In our proposed delisting rule (84 FR 56977; October 24, 2019) and this final rule, we have cited Jorgensen (2009, entire) and Farnsworth *et al.* (2017, entire), under *Habitat Loss and Curtailment of Range,* as examples that some anthropogenic activities are known to provide significant opportunities for Interior least tern nesting and recruitment, contributing to the population and range expansion of the species even within highly modified river systems. Neither of these commenters discounted the importance of anthropogenic habitats to tern recruitment in either the Platte or Missouri River.

Farnsworth *et al.* (2017, entire) used historical hydrological and channel geometry data from a specific reach of the Platte River to suggest that the timing of seasonal flooding of low sandbars was not conducive to Interior least tern and piping plover recruitment success. This study also noted that anthropogenic habitats created by sand and gravel mines adjacent to the Platte River have been important in maintaining stable populations of these two birds within this system. Jorgensen (2009, entire) conducted a similar analysis for a short reach of the Missouri River in Sioux City, Iowa, concluding that off-site recruitment was important to tern and plover presence within this reach of the river. Caitlan *et al.* (2010, entire) and Alexander *et al.* (2018, entire) stated that the Jorgensen and Farnsworth *et al.* studies, respectively, were flawed and diminished the importance of natural river habitats to the ecology of the birds.

When developing the proposed delisting rule, we were aware of the Caitlan *et al.* (2010, entire) and Alexander *et al.* (2018, entire) published editorials critiquing the Jorgensen and Farnsworth *et al.* studies. We were also aware that these critiques had been directly addressed by responses from the original authors clarifying semantic misinterpretations and including additional supporting information (Jorgensen 2010, entire; Farnsworth *et al.* 2018, entire). Both responses were accepted as closure of the identified issues within the same journals that the original articles and editorials were published.

We have not used this information (Jorgensen 2009, entire; Farnsworth *et al.* 2017, entire) to discount or diminish the importance of natural riverine habitats to the tern or the ecosystem, but rather as supporting evidence of the resiliency of the Interior least tern relative to its ability to adapt to and exploit some anthropogenic changes to its habitats. Natural and anthropogenic habitats in both the Platte and Missouri Rivers continue to be important components of the greater Interior least tern metapopulation.

(3) Comment: In their critique of the use of Farnsworth *et al.* (2017, entire) and Jorgensen (2009, entire), one peer reviewer and a nongovernmental organization stated that the Service did not consider the role of metapopulation dynamics in the use of anthropogenic habitats by Interior least terns in the Platte River. They noted that off-river anthropogenic habitats such as sand and gravel mines may not be sustainable and evolving mining practices may reduce the amount and quality of such habitats in the future.

Our Response: Under *Habitat Criteria* and elsewhere in the proposed delisting rule (84 FR 56977; October 24, 2019) and this final rule, the Service discusses the role and importance of metapopulation dynamics in the current and future distribution and resilience of the Interior least tern. We find the information presented in the referenced studies is important to understanding the role of past and future habitat conditions in the Platte and Missouri Rivers to the metapopulation dynamics of the Interior least tern.

Metapopulation dynamics allow species to exploit habitats that may change rapidly in abundance and/or quality and aid the re-establishment of extirpated populations. Both natural and anthropogenic least tern nesting habitats can be transitional in availability or quality. Some breeding colonies or subpopulation segments have declined or relocated due to localized stressors (*e.g.,* predation, disturbance), regional stressors (*e.g.,* droughts, floods), habitat changes (*e.g.,* vegetation encroachment, reservoir management, mine closures), or their cumulative effects (Kirsch and Sidle 1999, p. 475; Service 2013, pp. 13–27). Resulting variations in tern colony locations, sizes, or subpopulation densities are a characteristic of metapopulation dynamics, and such declines have been offset by increases in other colonies or population segments (Lott and Sheppard 2017a, pp. 50–52). While future changes in mining practices within the Platte River drainage may affect their use by Interior least terns, metapopulation dynamics allow the birds to find and use other suitable habitats within or outside of the drainage for nesting.

(4) Comment: One peer reviewer and a nongovernmental organization commented that the Service failed to reference or acknowledge changes to the Migratory Bird Treaty Act (MBTA) directed by the M-Opinion and encouraged the Service to evaluate the consequences relative to the Interior least tern.

Our Response: After the publication of our October 24, 2019, proposed delisting rule, the Service published a proposed rule to adopt a regulation that defines the scope of the MBTA as it applies to conduct resulting in the injury or death of migratory birds protected by the MBTA (85 FR 5915; February 3, 2020). This proposed regulation, if made final, will define the scope of the MBTA's prohibitions to reach only actions directed at migratory birds, their nests, or their eggs, and take that is incidental to otherwise lawful activities would no longer be prohibited. This position is consistent with the Solicitor's Opinion M–37050, *The Migratory Bird Treaty Act Does Not Prohibit Incidental Take,* issued December 22, 2017. We have reviewed this information and have evaluated the potential effects of these proposed changes on the Interior least tern. Our analysis is presented above *under Existing Regulatory Mechanisms.* In summary, incidental take is not currently a primary threat to the rangewide status of the Interior least tern, but there is the potential that with removal of the protections of the Act and these proposed regulatory changes defining the scope of the MBTA, incidental take may increase in some nesting areas. However, as described above, should the proposed changes be adopted, BMPs and SOPs to avoid incidental take of the tern will continue to be implemented across more than 90 percent of the species' range (*e.g.,* USACE 2013, entire; 2016, entire; 2017, entire; see *Habitat Criteria,* above). Therefore, the adoption of proposed regulatory changes to limit the scope of the take provisions of the MBTA are not likely to affect management commitments currently in place, which are expected to continue following delisting of the Interior least tern.

(5) Comment: Both peer reviewers, along with the States of Oklahoma and Colorado, a nongovernmental conservation agency, and several other public commenters stated that the duration of PDM plan is inadequate and recommended modifying the duration to include monitoring every third year for a period of 15 years. They noted that the Interior least tern may have a lifespan of 15 to 20 years; therefore, limiting PDM to 5 years may not be sufficient to track population fluctuations after delisting.

Our Response: Following delisting, the Act requires us to effectively implement a monitoring system for a minimum of 5 years in cooperation with the States that are within the range of the Interior least tern. To fulfill the PDM requirement, we developed a draft PDM plan for the Interior least tern and coordinated review of the plan with the State agencies, USACE Districts and Divisions, other Federal agencies, and various nongovernmental organizations. We acknowledge that sustaining PDM efforts can be challenging and subject to competing priorities for available resources. Nonetheless, we designed the draft PDM plan that was realistic given limited resources. However, given the comments we received on the duration of the draft PDM plan, we will continue to work with our conservation partners to ensure development and implementation of an effective, final PDM plan, with an appropriate duration, for the Interior least tern.

While section 4(g)(1) of the Act requires us to implement a system in cooperation with the States to effectively monitor the status of any species that have been recovered and removed from the List(s), it does not require the development of a formal PDM plan prior to removing the species from the List, or at any point. The Service and States have wide latitude in implementation of this provision. In the absence of a final PDM plan, monitoring, with surveys continuing in 2021, is expected to continue for more than 80 percent of the Interior least tern population due to management commitments by the USACE and the States. However, we generally desire to follow a written planning document to provide for the effective implementation of section 4(g), and we intend to do so here. We will notify the public of the final PDM plan on our website, *https://www.fws.gov/mississippiES/*, after coordination with our partners and when it becomes available.

(6) Comment: One peer reviewer expressed concern that the potential of increased frequency and duration of flooding due to climate change was not addressed in the PDM plan. This peer reviewer also believes that there should be a mechanism in the plan for the Service to intervene if there are continued or recurrent flooding events.

Our Response: The purpose of PDM is to track the post-delisting status of the Interior least tern to ensure that it remains secure from risk of extinction

following removal from the List. While the draft PDM plan does not identify a specific mechanism to intervene following flood events, it identifies actions that may be taken should monitoring indicate a substantial decline in the Interior least tern's population numbers or distribution. These actions include meeting with conservation partners, extending the monitoring period, modifying monitoring practices, initiating a rangewide status assessment, or relisting the Interior least tern, if warranted. As stated above under *Our Response* to *(5) Comment,* we will continue to work with our conservation partners to develop and implement an effective, final PDM plan for the Interior least tern that includes an appropriate duration and purpose to detect trends.

(7) Comment: One peer reviewer asserted that in parts of the species' range some degree of human intervention will be needed for continued success and that an assessment of habitat management should be part of the PDM plan.

Our Response: The Interior least tern's adaptation to, and exploitation of, anthropogenic habitats over the past several decades indicate that the species is no longer considered conservation-reliant and is recovered. However, we assessed the adequacy of habitat management commitments relative to recovery of the tern in our proposed delisting rule (84 FR 56977; October 24, 2019) and this final rule, finding that conservation actions and management by multiple conservation partners, most principally the USACE (*e.g.,* USACE 2013, entire; 2016, entire; 2017, entire), will continue following delisting. Many conservation programs and commitments incorporate components of adaptive management, which provide for periodic assessment of habitat management actions relative to effects on the Interior least tern (see *Habitat Criteria,* above, under Recovery Criteria). As noted in the draft PDM and the proposed delisting rule, management commitments by USACE alone currently encompass about 80 percent of the Interior least tern breeding population, including large portions of the Mississippi, Red, Arkansas, and Missouri Rivers.

As stated above under *Our Response* to *(5) Comment,* we will continue to work with our conservation partners to develop and implement an effective, final PDM plan for the Interior least tern that includes an appropriate duration and purpose to detect trends.

(8) Comment: One peer reviewer expressed concerns that the inclusion of the Arkansas River as part of the Mississippi River subpopulation in the PDM plan dilutes the importance of the Arkansas River. This reviewer suggested subdividing the four major subpopulations to ensure that recovery is truly rangewide.

Our Response: This comment refers to a map under ''Methods'' in the draft PDM plan showing the wide distribution of the tern, as well as the multiple habitats used as nesting areas. In the referenced map, Interior least tern subpopulations were defined by Lott *et al.* (2013, entire) based upon observed least tern dispersal movements relative to distance between nesting colonies. Based upon this analysis, the Lower Mississippi, Arkansas, Cimarron, and Canadian Rivers constitute one of four relatively continuous subpopulations. The identification of subpopulations does not reduce the importance of any geographical portion of a species' range, particularly as movement and population numbers relate to metapopulation dynamics. Additionally, the USACE Southwestern Division (SWD) Districts, who monitors the Arkansas River along with portions of the Red and Canadian Rivers, has committed to continue this monitoring post-delisting as appropriations allow.

(9) Comment: One peer reviewer expressed concern that the PDM plan does not assess productivity of Interior least terns.

Our Response: Within the Interior least tern metapopulation, measurements of productivity within individual colonies may be masked by movements between colonies or even drainages, depending upon habitat conditions. Attempts have been made to assess tern productivity at various locations (*e.g.,* some Missouri River colony clusters, Platte River, Mississippi River sites, Wabash industrial sites); however, annual tern counts show little relation to previous year measurements of nest success, fledgling ratios, or annual recruitment. Therefore, we did not include assessment of Interior least tern productivity in the draft PDM plan.

As noted in the draft PDM plan, rangewide PDM of the Interior least tern relies upon continuation of existing monitoring programs throughout the birds' extensive range. Monitoring methods have been, and will continue to be, at the discretion of each program, provided that they meet the minimum survey requirements in the PDM plan to record the location of breeding colonies (two or more birds) and make counts of adults present at the time the colonies are surveyed. Any additional efforts are at the discretion of the local program.

(10) Comment: One peer reviewer characterized the PDM plan as providing a 10,000 bird ''population target'' and indicated such an approach appears to be arbitrary. The peer reviewer suggested that the Service might identify a percentage decline, as opposed to a specific number, to initiate further monitoring, or that the population model developed by the Service and the USACE (TernPOP) might be used to generate a target number based on chance of long-term persistence.

Our Response: The 10,000 birds referenced in the draft PDM plan is not meant to be a population target, but rather, a threshold to review significance, methods, and potential threats with States and other collaborators before numbers might fall below the recovery objective (7,000 birds). Tern counts are not static or consistent, and there has always been high variability (15 percent or more) between annual counts at local, regional, and rangewide population levels over the period of record (35 years). Even so, the rangewide counts, as well as some subpopulations and colonies, have shown a general increasing trend over this same period.

As we noted in the proposed delisting rule (84 FR 56977; October 24, 2019) under *Future Conditions and Species Viability,* we developed TernPOP as a habitat-driven, rangewide population model to consider scenarios of status and population dynamics at multiple scales, with and without management, and with different scenarios of habitat loss. TernPOP is not designed to generate any target number based on long-term persistence. Local and regional Interior least tern numbers and success are generally driven by habitat. Nearly all scenarios of regional management or habitat loss had minimal effects on population growth rates calculated across a 30-year period at the spatial scales of subpopulation, population, and range.

(11) Comment: One peer reviewer expressed that the PDM plan should identify an action plan to quickly respond to any decline in numbers or productivity of the Interior least tern. The quick action plan should assess the causes of decline and direct resources for recovery.

Our Response: Because we have a 35-year record of increase for the tern, the objective of the draft PDM plan is to ensure that populations of the species do not decline once the Act's protections have been removed. As noted under *Our Response* to *(10) Comment,* above, we identified a conservative rangewide count number to initiate inquiry with Federal, State, and other collaborators into whether

any observed decline in tern counts is real or an annual variation, and/or to investigate any potential causes of decline.

State Comments

Section 4(b)(5)(A)(ii) of the Act states that the Secretary must give actual notice of a proposed regulation under section 4(a) to the State agency in each State in which the species is believed to occur and invite the comments of such agency. Section 4(i) of the Act directs that the Secretary will submit to the State agency a written justification for his or her failure to adopt regulations consistent with the agency's comments or petition. We solicited comments from the 18 States within the summer breeding range of the Interior least tern. The States of Oklahoma, Colorado, and New Mexico responded with concurrence for the delisting action; however, the States of Oklahoma and Colorado expressed concern that the duration of PDM was inadequate to determine trends in this long-lived species (see *Our Response* to *Comment (5),* above).

Other Public Comments

(12) Comment: One commenter observed that, while the Interior least tern may warrant delisting due to its population increase along the Mississippi River, its numbers have continued to decline in most other river systems within its range.

Our Response: Annual changes in relative abundance of colonies or subpopulations of a metapopulation may fluctuate widely on an annual basis. In the proposed delisting rule (84 FR 56977; October 24, 2019), we presented information that most Interior least tern subpopulations have been stable or increasing over the past two decades. While the Mississippi River has experienced the greatest increase in Interior least tern nesting population size, the analysis of 15 river system subpopulations with 20 or more years of monitoring data indicates that over that period of record, 10 experienced increases, 4 remained relatively stable, and only 1 (below Ft. Peck Dam) experienced a significant decline.

(13) Comment: Several commenters noted that the Interior least tern and its habitats remain vulnerable to climate change; one commenter was concerned about sea level rise and another stated that the species should remain threatened due to flooding associated with climate change.

Our Response: Because the Interior least tern nests within the Interior Basin remote from coastal areas, inundation by sea level rise is not a concern to its breeding range. We considered other potential effects of climate change in the proposed delisting rule (84 FR 56977; October 24, 2019) and this final rule under *Effects of Climate Change,* including the potential of increased flooding frequency. We conclude that the wide range of the Interior least tern (16 degrees of longitude; 18 degrees of latitude), its metapopulation dynamics, and its ability to relocate and exploit a wide variety of habitats reduces the magnitude of such threats. The response of the Interior least tern to any specific flood event may not be readily observed, and while such events may suppress local or regional reproduction and recruitment in some years, or shift reproduction and recruitment to other areas, major flood events also reset habitats and may result in increased numbers of terns in subsequent years. For example, Missouri River flood years are generally followed by improved nesting habitats supporting large increases in tern numbers and recruitment in subsequent years.

Summary of Changes From the Proposed Rule

We considered all comments and information we received during the comment period for the proposed rule to delist the Interior least tern (84 FR 56977; October 24, 2019). We made minor editorial changes throughout the rule and added additional information to clarify our understanding of ''foreseeable future,'' which published in an August 27, 2019, final rule (84 FR 45020) (see 50 CFR 424.11(d)). These recent revisions did not significantly modify the Service's interpretation of foreseeable future, but rather, we codified a framework that sets forth how we will determine what constitutes the foreseeable future based on our long-standing practice. We have added a statement under *Population Trends* regarding the role of increased survey effort and the geographical extent of the area surveyed in the observed population increase since listing. Lastly, we also added information about how we considered the potential consequences to the Interior least tern of the February 3, 2020 (85 FR 5915), proposed rule to define the scope of the MBTA under *Existing Regulatory Mechanisms,* above.

Determination of Interior Least Tern Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines endangered species as a species that is ''in danger of extinction throughout all or a significant portion of its range,'' and a threatened species as a species that is ''likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' For a more detailed discussion on the factors considered when determining whether a species meets the definition of an endangered species or a threatened species and our analysis on how we determine the foreseeable future in making these decisions, please see Summary of Factors Affecting the Species.

Status Throughout All of Its Range

Since its 1985 listing under the Act, the Interior least tern has shown an ability to adapt to changing environmental conditions caused by both human and natural disturbances. The Interior least tern nesting population encompasses hundreds of colonies in 18 States throughout the Interior Basin, from Montana southward through North Dakota, South Dakota, Nebraska, Colorado, Iowa, Kansas, Missouri, Illinois, Indiana, and Kentucky to eastern New Mexico, Oklahoma, Arkansas, Tennessee, Texas, Louisiana, and Mississippi (see supplemental documents at *https://www.regulations.gov* under Docket No. FWS–R4–ES–2018–0082). Therefore, the Interior least tern is highly redundant and resistant to future catastrophic events. Its representation is ensured by its continued occurrence within all known historical habitats (*i.e.,* Salt Plains, multiple river and stream orders) across a large latitudinal and longitudinal gradient and a wide variety of climatic conditions. Interior least tern resilience is demonstrated by metapopulation dynamics, by its ability to adapt to multiple natural and anthropogenic conditions, and by evidence of high genetic connectivity between drainage subpopulations. Because the Interior least tern has been considered to be increasing and self-sustaining since listing (35 years), and consists of a relatively large number of individuals with demonstrated high redundancy, representation, and resilience, we expect it to remain viable into the future.

We have carefully assessed the best scientific and commercial information available regarding the threats faced by the Interior least tern. Our analysis found an increase in the abundance, number of breeding sites, and range of the Interior least tern; resiliency to existing and potential threats; active habitat management and the implementation of beneficial

management practices; and changes in existing regulatory mechanisms that are protective of migratory bird habitats. Known threats at the time of listing—habitat loss and curtailment of range, and predation—have been reduced or adequately managed, and we have analyzed possible new threats related to climate change and determined that they are not significant threats to the Interior least tern now or within the foreseeable future. Existing State and Federal regulatory mechanisms are adequate to protect the tern. The net effect of current and predictable future stressors to the species, after considering applicable conservation measures and the existing regulatory mechanisms, are not sufficient to cause the Interior least tern to be in danger of extinction now or likely to become so within the foreseeable future throughout its range. We find that the Interior least tern has recovered so that it no longer meets the definition of an endangered species or a threatened species under the Act throughout its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. Having determined that the Interior least tern is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for the Interior least tern, we chose to address the status question first—we considered information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered or threatened. We considered whether any of the threats acting on the Interior least tern are geographically concentrated in any portion of the species' range at a biologically meaningful scale.

We examined the following threats: Habitat loss, curtailment of range, predation, and inadequacy of regulatory mechanisms, including cumulative effects. We found that while some colonies may be locally affected by future threats, these threats are not geographically concentrated. This finding is supported by a habitat driven, rangewide population model (TernPOP; Lott and Sheppard 2017a, b, entire), which considered 55 discrete scenarios of potential future habitat change (threats) or changes in management at local, regional, and rangewide scales, and covered the topics of (1) sandbar nesting habitat loss, (2) habitat degradation, (3) changes in predator management programs, and (4) deliberate efforts to create mid-channel nesting sandbars for the tern (see *Future Conditions and Species Viability,* above). We found no concentration of threats in any portion of the Interior least tern's range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portions of the species' range provides a basis for determining that the species is in danger of extinction or likely to become an endangered species in the foreseeable future throughout a significant portion of its range. This approach is consistent with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* No. 16-cv-01165–JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d, 946, 959 (D. Ariz. 2017).

Conclusion and Determination of Status

Our review of the best available scientific and commercial information indicates that the Interior least tern is not in danger of extinction nor likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. Therefore, we find that the Interior least tern does not meet the definition of an endangered species or a threatened species under the Act.

Effects of This Rule

This rule revises 50 CFR 17.11(h) by removing the Interior least tern from the Federal List of Endangered and Threatened Wildlife. On the effective date of this rule (see **DATES**, above), the protections provided by the Act, particularly through sections 7 and 9, no longer apply to the Interior least tern. Federal agencies are no longer required to consult with the Service under section 7 of the Act in the event that activities they authorize, fund, or carry out may affect the Interior least tern. There is no critical habitat designated for the Interior least tern; therefore, this rule does not affect 50 CFR 17.95. Removal of the Interior least tern from the List of Endangered and Threatened Wildlife does not affect the protection given to all migratory bird species under the MBTA.

Post-Delisting Monitoring

Section 4(g)(1) of the Act requires us to monitor for not less than 5 years, the status of all species that are delisted due to recovery. Post-delisting monitoring (PDM) refers to activities undertaken to verify that a species delisted due to recovery remains secure from the risk of extinction after the protections of the Act no longer apply. The primary goal of PDM is to monitor the species to ensure that its status does not deteriorate, and if a decline is detected, to take measures to halt the decline so that proposing it as endangered or threatened is not again needed. If at any time during the monitoring period, data indicate that protective status under the Act should be reinstated, we can initiate listing procedures, including, if appropriate, emergency listing under section 4(b)(7) of the Act. Section 4(g) of the Act explicitly requires us to cooperate with the States in development and implementation of PDM programs, but we remain responsible for compliance with section 4(g) of the Act and, therefore, must remain actively engaged in all phases of PDM. We also seek active participation of other entities that are expected to assume responsibilities for the species' conservation post-delisting. At the conclusion of the monitoring period, we will review all available information to determine if relisting, the continuation of monitoring, or the termination of monitoring is appropriate.

Draft Post-Delisting Monitoring Plan Overview

While section 4(g)(1) of the Act requires us to implement a system in cooperation with the States to effectively monitor the status of any species that have been recovered and removed from the List(s), it does not require the development of a formal PDM plan prior to removing the species from the List, or at any point. The Service and States have wide latitude in implementation of this provision. However, we generally desire to follow a written planning document to provide for the effective implementation of section 4(g), and we intend to do so here. To fulfill the requirement to

monitor for not less than 5 years, we developed a draft PDM plan for the Interior least tern and coordinated review of the plan with the State agencies, USACE Districts and Divisions, other Federal agencies, and various nongovernmental organizations. We published a notice of availability of a draft PDM plan with the proposed delisting rule (84 FR 56977; October 24, 2019). However, given the comments we received on the duration of the draft PDM plan, we will continue to work with our conservation partners to develop and implement an effective, final PDM plan, with an appropriate duration, for Interior least tern. Existing monitoring programs over more than 80 percent of the species' range (*e.g.,* USACE 2013, 2016, 2018) are committed to continue monitoring following delisting as we coordinate planning, and in the absence of a final PDM plan, periodic monitoring, with surveys in 2021, is expected to continue into the indefinite future due to management commitments by the USACE and the States, regardless of the tern's status under the Act. However, we generally desire to follow a written planning document to provide for the effective implementation of section 4(g), and we intend to do so here. We will notify the public of the final PDM plan on our website, *https://www.fws.gov/mississippiES/*, after coordination with our partners and when it becomes available. The current draft PDM plan is available at *https://www.fws.gov/mississippiES/.*

Required Determinations

National Environmental Policy Act

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with determining and implementing a species' listing status under the Endangered Species Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that Tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes.

We do not believe that any Tribes will be affected by this rule. However, we contacted each of the Tribes within the range of the Interior least tern and requested their input on the proposed delisting rule and draft PDM. We did not receive any comments from them.

References Cited

A complete list of references cited is available on *http://www.regulations.gov* under Docket Number FWS–R4–ES–2018–0082, or upon request from the Field Supervisor, Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Author

The primary author of this rule is Paul Hartfield, Mississippi Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245, unless otherwise noted.

§ 17.11 [Amended]

■ 2. Amend § 17.11(h) by removing the entry for ''Tern, least [Interior DPS]'' under ''Birds'' from the List of Endangered and Threatened Wildlife.

Signing Authority

The Director, U.S. Fish and Wildlife Service, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the U.S. Fish and Wildlife Service. Aurelia Skipwith, Director, U.S. Fish and Wildlife Service, approved this document on November 19, 2020, for publication.

Dated: November 19, 2020.

Madonna Baucum,

Regulations and Policy Chief, Division of Policy, Economics, Risk Management, and Analytics, Joint Administrative Operations, U.S. Fish and Wildlife Service.

[FR Doc. 2020–28192 Filed 1–12–21; 8:45 am]

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Proposed Rules

Federal Register

Vol. 86, No. 8

Wednesday, January 13, 2021

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 HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 5, 92, 93, 200, 574, 576, 578, 880, 882, 884, 886, 902, 982, 983 and 985

[Docket No. FR–6086–P–01]

RIN 2577–AD05

Economic Growth Regulatory Relief and Consumer Protection Act: Implementation of National Standards for the Physical Inspection of Real Estate (NSPIRE)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, Office of the Assistant Secretary for Community Planning and Development, Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Proposed rule.

SUMMARY: This rule proposes a new approach to defining and assessing housing quality: The National Standards for the Physical Inspection of Real Estate (NSPIRE). This proposed rule is part of a broader effort across HUD to revise the way HUD-assisted housing is inspected and evaluated. The purpose of NSPIRE is to reduce regulatory burden and improve HUD oversight through the alignment and consolidation of the inspection regulations used to evaluate HUD housing across multiple programs, which are currently evaluating housing quality through differing standards, protocols, and frequencies. The goal of this alignment and consolidation is to create a unified assessment of housing quality. In advancement of HUD's mission to create quality affordable housing and strong, sustainable, and inclusive communities, this rule would establish the method HUD will use for the implementation of specific NSPIRE standards, scoring, and processes through **Federal Register** notices. Additionally, the proposed rule seeks to apply a ''safe, habitable dwellings'' standard; reduce the categories of current inspectable areas for physical condition standards for covered housing programs from five to three; implement a new annual self-inspection and reporting requirement for certain HUD housing; establish an administrative process for the treatment of health and safety deficiencies; and incorporate provisions of the Economic Growth and Recovery, Regulatory Relief and Consumer Protection Act that will reduce administrative burden on small rural PHAs.

DATES: *Comment Due Date:* March 15, 2021.

ADDRESSES: Interested persons are invited to submit comments to the Office of the General Counsel, Rules Docket Clerk, Department of Housing and Urban Development, 451 Seventh Street SW, Room 10276, Washington, DC 20410–0001. Communications should refer to the above docket number and title and should contain the information specified in the ''Request for Comments'' section. There are two methods for submitting public comments.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street SW, Room 10276, Washington, DC 20410–0500. Due to security measures at all federal agencies, however, submission of comments by mail often results in delayed delivery. To ensure timely receipt of comments, HUD recommends that comments submitted by mail be submitted at least two weeks in advance of the public comment deadline.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make comments immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the notice.

No Facsimile Comments. Facsimile (fax) comments are not acceptable.

Public Inspection of Comments. All comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202) 708–3055 (this is not a toll-free number). Copies of all comments submitted are available for inspection and downloading at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Timothy Weese and Samuel Franco, Real Estate Assessment Center, Office of Public and Indian Housing, Department of Housing and Urban Development, 550 12th St SW, Suite 100, Washington, DC 20410–4000, telephone number 202–708–1112 (this is not a toll-free number). Individuals with hearing or speech impediments may access this number via TTY by calling the Federal Relay during working hours at 800–877–8339 (this is a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Background

There are currently two inspection models used across the majority of HUD housing programs: The Housing Quality Standards (HQS) developed in the 1970s, which are currently found at 24 CFR 982.401, and the Uniform Physical Condition Standards (UPCS) developed in the 1990s, which are currently found at 24 CFR 5.703. Both remain largely unchanged since their inception. The housing portfolio that was once dominated by government-owned properties has changed in the past two decades to become largely increasingly owned by private entities. This shift has caused Congress and HUD's evolving list of stakeholders to demand revisions to the physical inspection products and services that will both provide reliable evaluations of housing conditions and protect residents.

HUD analyzed the way inspections are conducted under both models to

better understand how housing quality regulations needed to evolve. HUD found that both inspection models can sometimes provide inaccurate and inconsistent results and can prevent HUD from effectively evaluating housing across programs. HUD determined that while the models are well-intentioned in design, neither model currently aligns with HUD's priorities, the state of the housing industry and improvements in technology. This is partly because neither model includes mechanisms for continual update. This analysis also identified a disproportionate emphasis around the appearance of items that are otherwise safe and functional and paid inadequate attention to the health and safety conditions within the built environment. HUD has concluded that existing housing standards need to focus on habitability and the residential use of the structures, and most importantly, the health and safety of residents.

To this end, HUD announced the implementation of NSPIRE through the publication of an August 21, 2019, notice,[1] which described the development of a new inspection model for HUD programs. HUD began building the updated standards, procedures, and scoring methodologies, which will to be refined through a multistage NSPIRE demonstration. The demonstration will test and HUD will further refine the future state of HUD's physical inspection model to best serve residents. NSPIRE programmatic provisions will be published in the **Federal Register** and will provide an opportunity for public comment.[2] The improvements being refined through the NSPIRE demonstration are intended to occur in parallel to support and reinforce the changes being proposed by this rule.

Regulatory Consolidation and Alignment

As noted above, the proposed rule would consolidate and align housing quality requirements and associated inspection standards across programs wherever possible. To achieve this, housing quality regulations across HUD programs would be consolidated into one location at 24 CFR part 5. HUD understands, however, that regulations must be flexible enough to accommodate each program's unique circumstances. Where differing statutory requirements or public policy considerations prevent alignment to 24 CFR part 5, those program-specific requirements would be maintained in their respective program regulations and would supersede or supplement 24 CFR part 5.

Current program regulations governing housing quality and inspections have a large regulatory footprint. Rather than being in a single location, they are located under 24 CFR part 5 and part 200 for programs governed by Uniform Physical Condition Standards (UPCS); 24 CFR 982.401 for programs governed by HQS; and within each program's individual regulations in 24 CFR parts 92, 93, 200, 574, 576, 578, 880, 882, 884, 886, 902, 982, 983, and 985. This means that finding and understanding the requirements across programs—even those governed by the same standard—is often cumbersome. Instead, this rule would consolidate 14 dispersed sections which are spread across 24 CFR, into 7 consecutive sections.

Further, there are often minor, unnecessary discrepancies in language across regulations. The use of ''decent, safe, and sanitary'' is a good example. The physical condition standards applicable to Public Housing and HUD's Multifamily Housing program outlines that housing must be ''decent, safe, sanitary, and in good repair.''[3] The Housing Choice Voucher (HCV) and Project-Based Voucher (PBV) program regulations state housing must be ''decent, safe, and sanitary rental housing of a modest (non-luxury) nature with suitable amenities.''[4] Meanwhile, regulations for the Home Investment Partnerships (HOME) program state housing be ''decent, safe, sanitary and affordable.'' HUD believes that all standards governing HUD housing are equivalent in that they mandate safe, habitable housing for residents. An alignment of these standards would create a single expectation of housing quality across these programs and remove these unnecessary discrepancies.

Finally, programmatic alignment and consolidation is increasingly important as HUD's inspection portfolio has shifted to include greater numbers of mixed finance properties which are subject to multiple inspection standards by the nature of their financing. A similar challenge is faced by PHAs and owners whose portfolio includes multiple HUD program types or that convert from one funding stream to another, such as through the Rental Assistance Demonstration (RAD) program. HUD acknowledges that the challenges a PHA faces are not always the same challenges that owners face, but in both cases, the lack of aligned requirements unduly increases the complexity and uncertainty associated with participating in HUD's programs and may deter some owners from future involvement.

Programmatic and Statutory Limits on Alignment

Part of this alignment will consolidate and align the regulations governing the physical condition of HUD housing to create a shared expectation of housing quality across a wide array of distinct programs. The remainder of the alignment centers around program administration: Inspection protocols, processes, and procedures.

Regarding these inspection protocols, processes, and procedures, the majority of the alignment that HUD is proposing involves the program regulations for the public housing and multifamily programs. However, given the unique nature of some HUD programs and the limits posed by existing statutory requirements, it is not possible for HUD to align all program administration regulations across all programs under this proposed rule.

Within this proposed rule, the Housing Choice Voucher (HCV) program, comprised of the Project Based Voucher (PBV) and Tenant Based Voucher (TBV) programs, has been aligned with other HUD programs to the maximum extent possible, while also acknowledging that varying types of rental housing and unique geographic features conditions nationwide necessitate separate requirements in certain areas. HUD's approach for aligning these programs accounts for the:

- Unique statutory requirements related to the standards of individual units rather than the project as a whole;[5]
- Nature of the entity responsible for conducting inspections[6] (the PHA rather than HUD);
- Relationship of housing quality standards to State and local codes;[7]
- Pass/fail nature of inspections; and
- Frequency of inspections.[8]

All of these differ greatly from other HUD programs, particularly project-based assistance programs.[9]

[1] 84 FR 162.

[2] *https://www.federalregister.gov/.*

[3] 24 CFR 5.703.

[4] 24 CFR 982.1(a)(1).

[5] U.S.C. 1437f(o)(8)(C).

[6] U.S.C. 1437f(o)(8)(C).

[7] U.S.C. 1437f(o)(8)(G).

[8] U.S.C. 1437f(o)(8)(D)(i).

[9] Important to note that PBVs are part of the HCV program and PBV units under section 8(o)(13) are subject to the requirements under section 8(o)(8), thus, using the Housing Quality Standards similar to tenant-based voucher units. Thus, key elements of physical standard requirements for the PBVs align with the HCV program and by virtue of section 8(o)(8) will be distinct and separate from PBRA and public housing.

Similarly, while the proposed rule aligns the Office of Community Planning and Development (CPD) programs whenever possible, CPD programs pose unique challenges to alignment, both across HUD and within CPD. CPD programs provide housing assistance, one-time or time-limited assistance (such as mediation with a property owner or a one-time payment of rental arrears to help a family avoid eviction from their existing housing, or payment of rental application fees to help a person in shelter get back into housing), and special housing needs programs. CPD programs also fund various services, such as legal assistance and mediation to prevent eviction and housing search and placement, for special needs populations. The variety of housing assistance and services offered through CPD programs required HUD to adopt, as proposed here, unique inspection frequencies and protocols that account for the needs of these different programs and assistance types. Furthermore, this alignment accounts for the fact that CPD programs are administered differently. For example, CPD's formula grant-based programs are provided to States, eligible units of local government, the District of Columbia, U.S. Territories and Tribal governments, which often follow local code requirements.

Through the rulemaking process, HUD invites recommendations on opportunities to further consolidate similar regulatory provisions.

With regard to consolidation, HUD is requesting public comments on the following questions:

Question for Comment #1: The Economic Growth and Recovery Act mandates that for small public housing agencies, the same standards apply to small public housing agencies for the acceptable condition of public housing projects also apply to projects assisted under Section 8. Is there a preferable approach to implementing the statutory provision that requires the same standards for small rural Section 8 projects and PHA public housing projects? If so, how should the standards for and small rural PHA Section 8 projects and public housing projects differ from the standards employed for all other public housing and HCV units while ensuring that all HUD housing must be free of health and safety hazards?

Why HUD Is Implementing NSPIRE Through Rulemaking

As previously noted, the current regulatory footprint of all housing standards is sprawling. HUD believes that consolidating these standards—a total of 16 regulations containing many administrative and procedural differences—is required to reduce administrative burden and increase resident safety.

While some of the programmatic modifications made by this proposed rule could have been implemented without formal rulemaking, proceeding with this proposed rule provides a framework for continued stakeholder engagement and ensures transparency throughout the process.

During the NSPIRE implementation and in parallel to formal rulemaking, HUD plans to draft **Federal Register** notices that would outline the specific standards, scoring, and protocols under NSPIRE. All updated standards and scoring methodologies would be published—as required by this proposed rule—through a **Federal Register** Notice at least once every 3 years with the opportunity for public comment prior to implementation. This would provide opportunity for both industry stakeholders and the general public to examine the proposed changes, provide pertinent comments, and suggest the inclusion of any relevant industry best practices. This would also allow HUD to be more responsive to the changing portfolio and evolving needs in the field and would allow HUD to further ensure resident safety remains at the forefront.

II. The Proposed Rule

There are three sections under this heading representing the four types of changes this rule is making: Section A covers amendments and additions to 24 CFR part 5, which make up the bulk of the changes proposed;'' Section B covers HUD's implementation of its statutory mandate regarding Small rural PHAs;'' and Section C discusses other changes which the proposed rule would make to regulations for programs which are being integrated under NSPIRE.

A: Amendments and Additions to 24 CFR Part 5

Amending 24 CFR part 5 would allow HUD to consolidate multiple physical condition requirements into a single regulation. This would align overarching policies related to the frequency of inspections, the method of appealing results, and the actors responsible for conducting inspections. It would also make several technical modifications to other regulations. These changes would ensure transparency, consolidate regulatory sprawl, and reduce overall burden for PHAs and owner/agents.

HUD's consolidation and alignment of the inspections regulations under this part broadly fall into two categories. First, amended and aligned § 5.703 would generally apply across all HUD programs covered under the proposed rule. These regulations are meant to convey clear expectations of housing quality and maintenance requirements across HUD programs, ensuring residents have a shared expectation of safe, habitable housing regardless of program type. Second, changes and alignment in § 5.705 through § 5.713 are generally only applicable to the public housing and multifamily programs as they deal with administrative procedures and scoring for HUD-conducted inspections. To clarify, by nature of their differing statutory requirements and programmatic considerations, § 5.705 through § 5.713 in part 5 generally do not apply to Section 8(o) programs (HCV and PBV), Moderate Rehabilitation, or certain CPD programs (*i.e.,* HOME and Housing Trust Fund (HTF)).

HUD proposes the following amendments and additions to 24 CFR part 5:

a. Section 5.701 Applicability

The current regulations at § 5.701 state that the physical condition standards in 24 CFR part 5 apply to Public Housing and certain programs administered under HUD's Office of Multifamily Housing, including all project-based Section 8 programs and any housing with mortgages insured or held by HUD or receiving insurance from HUD.

Amended § 5.701 would extend this subpart to the HCV (part 982) and PBV programs (part 983). CPD programs would adopt these standards by reference in the applicable CPD regulations to include: The HOME Program (part 92); HTF) (part 93); Housing Opportunities for Persons with Aids (HOPWA) (part 574); Emergency Solutions Grants (ESG) Program (part 576); and Continuum of Care (CoC) (part 578).

b. Section 5.703 National Standards for the Condition of HUD Housing

HUD's housing condition standards are located in two areas in the regulations today: Existing § 5.703 applies to public housing, multifamily, and some CPD programs while existing § 982.401 applies to HCV and PBV, and to some other CPD programs via cross-reference. CPD programs do not apply any scoring, weighting, ranking or enforcement from Part 5. This is outlined in the CPD program rules (*e.g.,* HOME rule at 24 CFR 92.251(f)(1)(i).)). CPD programs are fundamentally different than many of the programs subject to REAC inspections as they are

programs administered by local governments subject to local decision making. CPD programs have their own means of enforcement specified in each program regulation. These functions are instead performed by HUD CPD staff, and can include requiring the participating jurisdiction or grantee repaying the full amount of subsidy provided to the project. Amended § 5.703(a) through (e) consolidates and replaces both § 5.703 and § 982.401. These provisions parallel the specific directives at 42 U.S.C. 1437(f)(2) and 42 U.S.C. 1437(o)(8)(B) that require the Secretary to establish quality standards that ensure housing is safe and habitable. In these provisions, HUD proposes to define ''safe, habitable dwellings'' as those for which ''the items and components located inside the building, outside the building, and within the units of HUD housing . . . [are] functionally adequate, operable, and free of health and safety hazards.'' HUD believes the requirement of ''functionally adequate, operable, and free of health and safety hazards'' is generally equivalent to ''decent, safe, and sanitary.'' The intentional shift in language would serve as a uniting phrase across programs. Additionally, the shift would help the public differentiate between the old and the new regulatory frameworks. It would further allow HUD to establish clear, objective, and aligned property inspection standards (described later in this rule at § 5.705(a) and § 5.709) by creating identifiable limits that are comparable across housing programs. For example, the terms ''functionally adequate'' and ''operable'' may be defined based on universal habitability requirements and design specifications for an item or component. In contrast, ''decent,'' is a highly subjective term. Perceptions of decency vary from person to person and location to location. The terms ''health'' and ''safety'' can also be measured universally and quantitatively by using standard public health and safety metrics related to morbidity and mortality. ''Health'' as used here would be inclusive of ''sanitary;'' HUD believes that term ''health'' would be more useful for assessment of a broader range of impacts. HUD intends this new description to make clear that the built environment's effect on the health and safety of residents is more important than any building damage that is strictly cosmetic in nature. The new definition would also simplify the way in which this rule names the inspectable areas of a property by reducing the number of areas from five to three. This change is intended to increase readability, streamline the inspection process, and emphasize to stakeholders the importance of resident units.

Section 5.703(a) would limit the ways in which the quality requirements apply to units occupied by HCV and PBV participants, as well as common areas and exterior areas which either service or are associated with such units. This limitation is generally derived from the unique statutory requirements for these programs related to the application of housing quality standards to units (as opposed to projects). Other factors that make this limitation appropriate is the entity responsible for conducting the inspections (the PHA), the relationship of the housing quality standards to local codes, and the frequency of those inspections.

HUD also proposes to consolidate into § 5.703(d) several provisions currently found in one section of the regulations but implied in others. For example, the proposed rule would make it clear that certain unit features, like having a kitchen area, are minimum habitability requirements across programs. Most renters would expect to have the ability to store and prepare food in their home. While not new requirements, they reinforce the importance that this rule places on residents' units and the primarily residential nature of HUD housing. Similarly, amended § 5.703(d) would add the word ''safe'' to the current requirement that units have an adequate source of potable water. ''Safe'' in this context would be defined by HUD through future rulemaking after receiving public comments.

This portion of the rule would also incorporate requirements currently described more clearly by the HCV regulations for smoke detectors, including those for hearing impaired persons and the requirement for hot and cold running water, and would replace current paragraph (f) concerning health and safety concerns. So that all the habitability provisions are in one place, paragraph (e)(2) would maintain language found in the current regulation at § 5.703(f) regarding lead-based paint but would add information on applicability.

The remaining provisions in (f) through (h) discuss the relationship of local codes to HUD housing and identify when alternatives to § 5.703 would apply.

New paragraph (g) would clarify that § 5.703 may be replaced or supplemented by a state or local standard under the HCV and PBV program in line with the statutory exception for those programs found at 42 U.S.C. 1437f(o)(8)(B). Additionally, for special housing types, such as Single Room Occupancies or congregate housing, that may have incompatible design requirements, like shared bathroom or kitchen facilities, paragraph (h) would clarify that the provisions in § 5.703 may be modified by program specific requirements which would continue to be found in the same program-specific sections of the regulations as they are today.

With regard to standards, HUD is requesting public comments on the following questions:

Question for Comment #2: HUD has the following questions regarding water safety:

(a) How can HUD best define what is meant by safe or potable water?

(b) Should ''safe'' mean water provided by a public water system that is in compliance with the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*) as implemented by the EPA?

(c) How should HUD monitor whether water is safe?

(d) What elements should be reviewed during the physical inspection to determine water safety?

(e) Should inspectors verify that a municipal water supply authority is in compliance with EPA's Safe Drinking Water Act? How would they best do this?

Question for Comment #3: HUD is specifically seeking comment on whether the site and neighborhood standards as found in 24 CFR 982.401(l), should be included in the regulation or only in the inspection standards? HUD also seeks comments on whether all of the explicit standards should be included or if there are certain site and neighborhood standards that HUD should consider changing?

Question for Comment #4: The proposed rule would establish a subset of minimum NSPIRE standards to apply to rehabilitation of rental and owner-occupied or homebuyer housing and homebuyer acquisition of standard housing (*i.e.,* down payment assistance) assisted with HOME or HTF at §§ 92.251(b) and (c)(3) and §§ 93.301(b) and (c)(3), and to HOME- and HTF-assisted rental projects throughout the affordability period at § 92.251(f) and § 93.301(e), and for units occupied by tenants receiving HOME Tenant-based rental assistance (TBRA) in accordance with § 92.251(f)What minimum housing condition standards should HUD apply to HOME- and HTF-assisted rehabilitation activities for rental or owner-occupied housing and what minimum condition standard should apply to HOME-assisted homebuyer acquisition activities at completion to ensure that the housing is decent, safe,

sanitary and in good repair? In addition, what minimum housing condition standards should HUD apply throughout the affordability period to HOME- and HTF-assisted rental projects and units occupied by tenants receiving HOME TBRA to ensure that the housing remains decent, safe, sanitary and in good repair?

Question for Comment #5: How do the NSPIRE standards in this proposed rule compare to minimum deficiencies that must be corrected in HOME- and HTF-assisted rehabilitation projects at § 92.251(b) and § 93.301(b) or which must be corrected prior to HOME- and HTF-assisted homebuyer acquisition of standard housing (*i.e.,* down payment assistance) to ensure that upon completion the housing is decent, safe, sanitary and in good repair?

Question for Comment #6: Should HUD establish different minimum deficiencies that must be corrected in HOME- or HTF-assisted rental housing and homebuyer or owner-occupied housing rehabilitation projects at § 92.251(b) and § 93.301(b)? If so, what should HUD consider when establishing minimum standards for the rehabilitation of rental housing, homebuyer housing, or owner-occupied housing?

Question for Comment #7: Should HUD establish different minimum deficiencies that must be corrected in large and small HOME- or HTF-assisted rehabilitation projects at § 92.251(b) and § 93.301(b)? If so, what should HUD consider when establishing minimum standards and what should HUD define as a large housing project?

Question for Comment #8: Should HUD establish different minimum deficiencies that must be corrected for HOME or HTF-assisted rehabilitation and homebuyer or owner-occupied acquisition of standard housing (*i.e.,* down payment assistance) projects at § 92.251(c)(3) and § 93.301(c)(3)? If so, what should HUD consider when establishing minimum standards for rehabilitation projects and homebuyer acquisition projects?

Question for Comment #9: Should HUD establish minimum written property standards requirements for housing occupied by tenants receiving HOME TBRA at § 92.251(f) that exceed or are different than minimum requirements for the ongoing condition of HOME-assisted rental housing? Should HUD establish a list of minimum deficiencies that must be corrected if found during an onsite physical inspection of HTF-assisted rental housing? If so, what elements should be required in the written property standards?

Question for Comment #10: Alternatively, should HUD apply the NSPIRE standards established in accordance with this proposed rule (not to include the inspection procedures, administrative processes for scoring and ranking, or the enforcement requirements of NPSIRE) to housing occupied by tenants assisted receiving HOME TBRA at § 92.251(f)? HUD could require inspection of the assisted unit; the items and components within the primary and secondary means of egress from the unit's entry door(s) to the public way; the common features related to the residential use of the building (*e.g.,* the laundry room, community room, mail room); and, the systems equipment that directly services the unit similar to the exceptions that are included in the proposed rule for HCV and PBV. Is there another national housing quality or condition standard that HUD should apply to housing occupied by tenants assisted with HOME TBRA?

Question for Comment #11: Should HUD establish a list of minimum deficiencies that must be corrected if found during an onsite physical inspection of HOME- or HTF-assisted rental housing or housing occupied by a tenant receiving HOME TBRA at § 92.251(f)? If so, should HUD establish separate lists for HOME and HTF-assisted rental housing and housing occupied by a tenant receiving HOME TBRA? What should HUD consider in the development of such lists of deficiencies?

Question for Comment #12: Section 5.703(h) of the proposed rule identifies unique standards to special types of housing—single room occupancy (SRO) housing; congregate housing; group home; shared housing; manufactured home; cooperative housing; and homeownership—but applies this section only to the HCV, PBV, and Moderate Rehabilitation Programs. Should any of these unique standards—specifically SRO, congregate housing, shared housing, and manufactured homes—apply to the CoC, ESG, and HOPWA programs?

Question for Comment #13: HUD is considering adding certain affirmative requirements at the final rule stage. Currently under consideration are related to ground-fault circuit interrupter (GFCI), an arc-fault circuit interrupter (AFCI); Heating, ventilation, and air conditioning (HVAC); Guardrail; and Lighting-Interior. In alignment with HUD's prioritization of resident safety, HUD welcomes public comment on all issues, but is specifically seeking feedback regarding implementing the following:

a. Electrical Outlet and Switch—HUD is considering adding a deficiency under the Electrical Outlet and Switch Standard regarding an inadequate number of outlets (*i.e.,* either 2 working outlets or 1 working outlet and a permanent light) within all habitable rooms due to potential safety hazards, usability barriers, and inadequate illumination.

b. GFCI & AFCI—HUD is considering adding a deficiency under the GFCI & AFCI Standard regarding the lack of GFCI protection where required (*e.g.,* within 6 feet of sinks, tubs, showers; or exterior, garage, or unfinished basement areas) due to potential safety hazards, such as shock or electrocution.

c. HVAC—HUD is considering adding a deficiency under the HVAC Standard regarding the lack of a permanently installed heating source due to potential health safety hazards, such as fire or carbon monoxide exposure.

d. Guardrail—HUD is considering adding a deficiency under the Guardrail Standard to require a guardrail when there is an elevated walking surface with a drop off of 30 inches or greater measured vertically.

e. Lighting—Interior—HUD is considering adding a deficiency under the Lighting—Interior Standard regarding the absence of a permanently mounted light fixture in the kitchen or bathroom due to potential safety hazards and inadequate illumination.

c. Section 5.705 Inspection Requirements

The current § 5.705 states that entities must inspect covered HUD housing programs annually in accordance with HUD-prescribed physical condition standards unless program regulations or HUD provide otherwise. Amended and expanded § 5.705 would align inspection standards (including provisions pertaining to frequency), would identify entities responsible for conducting inspections, would outline timing of inspections and reinspection fees, and would mandate access to properties. Centralizing these standards would provide greater clarity and ease of access for stakeholders and oversight authorities.

Section 5.705(a)(1) continues to require that any entity responsible for conducting an inspection of HUD housing determine compliance with this subpart. However, (a)(1) would require that entities must inspect such HUD housing in accordance with the standards and procedures set out by the Secretary and published in the **Federal Register** as described in § 5.711, and would allow HUD to establish aligned

inspection standards across HUD programs.

New paragraph (b)(1) would incorporate existing provisions from § 200.855 describing the entity responsible for inspecting HUD housing. New paragraph (b)(2) would provide an exception for the HCV, PBV and Mod rehab programs in cases where the PHA is required to conduct the inspection.

New subparagraph § 5.705(c)(1) would pull elements from existing regulations which outline that a property must be inspected before the property is approved for participation in any of the HUD housing programs under this part unless the property is already a participant in another HUD program under this part. It would also continue to require that an entity responsible for conducting an inspection of HUD housing must determine compliance with this subpart and must inspect such housing annually, unless otherwise specified below.

Current inspection requirements for public housing and multifamily programs are risk-based with frequencies ranging from annually to once every three years. The proposed rule would maintain risk-based annual inspection requirements. The proposed rule would expand this time period to between 2 and 5 years. The criteria under which a PHA or owner/agent may qualify for a longer inspection cycle would be described in a future **Federal Register** Notice and will be based on a risk assessment. This change in inspection frequency would further incentivize performance without any anticipated degradation in housing quality as it would not obviate the expectation of continuous compliance with housing quality requirements. Further, since proposed § 5.707 would require properties to conduct an annual self-inspection and submit results to HUD, the Agency believes that submission of self-inspection results and status of repair would mitigate risk associated with longer inspection frequencies. In all cases, HUD housing would be required to remain in compliance with all applicable laws and regulations, including the quality standards in § 5.703, regardless of the date of the next inspection.

Due to different statutory and programmatic requirements, requirements surrounding inspections frequencies for some programs would continue to be governed by current applicable regulations, including HCV, PBV, and Moderate Rehabilitation. Further, small rural PHAs would be exempted from the annual inspection requirement and would instead follow provisions of the Economic Growth and Recovery Act outlined later in this notice. Finally, HUD may exempt assisted-living facilities, board and care facilities, and intermediate care facilities, and any other Section 232 facilities if they meet certain criteria as outlined in the regulation.

New paragraph (d) would incorporate and align existing language regarding reinspection costs from the public housing and multifamily regulations. The proposed rule would allow, but not require, the responsible entity (as identified in proposed § 5.705(a)(1)) to charge a property owner (including PHAs) a reasonable reinspection fee when an owner notifies the responsible entity that a repair has been made, or the allotted time for repairs has elapsed, and a reinspection reveals the deficiency was not corrected.

New paragraph (a)(3) would outline variants in inspection standards for the HCV and PBV programs by incorporating existing regulations at § 982.401(a)(ii). As required by statute, the proposed rule would continue to give PHAs the ability to consider variations in local laws and practices and provide appropriate flexibility to facilitate the efficient provision of assistance.[10]

With regard to inspection, HUD is requesting public comments on the following questions:

Question for Comment #14: HUD is soliciting comment on the risk-based annual inspection requirement expansion from 2 to 5 years. Is a different range merited? If so, what should HUD consider in setting and adjusting the ranges?

Question for Comment #15: HUD is soliciting comment on how to involve tenants in helping REAC identify poor performing properties. For example, could tenants provide a ''1–5 rating'' of their units with ''1'' being ''poor'' and ''5'' being ''excellent?'' Could tenants recommend their units for inspection separate from the statistical sample for scoring purposes to inform HUD's risk analysis of the property?

d. Section 5.707 Uniform Self-Inspection Requirement and Report

While 42 U.S.C. 1437(d)(f)(3) requires that each PHA inspect all public housing projects annually, current regulations governing other covered HUD housing programs, such as those for Multifamily Housing, do not explicitly require an annual self-inspection of all units. The proposed rule would add a new regulation at § 5.707 which would explicitly require annual self-inspections of all units in a project and would add a new electronic reporting requirement. The results of the electronic reporting requirement would be an integral part of HUD's real estate inspection process. With advances in technology, HUD believes it is now possible and practical to collect this type of property data electronically. The procedures for this reporting would be outlined in a future **Federal Register** Notice with an opportunity for public comment.

By making regular, comprehensive self-inspections and reporting a part of each covered property's physical assessment regimen, HUD would once again signal a focus on identifying and mitigating risks to resident health and safety. Self-inspections are a key component of ensuring properties are maintained year-round and encourage regular, preventative maintenance rather than ''just in time'' repairs ahead of HUD-conducted inspections.

It should be noted that due to the unique statutory requirements of the HCV, PBV, and CPD programs, they would be exempted from this electronic reporting requirement. Additionally, Moderate Rehabilitation would continue to follow program requirements described in the current regulations.

With regard to self-inspection, HUD is requesting public comments on the following questions:

Question for Comment #16: HUD is soliciting comment on how the clarification to self-inspect all HUD housing units in certain programs to ensure that units are being maintained in accordance with HUD housing quality standards will impact the operations of PHAs, owners and agents? What advantages and disadvantages would arise from extending this self-inspection requirement to the programs that do not explicitly require an annual self-inspection of all units (such as HCV, PBV, Moderate Rehabilitation, and CPD programs)?

Question for Comment #17: Is there an alternative to the self-inspection protocol (§ 5.707 Uniform self-inspection requirement and report) that would allow HUD to achieve the objective that families live in safe and habitable units, and what are the risks and benefits of that alternative?

e. Section 5.709 Administrative Process for Defining and Revising Inspection Criteria

The proposed rule would add § 5.709 which would require HUD to establish an administrative process for regularly receiving public comments on scoring and ranking criteria through **Federal Register** notices.

[10] 42 U.S.C. 1437(f)(o)(8)(g).

New paragraph (a)(1) would establish a timeframe for revisions of standards of every 3 years, or every 3 years after the most recent revision, whichever is later. The inclusion of this regulation would allow HUD to respond to the changing needs of an evolving housing portfolio and technological changes that may impact the inspections process. This proposed rule would mandate that the Agency update the scoring and ranking criteria regularly and would further demonstrate HUD's commitment to ensure scoring is reasonable, responsive, and current.

New paragraph (a)(2) would allow HUD to publish a notice without 30 days of public comment in the case of an emergency. For § 5.709, an emergency would be defined as a significant health hazard, a new safety concern due to changing construction technology, or another event as determined by the Secretary. This section would further highlight the Secretary's commitment to being responsive to the needs and safety of residents.

Question for Comment #18: In alignment with HUD's desire to increase clarity and decrease ambiguity, HUD is considering definitions for kitchens and sanitary facilities. HUD seeks public input on the following:

a. Should HUD define what constitutes a kitchen and its related components required for functional adequacy (*e.g.,* cooking appliance, means of refrigeration, food preparation and storage)?

b. Should HUD define what constitutes a sanitary facility and its related components required for functional adequacy (*e.g.,* bathtub or shower, toilet, ventilation, sink)?

f. Section 5.711 Scoring, Ranking Criteria, and Appeals

The proposed rule would add a new regulation at § 5.711 which would incorporate and streamline existing regulations governing the scoring and ranking of covered properties, chiefly multifamily and public housing properties. Further, it would include the responsibilities of PHAs and owner/agents after an inspection and outline the process for appealing inspection results. Proposed § 5.711 would also incorporate and replace the current scoring and ranking process under § 200.857 as well as the prior appeals process for physical inspections under the Public Housing Assessment System (PHAS) at §§ 902.22, 902.24, 902.26, and 902.68. By aligning similar language across programs, HUD believes the proposed rule will increase clarity and ease of compliance while creating a standardized set of expectations.

New paragraph (a) would exempt the HCV and PBV programs which would continue to be assessed under the Section Eight Management Assessment Program (SEMAP) as well as small rural PHAs which would be assessed under new subpart D of 985. As part of the streamlining in the proposed rule, new paragraph (b) moves the existing regulation at § 200.857(a)(1) to part 5.

New paragraph (b)(2) would clarify that Public Housing projects would continue to be scored and ranked under the Public Housing Assessment System (PHAS) outlined in part 902. New paragraph (c)(1) would introduce the category of severe health or safety (SHS) deficiencies which are the most serious types of conditions that can be cited as violations of § 5.703 and replaces the current exigent health and safety (EH&S) category of deficiencies found in § 902.22. Similar to the use of new language in § 5.703, the change in terminology would serve as a visual marker to help a reader differentiate between the existing and proposed regulations. It would also help to minimize confusion across the aligned programs. The term ''exigent health and safety'' has been associated with more than one definition in the past and has been confused with the term ''life-threatening.'' For example, HUD's notice at 76 FR 10055 employed EH&S and life threatening synonymously despite the different meanings.[11]

While generally equivalent in purpose to the way EH&S is being used today, the new phrase, ''severe health or safety'' would provide a clear expression of the seriousness of these types of issues which would also be reflected in the proposed default timeframe of repair of 24 hours. HUD acknowledges that current regulations are inconsistent in describing how soon an EH&S deficiency must be corrected, establishing a singular provision at § 5.711(c)(1) for the correction of SHS deficiencies for most programs would address these inconsistencies.

Additionally, the Housing Opportunity Through Modernization Act of 2016 (HOTMA) limited HUD's flexibility in defining the timeframes for repair of deficiencies in the HCV or PBV programs. That act requires that life threatening conditions be addressed in 24 hours and all other deficiencies within 30 days. In order to accommodate that statutory constraint, HUD would identify in the notice described in § 5.709 which of the SHS deficiencies are life threatening and which ones are non-life threatening. Section 5.711 would also require the correction of non-SHS health or safety deficiencies within 30 days, for all programs.

Further, proposed § 5.711 would incorporate and condense the administrative review and enforcement action provisions found at § 200.857(h) and § 200.857(i) to align with HUD's current procedures and eliminate inconsistencies with Section 219, Title II, Division H of the Consolidated Appropriations Act, 2020, Public Law 116–94, December 20, 2019. As previously noted, CPD programs do not apply any scoring, weighting, ranking or enforcement from Part 5. This is outlined in the HOME rule at 24 CFR 92.251(f)(1)(i). CPD programs are fundamentally different than many of the programs subject to REAC inspections as they are programs administered by local governments subject to local decision making. CPD programs have their own means of enforcement specified in each program regulation. These functions are instead performed by HUD CPD staff, and can include requiring the participating jurisdiction or grantee repaying the full amount of subsidy provided to the project. New paragraph (d)(2) would consolidate current regulations governing the process for technical reviews into one section with an aligned set of procedures applicable to properties inspected by HUD.

With regard to tenant-induced damage, HUD is requesting public comments on the following questions:

Question for Comment #19: HUD is soliciting comment on how to fairly approach tenant-induced damage to units and properties in such a way that it will have a positive impact on HUD-assisted properties. What could be used as incentives or disincentives to discourage tenant-induced damage?

Question for Comment #20: HUD seeks input on the scoring threshold that should be used to refer a property to the Departmental Enforcement Center (DEC): What factors should be considered by HUD in setting the threshold, and whether should this be a stationary threshold or one that is updated periodically?

[11] ''The UPCS physical inspection emphasizes health and safety (H&S) deficiencies because of their crucial impact on the well-being of residents. A subset of H&S deficiencies is exigent health and safety (EHS) deficiencies. These are life threatening (LT) and require immediate action or remedy. EHS deficiencies can substantially reduce the overall project score.'' See, 76 FR 10055 *https://www.federalregister.gov/documents/2011/02/23/2011-2633/changes-to-the-public-housing-assessment-system-phas-physical-condition-scoring-notice.*

g. Section 5.713 Second- and Third-Party Rights

The proposed rule would add new § 5.713, which would incorporate and modify existing language at § 982.407 on enforcement of inspection requirements. The new regulation would mirror existing regulations in place for the HCV and PBV programs—which in no way create any right to assert any claim against HUD or the PHA for damages, injunction, or other relief for alleged failure to enforce inspection standards, and would expand it to other programs under NSPIRE.

B: Addition of Part 902, Subpart H and Part 985, Subpart D Regarding Small Rural PHAs

Small rural PHAs generally operate in a very different financial environment and rental housing market than larger PHAs in major metropolitan areas. These PHAs often have less access to private capital and their small size typically means that they operate with fewer staff and outside consulting services. Accordingly, regulatory burden often falls more heavily on small rural PHAs, reducing their ability to serve low-income families.

On May 24, 2018, President Trump signed the Economic Growth and Recovery, Regulatory Relief and Consumer Protection Act (''Economic Growth Act'') into law. Section 209 of the Act added section 38 to the United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) and made several amendments pertaining to small rural PHAs. Certain statutory amendments made by section 209 became effective 60 days after enactment, and HUD published a notice in the **Federal Register** on February 14, 2019,[12] which, read together with the statutory language, was intended to aid HUD program participants and the public in understanding the reasons for deferred action with respect to specific statutory provisions. HUD published a notice in the **Federal Register** on February 27, 2020,[13] explaining how HUD designates small rural PHAs and described which 209 provisions were being implemented. The notice also stated that HUD would undertake future rulemaking for full implementation of other provisions, including defining small rural PHAs in the regulations. This proposed rule would implement this definition of small rural PHA as well as a new assessment system for their public housing and HCV programs. HUD believes that the Economic Growth Act's focus on inspections and the directive to follow the same standards for small, rural public housing as that for projects assisted under Section 8 make the inclusion of the act's provisions in this rule a logical fit.

The proposed rule would create new Subpart H under the current 902 regulations for the Public Housing Assessment System (PHAS). Section 209(a)(2) of the Economic Growth Act defined ''small public housing agency'' and directed HUD to use the existing definition of ''rural area'' contained in the regulations governing the Consumer Financial Protection Bureau (CFPB) at 12 CFR 1026.35(b)(2)(iv)(A). In the February 27, 2020 notice, HUD further refined this definition by defining PHAs that ''predominantly operate in a rural area'' and clarifying that these PHAs would be referred to as ''small rural PHAs'' to avoid confusion with other small PHA designations employed by HUD. The proposed rule would fully implement these definitions through § 902.101. A small rural PHA would be defined as a PHA that administers 550 or fewer combined public housing and Section 8 voucher units and either has a primary administrative building with a physical address in a rural area or more than 50 percent of its combined public housing units and voucher units in rural areas. The methodology for identifying a small rural PHA was identified in the February 27, 2020 notice and § 902.101(b) would require that HUD make this determination once every three years. PHAs would have the ability to appeal this determination in accordance with § 902.101(c).

The proposed rule would amend the current regulations for the Public Housing Assessment System (PHAS) to exempt small rural PHAs and would instead implement an alternate performance indicator and rating system. Under proposed § 902.103, small rural PHAs would be assessed based on the physical condition of their public housing properties. Proposed § 902.103(b) would establish an assessment frequency of no more than once every three years, as required under Section 209(c)(1)(A) of the Economic Growth Act, except that a troubled small rural PHA would be subject to an annual assessment.

A small rural PHA's public housing program would be designated as troubled under § 902.105 if:

- The weighted average score of all property inspections is below 70 percent of the total available points; or
- If a the PHA has a weighted average score of between 70 and 80 percent of the total available points and has at least one property that receives fewer than 70 percent of the total available points.

Troubled small rural PHAs would be referred to their local field office or other designated HUD office(s) for remedial action, oversight, and monitoring. HUD would negotiate and develop a Corrective Action Agreement (CAA) as described in § 902.105(c) within 30 days of the PHA's notification of their designation as troubled. Section 902.105(c) through (i) would outline the requirements and process for the CAA. Proposed § 902.107 would describe the situation under which HUD may withhold, deny, or rescind a troubled designation. Conditions for appealing troubled designations are outlined in proposed § 902.109. Sanctions for small rural PHAs that remain troubled as well as incentives for small rural PHAs that are high performers would remain the same as those currently described in the PHAS regulations.

The Economic Growth Act provides that HUD may designate a small rural PHA as a troubled PHA with respect to its HCV program if HUD determines the agency has failed to comply with HCV inspection requirements, HUD is proposing to add a new subpart D to 24 CFR part 985, Section 8 Management Assessment Program (SEMAP).

Under proposed § 985.201, PHAs that meet the definition of small rural under § 902.101 would no longer be subject to SEMAP requirements but would instead be assessed on the basis of the performance indicators and rating system under subpart D. In assessing whether a small rural PHA's HCV program is a high performer, standard performer, or troubled, HUD would take four indicators into consideration, all of which are related to the small rural PHA's compliance with the inspection requirements. Each indicator would be scored on a pass/fail basis. The inspection indicators described in the proposed § 985.203 include:

- *Inspection standards* which would confirm the PHA is applying the applicable NSPIRE standards to HCV or PBV-assisted units or a HUD-approved variation under § 5.703. The PHA would pass the indicator if all HCV and PBV units were inspected using the correct standards;
- *Initial unit inspections* which would validate the PHA is conducting initial inspections within the appropriate timeframes. The PHA would pass the indicator if at least 98 percent of newly leased units passed inspection prior to the beginning of assistance;
- *Frequency of HQS inspections* which would verify the PHA inspects tenant-based units under HAP contract and the required sample of PBV units at least once during the three-year period

[12] 84 FR 4097, February 14, 2019.

[13] 85 FR 11381, February 27, 2020.

from the last PHA inspection. The PHA would pass the indicator if at least 98 percent of the units were inspected; and

• *Unit condition enforcement* would confirm the PHA is taking corrective action as required in cases where the owner fails to correct an identified unit deficiency in accordance with HUD requirements. The PHA would pass the indicator if 98 percent of inspections with identified life-threatening or other deficiencies were corrected within the required timeframe.

In order for the small rural PHA to be designated as a high performer, additional requirements related to funding would also apply. Proposed § 985.205(a) would state that for a PHA to be designated as a high performer, the PHA must:

• Either utilize at least 98 percent of its HCV budget authority for the most recent calendar year or the percent of HCV units leased by renters or occupied by homeowners for the most recent calendar year must be at least 98 percent;

• Not end the calendar year with excess HAP reserves; and

• Not end the calendar year in a funding shortfall or receive shortfall prevention funding from HUD.

If the small rural PHA passes all four inspection indicators and meets the funding criteria listed above, the PHA is designated as a high performer. If a PHA passes all four inspection indicators but does not meet the funding criteria listed above, the PHA will be designated as a standard performer. If the small rural PHA fails any one of the four inspection indicators, regardless of whether or not it meets the funding requirements, the PHA is designated as troubled.

In accordance with statutory requirements contained in the Economic Growth Act, proposed § 985.207 would establish an assessment frequency of no more than once every three years, except that a troubled small rural PHA would be subject to an annual assessment in accordance with § 985.204.

Proposed § 985.209 would cover requirements that apply to small rural PHAs designated as troubled, including the statutorily mandated appeals process and the required corrective action agreement.

Proposed § 985.211 would state that HUD would maintain small rural PHAs' assessment files, including designations, appeals, and agreements, for at least 3 years.

With regard to small rural PHAs, HUD is requesting public comments on the following questions:

Question for comment #21: HUD is considering establishing the threshold for troubled PHAs under the small rural assessment as a PHA that either has a weighted average of less than 70 percent of all available points on physical inspections, or a PHA that has a weighted average of between 70 and 80 percent of all available points and that also has at least one property that received a score of less than 70 percent of available points. HUD is seeking comment on how this threshold will impact PHAs and residents, and what alternative thresholds HUD should use to define a troubled PHA?

Question for comment #22: HUD is specifically seeking comment on the four indicators proposed to determine if the PHA is failing to fulfill its responsibilities for unit inspections under the HCV program and the method by which HUD is proposing to determine if the PHA has passed or failed the indicator. Are the indicators proposed to make such determination appropriate? If not, are there better alternatives?

Question for comment #23: HUD is specifically seeking comment on the criteria it is proposing to determine if the PHA is a high performer or a standard performer. Are the conditions related to funding utilization appropriate? If not, are there better alternatives? Should HUD be considering other criteria besides utilization to designate a PHA a high performer as opposed to a standard performer? If so, what other performance measures should be taken into account? How would HUD verify the PHA's performance on any suggested additional or alternative performance criteria, keeping in mind HUD's preference to move away from reliance on self-certifications wherever possible and to not require PHAs to report or submit data for PHA assessments that is not already collected as part of normal HCV PHA operations and HUD oversight?

Question for comment #24: What specifically should be required in the corrective action agreement?

C: Other Regulatory Changes

As discussed above, § 5.701 would expand the scope of part 5, subpart G. Therefore, this proposed rule would amend regulations for the HCV (part 982), PBV (part 983), HOME (part 92), HTF (part 93), HOPWA (part 574), ESG (part 576), and CoC (part 578).

The proposed rule would align HOME property standards requirements for housing with the requirements for ongoing property condition standards of rental housing at § 92.251(f). Participating jurisdictions would be required to establish written property standards for housing occupied by tenants that meet minimum requirements at § 92.251(f) including compliance with State and local codes and ordinances, health and safety, and lead-based paint requirements.

While most participating jurisdictions are subject to State and local building or rehabilitation codes, many are not subject to comprehensive property condition or habitability codes. The program regulations at § 92.251(f) do not provide a uniform standard for housing that is decent, safe, and sanitary and in good repair where State and local codes are absent. HUD is proposing a uniform standard for what must be inspected during, and corrected as the result of, an ongoing physical inspection of HOME-assisted rental housing during the period of affordability or an annual inspection of housing occupied by a resident.

Also under the proposed rule, the Housing Trust Fund (HTF) program regulations would be revised to make conforming changes to the HTF property standards requirements at § 93.301(b)(1)(viii), (c)(3), and (e)(i). The specific deficiencies will be a subset of the deficiencies defined for NSPIRE and published in the **Federal Register** in accordance with § 5.705.

The proposed rule would also make conforming changes to apply § 5.703 to the Housing Opportunities for Persons with AIDS (HOPWA), Continuum of Care (CoC), and Emergency Solutions Grants (ESG) programs. The rule proposes to amend the HOPWA regulations at § 574.310; the CoC regulations at § 578.75; and the ESG regulations at § 576.403 to cite to § 5.703. The CoC regulations at § 578.75(b) regarding lead-based paint requirements would be amended only to apply § 5.703 where § 982.401 currently applies; this proposed rule makes no substantive changes to the lead-based paint requirements. The ESG regulations would be amended to include § 5.703 in the minimum standards for permanent housing but not emergency shelters.

These amendments are intended to replace program-specific standards with references to part 5. Further, § 5.711 would incorporate and condense the administrative review and enforcement action provisions at §§ 200.857(h) and 200.857(i) to align with HUD's current procedures and to eliminate inconsistencies with Section 219, Title II, Division H of the Consolidated Appropriations Act, 2020, Public Law 116–94, December 20, 2019.

HUD is also proposing technical changes for HAP contracts at §§ 880.612, 884.217, 886.123 and 886.323 to require

annual compliance with the expanded part 5, subpart G.

Under this proposed rule, the Moderate Rehabilitation program regulations at § 882.516(b) would be revised to clarify that PHAs must inspect (or cause to be inspected) units at least annually and at other times as necessary in accordance with the NSPIRE standards established under § 5.703. HUD would continue to conduct the inspections in accordance with the NSPIRE standards for mod rehab projects that are managed by the PHA as provided under § 882.516(d). In addition, the proposed rule would change the title of § 882.516(c) from ''Units not decent, safe, and sanitary'' to ''Units with health and safety hazards'' and add a title to § 882.516(e) for clarity.

D. Other Rulemakings

HUD notes that there is some overlap in the proposed changes with HUD's Housing Opportunity Through Modernization Act of 2016: Implementation of Sections 102, 103, and 104 proposed rule (84 FR 48820). HUD further notes that HUD intends to publish a proposed rule concerning the implementation of requirements to install carbon monoxide detectors in HUD-assisted and -Insured Housing, which would also overlap with this proposed rule. At the final rule stage, HUD will make any changes necessary to address any conflicts between these rules.

III. NSPIRE Improvements Beyond This Rule

In addition to the regulatory changes being proposed by this rule, HUD is making other improvements to its physical inspection program. HUD is committed to extending the same principles reflected in this rule to other aspects of the NSPIRE effort. HUD has continued to move forward with the ''top-to-bottom review'' of its inspection process directed by the Secretary to ensure taxpayer-supported housing is healthy, safe, and habitable for the millions of families HUD serves. The regulation will signal to the public HUD's clear intent to change its business approach. HUD is proactively aligning Public Housing, HCV, and other programs, through establishing an approach to revise and publish inspection standards, testing and validating a new inspection scoring model, and continuously engaging with the public in HUD's improvement efforts.

To ensure stakeholders can provide input on all aspects of NSPIRE, HUD launched listening sessions about making improving HUD's inspections better. That approach of early and often feedback has continued. For example, in the development of the physical inspection standards, HUD published drafts on the NSPIRE website for public input.[14] For reference, these are the standards which will apply to all inspections (see § 5.705(a)) and will be published formally for public comment prior to implementation (see § 5.709). HUD has received hundreds of suggestions on the draft NSPIRE standards and has closely reviewed all the comments. The majority were successfully incorporated into revisions. HUD's analysis, supported by stakeholder feedback, has identified that the current Uniform Physical Condition Standards (UPCS) and Housing Quality Standards (HQS) specifications do not always clearly identify or explain the particular harm or hazard that HUD is trying to avoid. To address this concern, HUD applied best practices from risk analysis frameworks that feature predominantly in the public health discipline to help all stakeholders understand the ''why'' or the ''rationale'' for each deficiency. A ''rationale'' is a plainly written risk-based assessment that describes the harm or negative result that could occur if that issue were to be present at a property. It justifies why that issue is critical to housing quality. By taking this approach, HUD can ground each standard in a clear and defensible explanation based in sound science.

Given the approach described above—and because it is important to ensure the standards remain up to date—HUD is working to establish an ''infrastructure of partnerships'' to provide continuous technical input and scientific guidance for standards development. HUD started this effort by collaborating with partners across the public and private sectors—including other Federal agencies—and academic and non-profit organizations. HUD anticipates that the continued expansion of these relationships will help to provide the input into the three-year updates to which HUD commits in this rule.

Along with the efforts already described, HUD has launched two demonstrations: (1) The Demonstration to Assess the National Standards for the Physical Inspection of Real Estate (84 FR 43536) and (2) the Demonstration to Test Proposed New Method of Assessing the Physical Conditions of Voucher-Assisted Housing (81 FR 26759). These demonstrations are among the first steps in implementing an aligned inspection protocol for public housing, multifamily housing, and voucher programs. More information about those demonstrations can be found on the NSPIRE[15] and ISDV[16] websites.

Strategically, the demonstration programs give HUD and properties an opportunity to ''stress test'' processes in a real-world setting to ensure they are stable and ready to scale out to the full population of Property Owner Agent (POA). In addition to being reasonable, HUD wants to ensure that its inspection standards are *performable* across a wide variety of inspectors. The demonstrations allow HUD the ability to make sure its administrative processes that support physical inspections are efficient and responsive. HUD is also leveraging technology to eliminate manual processes and to realize the benefits of having aligned programs.

The information coming out of both demonstrations also informs the development and refinement of property scoring approaches. HUD has worked diligently to identify the most appropriate scoring models to improve the accuracy, objectivity, and consistency of assessment across different property configurations. Along with modifications to the current model, HUD is currently exploring alternative scoring models based instead on data-driven methodologies, including those based on probabilistic approaches.

Finally, aligning HUD's oversight to property risk will benefit both HUD and the POAs. For example, HUD has proposed in this rule that a risk model inform the extension of the frequency of inspections up to 5 years in some programs. Taking a risk-based oversight approach allows high-performing properties to continue to do those things that make them successful while ensuring struggling properties are able to get the attention needed. While HUD will maintain a ''pass/fail'' result for HCV and PBV inspections as required by statute, moving to NSPIRE with consistent inspection standards allows large volumes of inspection and housing quality data to be compared across programs for the first time. HUD believes that better data will lead to the

[14] U.S. Department of Housing and Urban Development. (2019). National Standards for Physical Inspection of Real Estate (NSPIRE) Standards. Retrieved from: *https://www.hud.gov/program_offices/public_indian_housing/reac/nspire/standards.*

[15] U.S. Department of Housing and Urban Development. (2019). The Demonstration to Assess the National Standards for the Physical Inspection of Real. Estate Retrieved from: *https://www.hud.gov/program_offices/public_indian_housing/reac/nspire/demonstration.*

[16] U.S. Department of Housing and Urban Development. (2019). The Demonstration to Test Proposed New Method of Assessing the Physical Conditions of Voucher-Assisted Housing. Retrieved from: *https://www.hud.gov/sites/dfiles/PIH/documents/upcsvdemoparticpation.pdf.*

development of more refined risk models and also allow rigorous assessment of the impacts of deficiencies, individually and in combination, on residents.

IV. Findings and Certifications

Regulatory Review—Executive Orders 12866 and 13563

Pursuant to Executive Order 12866 (Regulatory Planning and Review), a determination must be made whether a regulatory action is significant and therefore subject to review by the Office of Management and Budget (OMB) in accordance with the requirements of the order. Executive Order 13563 (Improving Regulations and Regulatory Review) directs executive agencies to analyze regulations that are ''outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned.'' Executive Order 13563 also directs that, where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, agencies are to identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public.

HUD believes that this proposed rule, by consolidating physical condition inspection standards into a streamlined format and utilizing improved technology and methods will aid all parties—PHAs, property owners, agents, and inspectors—in complying with HUD's physical condition standards creating a smaller burden while maintaining or increasing the effectiveness of HUD's physical condition requirements. The proposed rule has been determined to be a ''significant regulatory action,'' as defined in section 3(f) of the Order, but not economically significant under section 3(f)(1) of the Order. The docket file is available for public inspection online at *www.regulations.gov.*

Executive Order 13771, Regulatory Costs

Executive Order 13771, entitled ''Reducing Regulation and Controlling Regulatory Costs,'' was issued on January 30, 2017. This proposed rule is expected to be an Executive Order 13771 deregulatory action. The requirements this proposed rule would place on the public are comparable to pre-existing requirements. This rule would also provide relief to small rural PHAs and certain qualifying properties and would provide relief by removing inconsistencies across HUD's programs, reducing compliance costs.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. There are 2,297 small PHAs all of which will be affected; however, the economic impact will not be significant.

The economic impact will not be significant because the proposed rule would not change the substantive requirement that HUD program participants are required to maintain the physical condition of HUD housing. The proposed rule would also, in most cases, maintain the same level of review for compliance in the form of physical inspections. Regulatory flexibility would be increased by allowing HUD to require less frequent inspections for high-performing PHAs under PHAS. Regulatory relief would also be provided to small rural PHAs, which would only be subject to triennial inspections under PHAS. Accordingly, the undersigned certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Notwithstanding HUD's determination that this rule will not have a significant effect on a substantial number of small entities, HUD specifically invites comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in the preamble to this rule.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410–0500. The FONSI is also available through the Federal eRulemaking Portal at *http://www.regulations.gov.*

Executive Order 13132, Federalism

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either: (i) Imposes substantial direct compliance costs on State and local governments and is not required by statute, or (ii) preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule would merely revise existing Federal standards in a way which would not increase or decrease compliance costs on State or local governments and therefore does not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments, and on the private sector. This proposed rule would not impose any Federal mandates on any State, local, or tribal governments, or on the private sector, within the meaning of the UMRA.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid Office of Management and Budget (OMB) control number. Except for the self-inspection report requirements, the information collection requirements contained in this proposed rule have been approved by OMB under the Paperwork Reduction Act and assigned OMB control numbers 2502–0369 (Uniform Physical Standards and Physical Inspection Requirements), 2577–0241 (Exigent Health and Safety Deficiency Correction Certification), 2577–0257 (Public Housing Assessment System (PHAS) Appeals, Technical Reviews and Database Adjustments), 2577–0289 (National Standards for the Physical Inspection of Real Estate (NSPIRE)), and 2577–0169 (HCV Program and Tribal HUD–VASH). The collection requirements will be amended to reflect the altered burden contained in this proposed rule. The current PRA ''HCV Program and Tribal HUD–VASH'' (OMB 2577–0169) authorizes collection of unit inspection data from PHAs as part of their participation in the HCV and PBV programs. This proposed rule will not require a modification to this approved collection.

The current PRA package ''National Standards for the Physical Inspection of Real Estate (NSPIRE)'' (OMB 2577–02890) authorizes collection of self-inspection data from properties participating in HUD's NSPIRE Demonstration. As NSPIRE moves from demonstration to implementation, the number of responses will increase to accommodate the full portfolio of properties required to submit self-inspection results to HUD.

The current PRA package ''Administrative Process for Scoring, Ranking, and Appeals'' (OMB 2577–0257) authorizes the collection of data associated with data base adjustments, technical reviews, and appeals (Public Housing only) for Multifamily and Public Housing properties. HUD anticipates this number to remain constant upon implementation of NSPIRE.

The current PRA package ''Uniform Physical Standards and Physical Inspection Requirements'' (OMB 2502–0369) authorizes the collection of data associated with inspections of HUD-insured mortgages. HUD expects this number to increase slightly due to higher unit sampling as part of the NSPIRE protocol.

The current PRA package ''Other Reporting Requirements'' (OMB 2577–0241) only authorizes the collection of electronic certifications by PHAs for corrected/mitigated Exigent Health and Safety (EH&S) deficiencies. The new number of responses and burden reflect the inclusion of all programs, beyond Public Housing, that will now be required to submit electronic closeout of all health and safety deficiencies, not just EH&S deficiencies.

The burden of the information collections in this proposed rule is estimated as follows:

Information collection	Number of responses		Burden hours per response		Hourly cost *	Total annual cost	
	Current	New	Current	New		Current	New
Inspection Reporting (HCV) (OMB 2577–0169)	3,680,527	3,680,527	.44	.44	$34	$55,060,684.00	$55,060, 684.00
Self-inspection Reporting (OMB 2577–0289)	4,500	38,000	2.7	2.7	34	413,100.00	2,335,176.00
Administrative Process for Scoring, Ranking, and Appeals (OMB 2577–0257	1,510	1,510	7.7	7.7	34	51,366.00	51,366.00
Uniform Physical Standards and Physical Inspection Requirements (OMB 2502–0369)	12,100	12,100	6.0	8.0	34	2,468,400.00	3,291,200.00
Other Reporting Requirements (OMB 2577–0241)	971	16,000	.28	1.0	34	9,244.00	544,000.00
Totals	3,699,608	3,748,137	.....	.....	.....	58,002,794.00	61,282,426.00

* Estimates assume a blended hourly rate that is equivalent to a GS–12, Step 5, Federal Government Employee.

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the information collection requirements in the proposed rule regarding:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) The accuracy of the agency's estimate of the burden of the proposed collection of information;

(3) Whether the proposed collection of information enhances the quality, utility, and clarity of the information to be collected; and

(4) Whether the proposed information collection minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

Interested persons are invited to submit comments regarding the information collection requirements in this rule. Under the provisions of 5 CFR part 1320, OMB is required to make a decision concerning this collection of information between 30 and 60 days after the publication date. Therefore, a comment on the information collection requirements is best assured of having its full effect if OMB receives the comment within 30 days of the publication. This time frame does not affect the deadline for comments to the agency on the proposed rule, however. Comments must refer to the proposed rule by name and docket number (FR–6123) and must be sent to:

HUD Desk Officer, Office of Management and Budget, New Executive Office Building, Washington, DC 20503, Fax number: 202–395–6947

and

Colette Pollard, HUD Reports Liaison Officer, Department of Housing and Urban Development, 451 7th Street SW, Room 2204, Washington, DC 20410

Interested persons may submit comments regarding the information collection requirements electronically through the Federal eRulemaking Portal at *http://www.regulations.gov.* HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the *http://www.regulations.gov* website can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

List of Subjects

24 CFR Part 5

Administrative practice and procedure, Aged, Claims, Crime, Government contracts, Grant programs—housing and community development, Individuals with disabilities, Intergovernmental relations, Loan programs—housing and community development, Low and moderate income housing, Mortgage insurance, Penalties, Pets, Public housing, Rent subsidies, Reporting and recordkeeping requirements, Social security, Unemployment compensation, and Wages.

24 CFR Part 92

Administrative practice and procedure, Low and moderate income housing, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 93

Administrative practice and procedure, Grant programs—housing and community development, Low and moderate income housing, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 200

Administrative practice and procedure, Claims, Equal employment opportunity, Fair housing, Housing

standards, Lead poisoning, Loan programs—housing and community development, Mortgage insurance, Organization and functions (Government agencies), Penalties, Reporting and recordkeeping requirements, Social security, Unemployment compensation, and Wages.

24 CFR Part 574

Community facilities, Grant programs—housing and community development, Grant programs—social programs, HIV/AIDS, Low and moderate income housing, and Reporting and recordkeeping requirements.

24 CFR Part 576

Community facilities, Grant programs—housing and community development, Grant programs—social programs, Homeless, and Reporting and recordkeeping requirements.

24 CFR Part 578

Community development, Community facilities, Grant programs—housing and community development, Grant programs—social programs, Homeless, and Reporting and recordkeeping requirements.

24 CFR Part 880

Grant programs—housing and community development, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 882

Grant programs—housing and community development, Homeless, Lead poisoning, Manufactured homes, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 884

Grant programs—housing and community development, Rent subsidies, Reporting and recordkeeping requirements, and Rural areas.

24 CFR Part 886

Grant programs—housing and community development, Lead poisoning, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 902

Administrative practice and procedure, Public housing, and Reporting and recordkeeping requirements.

24 CFR Part 982

Grant programs—housing and community development, Grant programs—Indians, Indians, Public housing, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 983

Grant programs—housing and community development, Low and moderate income housing, Rent subsidies, and Reporting and recordkeeping requirements.

24 CFR Part 985

Grant programs—housing and community development, Public housing, Rent subsidies, and Reporting and recordkeeping requirements.

For the reasons discussed in the preamble, HUD proposes to amend 24 CFR parts 5, 92, 93, 200, 574, 576, 578, 880, 882, 883, 884, 886, 902, 982, 983 and 985 as follows:

PART 5—GENERAL HUD PROGRAM REQUIREMENTS; WAIVERS

■ 1. The authority for 24 CFR part 5 continues to read as follows:

Authority: 12 U.S.C. 1701x; 42 U.S.C. 1437a, 1437c, 1437d, 1437f, 1437n, 3535(d); Sec. 327, Pub. L. 109–115, 119 Stat. 2936; Sec. 607, Pub. L. 109–162, 119 Stat. 3051 (42 U.S.C. 14043e *et seq.*); E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13559, 75 FR 71319, 3 CFR, 2010 Comp., p. 273.

■ 2. Revise subpart G to read as follows:

Subpart G—Physical Inspection of Real Estate

Sec.
5.701 Applicability.
5.703 National Standards for the Condition of HUD Housing.
5.705 Inspection Requirements.
5.707 Uniform self-inspection requirement and report.
5.709 Administrative Process for Defining and Revising Inspection Criteria.
5.711 Scoring, Ranking Criteria, and Appeals.
5.713 Second- and Third-Party Rights.

§ 5.701 Applicability.

(a) *Scope.* This subpart applies the national standards for the physical inspection of real estate standards to the following HUD programs:

(1) All Public Housing programs (programs for housing assisted under the U.S. Housing Act of 1937 other than section 8 of the Act);

(2) The Housing Choice Voucher program under section 8(o) of the U.S. Housing Act of 1937, part 982 of this title and the Project-Based Voucher program under section 8(o)(13) of the Act and the regulations at part 983 of this title (referred to in this part as the HCV and PBV programs, or HCV and PBV housing);

(3) All project-based Section 8 programs;

(4) Section 202 Program of Supportive Housing for the Elderly (Capital Advances);

(5) Section 811 Program of Supportive Housing for Persons with Disabilities (Capital Advances);

(6) Section 202 loan program for projects for the elderly and handicapped (including 202/8 projects and 202/162 projects); and

(7) Housing with mortgages insured or held by HUD, or housing that is receiving assistance from HUD, under the following authorities:

(i) Section 207 of the National Housing Act (NHA) (12 U.S.C. 1701*et seq.*) (Rental Housing Insurance);

(ii) Section 213 of the NHA (Cooperative Housing Insurance);

(iii) Section 220 of the NHA (Rehabilitation and Neighborhood Conservation Housing Insurance);

(iv) Section 221(d)(3) of the NHA (Market Interest Rate (MIR) Program);

(v) Section 221(d)(3) and (5) of the NHA (Below Market Interest Rate (BMIR) Program);

(vi) Section 221(d)(4) of the NHA (Housing for Moderate Income and Displaced Families);

(vii) Section 231 of the NHA (Housing for Elderly Persons);

(viii) Section 232 of the NHA (Mortgage Insurance for Nursing Homes, Intermediate Care Facilities, Assisted Living Facilities, Board and Care Homes);

(ix) Section 234(d) of the NHA (Rental) (Mortgage Insurance for Condominiums);

(x) Section 236 of the NHA (Rental and Cooperative Housing for Lower Income Families);

(xi) Section 241 of the NHA (Supplemental Loans for Multifamily Projects). (Where, however, the primary mortgage of a Section 241 property is insured or assisted by HUD under a program covered in this part, the coverage by two HUD programs does not trigger two inspections); and

(xii) Section 542(c) of the Housing and Community Development Act of 1992 (12 U.S.C. 1707 note) (Housing Finance Agency Risk Sharing Program).

(b) *Conflicts.* The regulations in this subpart may be supplemented by the specific regulations for the HUD-assisted programs listed in paragraph (a). The program-specific regulations may address the frequency of inspections, who performs the inspections and whether alternative inspections are available given the statutory and regulatory framework for the program. When there is conflict between the regulations of this subpart

and the program-specific regulations, the program-specific regulations govern.

(c) *HUD housing.* For purposes of this subpart, the term ''HUD housing'' means the types of housing listed in paragraph (a) of this section.

§ 5.703 National Standards for the Condition of HUD housing.

(a) *General.* To ensure that all residents live in safe, habitable dwellings, the items and components located inside the building, outside the building, and within the units of HUD housing must be functionally adequate, operable, and free of health and safety hazards. The standards under this section apply to all HUD housing. HUD housing under the HCV and PBV programs shall be subject to these standards only for:

(1) The subsidized unit itself; and

(2) Items and components within the primary and secondary means of egress from a unit's entry door(s) to the public way, those common features related to the residential use of the building (*e.g.,* the laundry room, community room, mail room), and the systems equipment that directly services the voucher unit.

(b) *Inside.* Inside of HUD housing refers to the common areas and building systems that can be generally found within the building interior and are not inside a unit. Examples of ''inside'' common areas may include, basements, interior or attached garages, enclosed carports, restrooms, closets, utility rooms, mechanical rooms, community rooms, day care rooms, halls, corridors, stairs, shared kitchens, laundry rooms, offices, enclosed porches, enclosed patios, enclosed balconies, and trash collection areas. Examples of building systems include those components that provide domestic water, electricity, elevators, emergency power, fire protection, HVAC, and sanitary services.

(c) *Outside.* Outside of HUD housing (or ''outside areas'') refers to the building site, building exterior components, and any building systems located outside of the building or unit. Examples of ''outside'' components may include fencing, retaining walls, grounds, lighting, mailboxes, project signs, parking lots, detached garage or carport, driveways, play areas and equipment, refuse disposal, roads, storm drainage, non-dwelling buildings, and walkways. Components found on the exterior of the building are also considered outside areas, and examples may include doors, attached porches, attached patios, balconies, car ports, fire escapes, foundations, lighting, roofs, walls, and windows.

(d) *Units.* A unit (or ''dwelling unit'') of HUD housing refers to the interior components of an individual unit. Examples of components included in the interior of a unit may include the bathroom, call-for-aid (if applicable), ceiling, doors, electrical systems, floors, water heater, HVAC (where individual units are provided), kitchen, lighting, outlets, switches, smoke detectors, stairs, walls, and windows. The unit must also meet the following affirmative requirements:

(1) The unit must have hot and cold running water, including an adequate source of safe and potable water;

(2) The unit must include its own sanitary facility, it must be in proper operating condition, usable in privacy, and adequate for personal hygiene and the disposal of human waste;

(3) The unit must include at least one battery-operated or hard-wired smoke detector, in proper working condition, on each level of the unit installed as specified in National Fire Protection Association Standard (NFPA) 72 or successor standards. If the unit is occupied by any hearing-impaired person, smoke detectors *must* have an alarm system, designed for hearing-impaired persons;

(4) The unit must have a living room and a kitchen area;

(5) For units assisted under the HCV or PBV program, the unit must have at least one bedroom or living/sleeping room for each two persons. Children of opposite sex, other than very young children, may not be required to occupy the same bedroom or living/sleeping room.

(e) *Health and safety concerns*—(1) *General.* The inside, outside and unit must be free of health and safety hazards that pose a danger to residents. Types of health and safety concerns include, but are not limited to carbon monoxide, mold, flammable materials or other fire hazards, electrical hazards, garbage and debris, handrail hazards, infestation, and lead-based paint.

(2) *Lead-Based Paint.* HUD housing must comply with all requirements related to the evaluation and control of lead-based paint hazards and have available proper documentation of such (see part 35 of this title). The Lead-based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and the applicable regulations at part 35 of this title apply.

(f) *Compliance with State and local codes.* (1) The standards for the condition of HUD housing in this section do not supersede State and local housing codes (such as fire, mechanical, plumbing, property maintenance, or residential code requirements).

(2) All HUD housing other than units assisted under the HCV and PBV programs must comply with State or local housing code in order to comply with this subpart.

(3) State and local code compliance is not part of the determination whether a unit passes the standards for the condition of HUD housing under this section for the HCV and PBV programs (except in accordance with § 5.705(a)(3)).

(g) *Use of an alternative or additional standard for HCV and PBV programs.* A PHA is not subject to the standards set by this section when the PHA is approved by HUD to use an alternative standard in accordance with § 982.406 of this title. PHAs may also elect to establish additional requirements for quality, architecture, or design of PBV housing, and any such additional requirements must be specified in the Agreement to Enter into a HAP Contract (''Agreement'') as provided in § 983.152(d)(2) of this title.

(h) *Special housing types in the HCV, PBV, and Moderate Rehabilitation programs.* part 982, subpart M of this title identifies special housing types which require standards unique to special types of housing. Unless modified by program-specific regulations, NSPIRE Standards will apply for these special housing types.

§ 5.705 Inspection requirements.

(a) *Procedures*—(1) *General.* Any entity responsible for conducting an inspection of HUD housing, to determine compliance with this subpart, must inspect such HUD housing in accordance with the standards and procedures for identifying safe, habitable housing set out by the Secretary and published in the **Federal Register** as described in § 5.711.

(2) *Inspection Scope.* The inspection requirement for HUD housing generally requires the inside, outside and unit to be inspected, in accordance with § 5.703. The inspection requirement for the tenant-based HCV program and the unit inspection for the PBV program only applies to units occupied or to be occupied by HCV and PBV participants, and common areas and exterior areas which either service or are associated with such units.

(3) *HCV and PBV Variant inspection standards.* (i) HUD may approve inspection criteria variations for the following purposes:

(A) Variations which apply standards in local housing codes or other codes adopted by the PHA; or

(B) Variations because of local climatic or geographic conditions.

(ii) Acceptability criteria variations may only be approved by HUD pursuant to paragraph (a)(3)(i) if such variations either:

(A) Meet or exceed the performance requirements; or

(B) Significantly expand affordable housing opportunities for families assisted under the program.

(iii) HUD will not approve any inspection criteria variation if HUD believes that such variation is likely to adversely affect the health or safety of participant families, or severely restrict housing choice.

(b) *Entity Conducting Inspections.* HUD housing must be inspected by the appropriate entity as described in paragraph (b)(1) of this section, except as described in paragraph (b)(2) of this section.

(1) *General.* The owner, lender, contract administrator, or HUD is the entity responsible for performing inspections of HUD housing as provided in this title, or a regulatory agreement or contract. For properties with more than one HUD-insured loan, only the first mortgage lender is required to conduct the inspection. The second mortgage lender will be provided a copy of the physical inspection report by the first mortgage lender.

(2) *Exception.* Under the HCV and PBV programs, the Public Housing Agency is responsible for inspecting HUD housing under those programs, unless another entity is assigned the inspection by the program regulations governing the housing, regulatory agreements or contracts. A PHA-owned unit receiving assistance under section 8(o) of the 1937 act must be inspected by an independent entity as specified in § 982.352(b)(iv) of this title. Under the Moderate Rehabilitation Program, the PHA is responsible for inspecting the HUD housing unless the PHA is managing units on which it is also administering the HAP Contract in accordance with § 882.412, in which case HUD is responsible for the inspections in accordance with § 882.516(d) of this title.

(c) *Timing of inspections*—(1) *Generally.* A property must be inspected before the property is approved for participation in any of the HUD housing programs under this part unless the property is already a participant in another of the HUD programs under this part. An entity responsible for conducting an inspection of HUD housing to determine compliance with this subpart must inspect such housing annually unless specified otherwise below. An inspection shall be conducted no earlier than 3 months before and no later than 3 months after the date marking the anniversary of the previous inspection in the year that the inspection is due; however, an inspection must be completed before the end of the calendar year that the inspection is due.

(2) *Extended Inspection cycle.* HUD housing other than HCV, PBV, and Moderate Rehabilitation housing shall be subject to annual inspection as described in paragraph (c)(1) of this section, except that the Secretary, based on appropriate evaluation of risk, may extend the inspection cycles of certain qualifying properties for a period between two and five years, through publication in the **Federal Register**, following notice and the opportunity to comment.

(3) *Triennial cycle for small rural PHAs.* Small rural PHAs as defined in § 902.101 of this title shall be assessed in accordance with part 902, subpart H of this title.

(4) *Housing Choice Vouchers.* PHAs must inspect units subject to part 982 of this title in accordance with the frequency described in § 982.405 of this title.

(5) *Project Based Vouchers.* PHAs must inspect units subject to part 983 of this title in accordance with the frequency described in § 983.103 of this title.

(6) *FHA insured mortgages section 232 facilities.* HUD may exempt assisted-living facilities, board and care facilities, and intermediate care facilities from physical inspections under this part if HUD determines that the State or local government has a reliable and adequate inspection system in place, with the results of the inspection being readily and timely available to HUD. For any other Section 232 facilities, the inspection will be conducted only when and if HUD determines, on the basis of information received, such as through a complaint, site inspection, or referral by a State agency, on a case-by-case basis, that inspection of a particular facility is needed to assure protection of the residents or the adequate preservation of the project.

(d) *Inspection Costs.* The cost of an inspection shall be the responsibility of the entity responsible for the inspection as identified in paragraph (a) of this section, except that a reasonable fee may be required of the owner of a property for a reinspection if an owner notifies the entity responsible for the inspection that a repair has been made or the allotted time for repairs has elapsed and a reinspection reveals that any deficiency cited in the previous inspection that the owner is responsible for repairing was not corrected. No fee may be passed along to the household residing in the unit or units.

(e) *Access to property for inspection*—(1) *HUD Inspections.* Nothing in this subpart shall restrict the right of HUD, or an entity contracted by HUD, to inspect HUD housing.

(2) *Public housing projects.* All PHAs are required to provide HUD or its representative with full and free access to all facilities in its projects. All PHAs are required to provide HUD or its representative with access to its projects and to all units and appurtenances in order to permit physical inspections, monitoring reviews, and quality assurance reviews under this part. Access to the units shall be provided whether or not the resident is home or has installed additional locks for which the PHA did not obtain keys. In the event that the PHA fails to provide access as required by HUD or its representative, the PHA shall be given a physical condition score of zero for the project or projects involved. This score of zero shall be used to calculate the physical condition indicator score and the overall assessment score for that PHA.

§ 5.707 Uniform self-inspection requirement and report.

All owners of HUD housing, other than owners participating in the HCV, PBV, and Moderate Rehabilitation Programs, are required to annually inspect their properties, including all units, to ensure the units are maintained in accordance with the standards in § 5.703 and electronically report results to HUD, in accordance with the procedures set out by the Secretary and published in the **Federal Register**, following notice and the opportunity to comment. This self-inspection is independent of other HUD inspections discussed in § 5.705.

§ 5.709 Administrative Process for Defining and Revising Inspection Criteria.

(a) *Inspection standards and scoring methodology.* The Secretary will publish in the **Federal Register**, following notice and the opportunity to comment, a list of deficiencies and methodologies to use for scoring and ranking HUD housing. The **Federal Register** notice will include the factors for determining if an HCV unit passes or fails the inspection in addition to the scoring and ranking of other HUD housing. After considering the public comments received on the **Federal Register** notice, HUD will publish a notice announcing the new inspections procedures, and the date on which the new procedures becomes effective.

(1) *Revisions.* HUD will issue a notice in the **Federal Register** published for 30 days of public comment making any revisions to the inspection procedures HUD deems necessary, every three years, or three years after the most recent revision, whichever is later.

(2) *Emergency Revisions.* The Secretary may publish a final notice without 30 days of public comment in the case of an emergency to protect Federal financial resources or the health or safety of residents of public housing projects, after HUD makes a documented determination that such action is warranted due to:

(i) A Severe Health or Safety deficiencies and other significant risks to safety as outlined in § 5.703;

(ii) A new safety concern due to changing construction technology; or

(iii) Other events as determined by the Secretary.

§ 5.711 Scoring, Ranking Criteria, and Appeals.

(a) *Applicability.* Administrative process for scoring and ranking the physical condition of HUD housing properties under this section does not apply to the HCV or PBV program. PHAs administering HCV and PBV programs will be assessed under the Section 8 Management Assessment Program (''SEMAP'') or the small rural PHA assessment in accordance part 985 of this title.

(b) *Scoring and ranking of HUD housing*—(1) *General.* HUD's Real Estate Assessment Center (REAC), or the appropriate entity either as described in § 5.705(b), or as identified in the regulator agreement or contract for the property as described in § 5.705(b)(1), will score and rank the physical condition of HUD housing properties in accordance with the procedures set out by the Secretary in § 5.709.

(2) *Public Housing programs.* PHAs operating Public Housing will be scored and ranked under the Public Housing Assessment System (''PHAS'') outlined in part 902 of this title.

(c) *Inspection report requirements*—(1) *Severe health or safety deficiencies.* Upon completion of an inspection, or at the end of each day on a multiple-day inspection, REAC, or the appropriate party as described in § 5.705(b), will provide the owner or PHA or owner's representative, a notice of any items classified as Severe Health or Safety (SHS) deficiencies. All SHS items must be mitigated within 24 contiguous hours of receipt of notice of these items, and the owner or PHA or owner's representative must electronically certify and provide supporting evidence within 3 business days after the end of the inspection that the SHS items have been resolved or sufficiently abated such that they no longer pose a severe health or safety risk to residents of the property. SHS deficiencies (together with other types of deficiencies) will be fully described in a future **Federal Register** notice.

(2) *Post-report inspection.* The owner or PHA must carefully review the inspection report and is responsible for conducting its own survey of the total property based on the inspecting entity's inspection findings. Non-severe health or safety deficiencies must be corrected expeditiously, and electronic evidence provided of correction.

(3) *Identification of material errors or adverse conditions.* If, after reviewing the inspection results, the owner or PHA reasonably believes that either an objectively verifiable and material error occurred in the inspection or that adverse conditions beyond the owner's or PHA's control negatively impacted the score, and that the error or adverse condition, if corrected or accounted for, would result in a significant improvement in the property's overall score, the owner or PHA may electronically submit a request for a technical review.

(d) *Technical review of inspection results*—(1) *Timing.* A request for a technical review of inspection results must be submitted electronically and must be received by the inspecting entity no later than the 45th calendar day following the release of the inspection report.

(2) *Request for technical review.* The request must be accompanied by the owner's or PHA's relevant evidence that an objectively verifiable and material error occurred or adverse conditions beyond the owner or PHA's control occurred, which if corrected will result in a significant improvement in the overall score of the owner's property. A technical review of the inspection results will not be conducted based on conditions that were corrected subsequent to the inspection. Upon receipt of this request from the owner or PHA, the REAC will review the inspection and the evidence. If the REAC review determines that an objectively verifiable and material error (or errors) or adverse condition(s) beyond the owner or PHA's control has been documented and that it is likely to result in a significant improvement in the property's overall score, the REAC will take one or a combination of the following actions:

(i) Undertake a new inspection;

(ii) Correct the original inspection; or

(iii) Issue a new physical condition score.

(3) *Burden of proof that error or adverse conditions occurred rests with owner.* The burden of proof rests with the owner to demonstrate that an objectively verifiable and material error (or errors) or adverse conditions occurred in the REAC's inspection through submission of evidence, which if corrected will result in a significant improvement in the property's overall score. The REAC will apply a rebuttable presumption that the inspection was conducted accurately. To support its request for a technical review of the physical inspection results, the owner may submit photographic evidence, written material from an objective source with subject matter expertise that pertains to the item being reviewed such as a local fire marshal, building code official, registered architect, or professional engineer, or other similar evidence.

(4) *Basis for Technical Review.* There are four sources of error that are associated with an inspection score. After review of each type of error, the property's score may be adjusted or other action taken.

(i) *Material errors.* An objectively verifiable material error must be present to allow for a technical review of inspection results. Material errors are those that were not due to the fault of the owner and exhibit specific characteristics and meet specific thresholds. The three types of material errors are as follows.

(ii) *Building data error.* A building data error occurs if the inspector inspected the wrong building or a building that was not owned by the property, including common or site areas that were not a part of the property. Incorrect data due to the failure of an owner to ensure HUD's systems of records are updated cannot form the basis of a review. Incorrect building data that does not affect the score, such as the address, building name, year built, etc., would not be considered material.

(iii) *Unit count error.* A unit count error occurs if the total number of units considered in scoring is incorrect due to the fault of HUD. Since scoring uses total units, REAC will examine instances where the participant can provide evidence that the total units used was incorrect and that the results were not representative of the condition of the property.

(iv) *A non-existent deficiency error.* A non-existent deficiency error occurs if the inspection records an observed deficiency that does not satisfy or does not meet a reasonable interpretation of the definition of that deficiency as defined by inspection procedures.

(5) *Significant improvement.* Significant improvement in the project's overall score refers to an increase in a score for the owner or PHA such that the new score crosses an administratively significant threshold.

(6) *Reinspection.* If HUD determines that a reinspection is appropriate, it will arrange for a complete reinspection of the project(s) in question, not just the deficiencies previously identified. The reinspection will constitute the final inspection for the project, and HUD will issue a new inspection report (the final inspection report).

(7) *Deficiencies.* If any of the previously identified SHS deficiencies that the owner certified were corrected, remedied, or acted upon to abate are found during the reinspection not to have been corrected, remedied, or acted upon to abate, the score in the final inspection report will reflect a point deduction of triple the value of the original deduction, up to the maximum possible points for the unit or area, and the owner must reimburse HUD for the cost of the reinspection.

(e) *Independent HUD review.* Under certain circumstances, HUD may find it appropriate absent a PHA request for technical review to review the results of an inspection which are anomalous or have an incorrect result due to facts and circumstances affecting the inspected property which are not reflected in the inspection or reflected inappropriately in the inspection. These circumstances include, but are not necessarily limited to, inconsistencies between local code requirements and the inspection standards in paragraph (a); conditions which are permitted by variance or license or which are preexisting physical features non-conformities and are inconsistent with the inspection standards in paragraph (a); or cases where the owner has been scored for elements (*e.g.,* roads, sidewalks, mail boxes, resident owned appliances, etc.) that it does not own and is not responsible for maintaining.

(f) *Responsibility for the cost of a new inspection.* If a new inspection is undertaken by the inspecting party and the new inspection score results in a significant improvement in the property's overall score, then the entity responsible for the inspection shall bear the expense of the new inspection. If no significant improvement occurs, then the owner or PHA responsible for the property must bear the expense of the new inspection. The inspection cost of a new inspection, if paid by the owner, is not a valid project operating expense. The new inspection score will be considered the final score.

(g) *Issuance of final score and publication of score.* (1) The score of the property is the final score if the owner or PHA files no request for technical review, as provided in paragraph (d) of this section, or for other adjustment of the physical condition score, as provided in paragraph (c) of this section. If the owner or PHA files a request for technical review or score adjustments in accordance with paragraphs (c) and (d) of this section, the final inspection score is the score issued by HUD after any adjustments are determined necessary and made by HUD at the conclusion of these processes.

(2) HUD will make public the final scores of the owners through posting on HUD's internet site, or other appropriate means.

(h) *Responsibility to notify residents of inspection; and availability of documents to residents*—(1) *Notification to residents.* An owner must notify its residents of any planned inspections of their units or the housing development generally.

(2) *Availability of documents for review.* (i) Once a final score has been issued the owner must make the physical inspection report and all related documents available to residents during regular business hours upon reasonable request for review and copying. Related documents include the owner's survey plan, plan of correction, certification, and related correspondence.

(ii) Once the owner's final inspection score is issued and published, the owner must make any additional information, such as the results of any reinspection, appeal requests, available for review and copying by its residents upon reasonable request during regular business hours.

(iii) The owner must maintain the documents related to the inspection of the property, as described paragraphs (i) and (ii) above, for review by residents for a period of 60 days from the date of submission to the owner of the inspection score for the property in which the residents reside.

(3) The owner must post a notice to the residents in the owner's management office and on any bulletin boards in all common areas that advises residents of the availability of the materials described in this section. The notice should include, where applicable, the name, address, and telephone number of the HUD Project Manager.

(4) Residents are encouraged to comment on this information provided by the owner and submit any comments directly to the applicable HUD Field Office or responsible entity. Should residents discover the owner provided HUD with a false certification during the review they are encouraged to notify the applicable HUD Field Office where appropriate inquiry and action will be taken.

(i) *Administrative review of properties.* The file of a property that receives a score of 30 points or less on its inspection will be referred to HUD's Departmental Enforcement Center (DEC) for evaluation.

(1) *Notification to owner of submission of property file to the DEC.* The Department will provide for notification to the owner that the file on the owner's property is being submitted to the DEC for evaluation. The notification will be provided at the time the REAC issues the inspection report to the owner or at such other time as a referral occurs.

(2) *Evaluation of the property.* During the evaluation period, the DEC will perform an analysis of the property, which may include input from tenants, HUD officials, elected officials, and others as may be appropriate. Although program offices will assist with the evaluation, the DEC will have primary responsibility for the conclusion of the evaluation of the property after taking into consideration the input of interested parties as described in this paragraph (h)(2). The DEC's evaluation may include a site visit to the owner's property.

(3) *Continuing responsibilities of Housing Program Offices and Mortgagee.* During the period of DEC evaluation, HUD's Housing offices continue to be responsible for routine asset management tasks on properties and all servicing actions (*e.g.,* rent increase decisions, releases from reserve account approvals). In addition, during this period of evaluation, the mortgagee shall continue to carry out its duties and responsibilities with respect to the mortgage.

(4) *Enforcement action.* Except as otherwise provided by statute, if, based on the DEC's evaluation and in consultation with Housing, the DEC determines that enforcement actions are appropriate, it may take those actions for which the DEC has delegated authority and/or make recommendations to Housing with respect to resolving identified physical deficiencies and owner noncompliance.

(j) *No limitation on existing enforcement authority.* The administrative process provided in this section does not prohibit HUD, to take whatever action may be necessary when necessary (notwithstanding the commencement of this process), as

authorized under existing statutes, regulations, contracts or other documents, to protect HUD's financial interests in HUD housing properties and to protect the residents of these properties.

§ 5.713 Second- and Third-Party Rights.

Nothing in this subpart is intended to create any right of the family residing in HUD Housing or any party, other than HUD or a Public Housing Authority, to require enforcement of the standards required by this subpart or to assert any claim against HUD or the Public Housing Authority for damages, injunction, or other relief for alleged failure to enforce the standards.

PART 92—HOME INVESTMENT PARTNERSHIPS PROGRAM

■ 3. The authority for 24 CFR part 92 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 1701x and 4568.

§ 92.2 [Amended]

■ 4. Amend § 92.2 by removing the definition of ''Uniform Physical Condition Standards''.

■ 5. In § 92.209, revise paragraph (i) to read as follows:

§ 92.209 Tenant-based rental assistance: Eligible costs and requirements.

* * * * *

(i) *Housing quality standards.* Housing occupied by a family receiving tenant-based assistance under this section must meet the participating jurisdiction's property standards under § 92.251. The participating jurisdiction must inspect the housing initially and re-inspect it annually.

* * * * *

■ 6. Revise § 92.251 by:

■ a. Revising paragraphs (b)(1)(viii) and (c)(3);

■ b. Removing and reserving paragraph (d); and

■ c. Revising paragraph (f)(1) introductory text, and paragraph (f)(1)(i).

The revisions read as follows:

§ 92.251 Property standards.

* * * * *

(b) * * *

(1) * * *

(viii) *HUD housing standards.* The standards of the participating jurisdiction must be such that, upon completion, the HOME-assisted project and units will be decent, safe, sanitary, as referenced in 24 CFR 5.703. The requirements of 24 CFR 5.705–5.713 do not apply. At minimum, the specific deficiencies proscribed by HUD and published in the **Federal Register** must be corrected under the participating jurisdiction's rehabilitation standards. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing set out by the Secretary and published in the **Federal Register** pursuant to 24 CFR 5.705.

* * * * *

(c) * * *

(3) Existing housing that is acquired for homeownership (*e.g.,* downpayment assistance) must be decent, safe, sanitary, and in good repair as referenced in 24 CFR 5.703. The participating jurisdiction must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local housing quality standards and code requirements and the housing does not contain the specific deficiencies proscribed by HUD and published in the **Federal Register**. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing (National Standards for the Physical Inspection of Real Estate (NSPIRE)) set out by the Secretary and published in the **Federal Register** pursuant to 24 CFR 5.705. The participating jurisdiction must inspect the housing and document this compliance based upon an inspection that is conducted no earlier than 90 days before the commitment of HOME assistance. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards of this paragraph (c)(3) or it cannot be acquired with HOME funds.

* * * * *

(f) *Ongoing property condition standards: Rental housing and housing occupied by tenants receiving HOME tenant-based rental assistance*—(1) *Ongoing property standards.* The participating jurisdiction must establish property standards for rental housing (including manufactured housing) that apply throughout the affordability period and for housing occupied by tenants receiving HOME tenant-based rental assistance. The standards must ensure that owners maintain the housing as decent, safe, and sanitary housing in good repair. The participating jurisdiction's description of its property standards must be in sufficient detail to establish the basis for a uniform inspection of HOME rental projects and housing occupied by tenants receiving HOME tenant-based rental assistance. The participating jurisdiction's ongoing property standards must address each of the following:

(i) *Compliance with State and local codes, ordinances, and requirements.* The participating jurisdiction's standards must require the housing to meet all applicable State and local code requirements and ordinances. In the absence of existing applicable State or local code requirements and ordinances, at a minimum, the participating jurisdiction's ongoing property standards must provide that the property does not contain the specific minimum deficiencies proscribed by HUD and published in the **Federal Register** for rental housing (including manufactured housing) and housing occupied by tenants receiving HOME tenant-based rental assistance. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing set out by the Secretary and published in the **Federal Register** pursuant to 24 CFR 5.705. The participating jurisdiction's property standards are not required to use any inspection procedures, including scoring, item weight, or level of criticality required in 24 CFR 5.705–5.713.

* * * * *

■ 7. In § 92.504, revise paragraph (d)(1)(iii) to read as follows:

§ 92.504 Participating jurisdiction responsibilities; written agreements; on-site inspections.

* * * * *

(d) * * *

(1) * * *

(iii) *Annual inspections.* Tenant-based rental assistance (TBRA). All housing occupied by tenants receiving HOME tenant-based rental assistance must meet the property standards of § 92.251. The participating jurisdiction must perform annual on-site inspections of rental housing occupied by tenants receiving HOME-assisted TBRA to determine compliance with these standards.

* * * * *

PART 93—HOUSING TRUST FUND

■ 8. The authority for 24 CFR part 93 continues to read as follows:

Authority: 42 U.S.C. 3535(d), 12 U.S.C. 4568.

■ 9. In § 93.301, revise paragraphs (b)(1)(viii), (c)(3), and (e)(1)(i) to read as follows:

§ 93.301 Property standards.

* * * * *

(b) * * *

(1) * * *

(viii) *HUD housing standards.* The standards of the grantee must be such that, upon completion, the HTF-assisted project and units will be decent, safe, sanitary, and in good repair and meet the standards in 24 CFR 5.703. The requirements of 24 CFR 5.705–5.713 do not apply. At minimum, the specific deficiencies proscribed by HUD and published in the **Federal Register** must be corrected under the grantee's rehabilitation standards. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing set out by the Secretary and published in the **Federal Register** pursuant to 24 CFR 5.705.

* * * * *

(c) * * *

(3) Existing housing that is acquired for homeownership (*e.g.,* down payment assistance) must be decent, safe, sanitary, and in good repair. The grantee must establish standards to determine that the housing is decent, safe, sanitary, and in good repair. At minimum, the standards must provide that the housing meets all applicable State and local standards and code requirements, and the housing does not contain the specific deficiencies proscribed by HUD and published in the **Federal Register**. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing set out by the Secretary and published in the **Federal Register** pursuant to 24 CFR 5.705. The grantee must inspect the housing and document this compliance based upon an inspection that is conducted no earlier than 90 calendar days before the date of commitment of HTF assistance. If the housing does not meet these standards, the housing must be rehabilitated to meet the standards of this paragraph or it cannot be assisted with HTF funds.

* * * * *

(e) * * *

(1) * * *

(i) At a minimum, the grantee's ongoing property standards must provide that the property does not contain the specific minimum deficiencies proscribed by HUD and published in the **Federal Register**. HUD will establish the minimum deficiencies based on the applicable standards for the condition of HUD housing set out by the Secretary and published in the **Federal Register** pursuant to § 5.705 of this title. The grantee's property standards are not required to use any inspection procedures, including scoring, item weight, or level of criticality required in §§ 5.705–5.713 of this title.

* * * * *

PART 200—INTRODUCTION TO FHA PROGRAMS

■ 10. The authority for 24 CFR part 200 continues to read as follows:

Authority: 12 U.S.C. 1702–1715z–21; 42 U.S.C. 3535(d).

■ 11. Revise § 200.850 to read as follows:

§ 200.850 Physical condition standards and physical inspection requirements.

The requirements in part 5, subpart G of this title are applicable to the multifamily properties assisted or insured that are listed in § 5.701 of this title.

§§ 200.853, 200.855, and 200.857 [Removed and Reserved]

■ 12. Remove and reserve §§ 200.853, 200.855, and 200.857.

PART 574—HOUSING OPPORTUNITIES FOR PERSONS WITH AIDS, SUBPART D—USES OF GRANT FUNDS

■ 13. The authority for 24 CFR part 574 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 3535(d) and 5301–5320.

■ 14. In § 574.310, revise paragraph (b) introductory text and paragraph (b)(2), and add paragraph (b)(3) to read as follows:

§ 574.310 General standards for eligible housing activities.

* * * * *

(b) * * *. The following standards apply for all housing for which HOPWA funds that are used under § 574.300(b)(3), (4), (5), and (8), and when HOPWA funds are used under § 574.300(b)(7) to pay an eligible person's security deposit, utility hookup and processing costs, or other move-in costs, except rental application and credit check fees.

* * * * *

(2) *HUD housing standards.* Except for such variations as are proposed by the grantee and approved by HUD, the housing must meet the standards for HUD housing in 24 CFR 5.703, except that:

(i) As applied to HOPWA, ''HUD housing'' in 24 CFR 5.703 means the units eligible persons occupy or will occupy, systems equipment that directly services those units, items and components within the primary and secondary means of egress from those units' doors to the public way, and common features related to the residential use of the building (*e.g.,* the laundry room, community room, mail room).

(ii) Housing that continues to meet the HOPWA housing quality standards that applied when the eligible person(s) moved into that housing shall not be required to meet new or different standards under 24 CFR 5.703.

(3) The requirements of 24 CFR 5.705–5.713 do not apply.

* * * * *

PART 576—EMERGENCY SOLUTIONS GRANTS PROGRAM

■ 15. The authority for 24 CFR part 576 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 11371 *et seq.,* 42 U.S.C. 3535(d).

Subpart E—Program Requirements

■ 16. In § 576.403, revise paragraph (c) and add paragraphs (d) through (f) to read as follows:

§ 576.403 Shelter and housing standards.

* * * * *

(c) *Minimum standards for permanent housing.* When ESG funds are used for permanent housing under 24 CFR 576.105 or 576.106, the minimum standards in 24 CFR 5.703 apply to the program participant's unit, systems equipment that directly services those units, items and components within the primary and secondary means of egress from those units' doors to the public way, and common features related to the program participant's use of the building (*e.g.,* the laundry room, community room, mail room). The recipient may also add standards that exceed these minimum standards. The requirements in 24 CFR 5.705–5.713 do not apply.

(d) *Housing inspections.* For the first 30 days in which a program participant receives homelessness prevention assistance, the recipient or subrecipient may provide services under 576.105(b) to help the program participant remain in their unit without inspecting the unit or determining it meets the requirement in this section. Before otherwise using ESG funds under 24 CFR 576.105 or 576.106 to help a program participant remain in or move into specific housing, however, the recipient or subrecipient must inspect that housing to confirm that it meets the requirements in this section. In addition, recipient or subrecipient must inspect the housing at least once every 12 months during the period of assistance to confirm the housing continues to meet the minimum standards in paragraph (c) of this section.

(e) *Correction of deficiencies.* If an inspection reveals one or more deficiencies that prevent the housing from meeting the requirements in this section, ESG funds must not be used under 24 CFR 576.105 or 576.106 with respect to that housing unless the owner corrects the deficiencies within 30 days from the date of the initial inspection and the recipient or subrecipient verifies that all deficiencies have been corrected.

(f) *Rental arrears.* Housing for which rental arrears are paid is only subject to the requirements in this section, if a program participant is seeking to stay in that housing.

PART 578—PROGRAM REQUIREMENTS

■ 17. The authority for 24 CFR part 578 continues to read as follows:

Authority: 12 U.S.C. 1701x, 1701x–1; 42 U.S.C. 11381 *et seq.,* 42 U.S.C. 3535(d).

■ 18. In § 578.75, revise paragraph (b) to read as follows:

§ 578.75 General operations.

* * * * *

(b) *Housing standards.* Housing leased with Continuum of Care program funds, or for which rental assistance payments are made with Continuum of Care program funds, must meet the applicable standards under 5.703 of this title. For housing that is occupied by program participants receiving tenant-based rental assistance, 24 CFR part 35, subparts A, B, M, and R apply. For housing rehabilitated with funds under this part, the lead-based paint requirements in 24 CFR part 35, subparts A, B, J, and R apply. For housing that receives project-based or sponsor-based rental assistance, 24 CFR part 35, subparts A, B, H, and R apply. For residential property for which funds under this part are used for acquisition, leasing, services, or operating costs, 24 CFR part 35, subparts A, B, K, and R apply. Additionally, for tenant-based rental assistance, for leasing of individual units, and for sponsor based rental assistance where not all units in a structure are or will be assisted, the standards apply only to the unit itself, and to the means of ingress and egress from the unit to the public way and to the building's common areas.

(1) Before any assistance will be provided on behalf of a program participant, the recipient, or subrecipient, must physically inspect each unit to assure that the unit meets 24 CFR 5.703. Assistance will not be provided for units that fail to meet 24 CFR 5.703, unless the owner corrects any deficiencies within 30 days from the date of the initial inspection and the recipient or subrecipient verifies that all deficiencies have been corrected.

(2) Recipients or subrecipients must inspect all units at least annually during the grant period to ensure that the units continue to meet 24 CFR 5.703.

(3) The requirements in 24 CFR 5.705–5.713 do not apply.

* * * * *

PART 880—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM FOR NEW CONSTRUCTION

■ 19. The authority for 24 CFR part 880 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), 12701, and 13611–13619.

■ 20. In § 880.612, revise paragraph (a) to read as follows:

§ 880.612 Reviews during management period.

(a) After the effective date of the Contract, the contract administrator will inspect the project and review its operation at least annually to determine whether the owner is in compliance with the Contract and the assisted units comply with the standards under part 5, subpart G of this title.

* * * * *

PART 882—SECTION 8 MODERATE REHABILITATION PROGRAMS

■ 21. The authority for 24 CFR part 882 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

§ 882.404 [Amended]

■ 22. In § 882.404, remove paragraph (d).

■ 23. In § 882.516, revise paragraphs (b), (c) and (e) to read as follows:

§ 882.516 Maintenance, operation and inspections.

* * * * *

(b) *Periodic inspection.* In addition to the inspections required prior to execution of the Contract, the PHA must inspect or cause to be inspected each unit under Contract in accordance with the standards under part 5, subpart G of this title at least annually and at such other times as may be necessary to assure that the Owner is meeting the obligations to maintain the units so they are compliant with part 5, subpart G of this title, and to provide the agreed upon utilities and other services. The PHA must take into account complaints and any other information coming to its attention in scheduling inspections.

(c) *Units with health and safety hazards.* If the PHA notifies the Owner that the unit(s) under Contract are not being maintained in compliance with the standards under part 5, subpart G of this title and the Owner fails to take corrective action (including corrective action with respect to the Family where the condition of the unit is the fault of the Family) within the time prescribed in the notice, the PHA may exercise any of its rights or remedies under the Contract, including abatement of housing assistance payments (even if the Family continues in occupancy), termination of the Contract on the affected unit(s) and assistance to the Family in accordance with § 882.514(e).

* * * * *

(e) *Periodic reviews.* Periodic PHA audits must be conducted as required by HUD, in accordance with 2 CFR part 200, subpart F.

PART 884—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM, NEW CONSTRUCTION SET-ASIDE FOR SECTION 515 RURAL RENTAL HOUSING PROJECTS

■ 24. The authority for 24 CFR part 884 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

■ 25. Revise § 884.217 to read as follows:

§ 884.217 Maintenance, operation and inspections.

(a) *Maintenance and operation.* The Owner shall maintain and operate the project consistent with part 5, subpart G of this title, and shall provide all the services, maintenance and utilities which the Owner agrees to provide under the Contract, subject to abatement of housing assistance payments or other applicable remedies if he fails to meet these obligations.

(b) *Inspection prior to occupancy.* Prior to occupancy of any unit by a Family, the Owner and the Family shall inspect the unit and both shall certify, on forms prescribed by HUD, that they have inspected the unit and have determined it to be compliant with part 5, subpart G of this title and the criteria provided in the prescribed forms. Copies of these reports shall be kept on file by the Owner for at least 3 years, and may be required to be electronically submitted to HUD.

(c) *Periodic inspections.* HUD (or the PHA, as appropriate) will inspect or cause to be inspected each Contract unit and related facilities in accordance with the physical inspection requirements in part 5, subpart G of this title, and at such other times (including prior to initial occupancy and renting of any unit) as HUD (or the PHA) may

determine to be necessary to assure that the Owner is meeting his obligation to maintain the units in accordance with part 5, subpart G of this title and to provide the agreed upon utilities and other services.

(d) *Units with health and safety hazards.* If HUD (or the PHA, as appropriate) notifies the Owner that the Owner has failed to maintain a unit that in accordance with part 5, subpart G of this title and the Owner fails to take corrective action within the time prescribed by notice, HUD (or the PHA) may exercise any of its rights or remedies under the Contract, including abatement of housing assistance payments, even if the Family continues to occupy the unit. If, however, the Family wishes to be rehoused in another unit with Section 8 assistance and HUD (or the PHA) does not have other Section 8 funds for such purposes, HUD (or the PHA) may use the abated housing assistance payments for the purpose of rehousing the Family in another unit. Where this is done, the Owner shall be notified that the Owner will be entitled to resumption of housing assistance payments for the vacated unit if:

(1) The unit is restored to in accordance with part 5, subpart G of this title;

(2) The Family is willing to and does move back to the restored dwelling unit; and

(3) A deduction is made for the expenses incurred by the Family for both moves.

PART 886—SECTION 8 HOUSING ASSISTANCE PAYMENTS PROGRAM—SPECIAL ALLOCATIONS

■ 26. The authority for 24 CFR part 886 continues to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 3535(d), and 13611–13619.

§ 886.113 [Amended]

■ 27. In § 886.113, remove and reserve paragraphs (b) and (i).

■ 28. Revise § 886.123 to read as follows:

§ 886.123 Maintenance, operation, and inspections.

(a) *Maintenance and operation.* The Owner shall maintain and operate the project so as to provide housing that is compliant with part 5, subpart G of this title, and the Owner shall provide all the services, maintenance and utilities which the Owner agrees to provide under the Contract, subject to abatement of housing assistance payments or other applicable remedies if the Owner fails to meet these obligations.

(b) *Inspection prior to occupancy.* Prior to occupancy of any unit by a Family, the Owner and the Family shall inspect the unit and both shall certify, on forms prescribed by HUD that they have inspected the unit and have determined it to be compliant with part 5, subpart G of this title and with the criteria provided in the prescribed forms. Copies of these reports shall be kept on file by the Owner for at least three years.

(c) *Periodic inspections.* HUD will inspect or cause to be inspected a reasonable sample of contract units according to the requirements in part 5, subpart G of this title and at such other times as may be necessary to assure that the owner is meeting contractual obligations.

(d) *Units not free of health and safety hazards.* If HUD notifies the Owner that the Owner has failed to maintain a unit that is compliant with the requirements in part 5, subpart G of this title and the Owner fails to take corrective action within the time prescribed by notice, HUD may exercise any of its rights or remedies under the Contract, including abatement of housing assistance payments, even if the Family continues to occupy the unit.

§ 886.307 [Amended].

■ 29. In § 886.307, remove and reserve paragraphs (b), (i), and (m).

■ 30. Revise § 886.323 to read as follows:

§ 886.323 Maintenance, operation, and inspections.

(a) *Maintain housing free of health and safety hazards.* The owner shall maintain and operate the project so as to be compliant with part 5, subpart G of this title, and the owner shall provide all the services, maintenance, and utilities which the Owner agrees to provide under the contract and the lease. Failure to do so shall be considered a material default under the contract and Regulatory Agreement, if any.

(b) *HUD inspection.* Prior to execution of the contract, HUD shall inspect (or cause to be inspected) each proposed contract unit and related facilities to ensure that they comply with the requirements at part 5, subpart G of this title.

(c) *Owner and family inspection.* Prior to occupancy of any vacant unit by a family, the owner and the family shall inspect the unit, and both shall certify that they have inspected the unit and have determined it to be compliant with part 5, subpart G of this title. Copies of these reports shall be kept on file by the owner for at least 3 years.

(d) *Periodic inspections.* HUD will inspect the project (or cause it to be inspected) in accordance with the requirements in part 5, subpart G of this title and at such other times as HUD may determine to be necessary to assure that the owner is meeting the Owner's obligation to maintain the units and the related facilities in accordance with part 5, subpart G of this title and to provide the agreed-upon utilities and other services.

(e) *Failure to maintain housing.* If HUD notifies the owner that he/she has failed to maintain a unit that is compliant with part 5, subpart G of this title, and the owner fails to take corrective action within the time prescribed in the notice, HUD may exercise any of its rights or remedies under the contract, or Regulatory Agreement, if any, including abatement of housing assistance payments (even if the family continues to occupy the unit) and rescission of the sale. If the family wishes to be rehoused in another unit, HUD shall provide assistance in finding such a unit for the family.

PART 902—PUBLIC HOUSING ASSESSMENT SYSTEM

■ 31. The authority for 24 CFR part 902 is revised to read as follows:

Authority: 42 U.S.C. 1437d(j), 42 U.S.C. 3535(d), 1437z–10.

■ 32. Amend § 902.3 by:

■ a. Removing the definition of ''Criticality'';

■ b. Revising the definitions of ''Dictionary of Deficiency Definitions'' and ''Inspectable areas (or area)''; and

■ c. Removing the definitions of ''Item Weights and Criticality Levels document'', ''Normalized weights'', ''Score'', ''Severity'', ''Statistically valid sample'', and ''Unit-weighted average''.

The revisions read as follows:

§ 902.3 Definitions.

* * * * *

Dictionary of Deficiency Definitions means the document published in the **Federal Register** that contains the inspection standards and scoring values pursuant to part 5, subpart G of this title.

* * * * *

Inspectable areas (or area) mean any of the three major components of public housing that are inspected, which are: Inside, outside, unit.

* * * * *

§ 902.20 [Removed and Reserved]

■ 33. Remove and reserve § 902.20.

■ 34. Revise § 902.21 to read as follows:

§ 902.21 Physical condition standards for public housing.

Public housing must be maintained in a manner that meets the physical condition standards set forth in part 5, subpart G of this title.

■ 35. Revise § 902.22 to read as follows:

§ 902.22 Inspection of PHA projects.

The PHA's score for the physical condition indicator is based on an independent inspection of a PHA's project(s) provided by HUD and using the requirements and timelines laid out in part 5, subpart G of this title, to ensure projects meet acceptable basic housing conditions. Mixed-finance projects will be subject to the physical condition inspections.

§§ 902.24, 902.26, and 902.68 [REMOVED AND RESERVED]

■ 36. Remove and reserve §§ 902.24, 902.26, and 902.68.

■ 37. Add subpart H to read as follows:

Subpart H—Assessment of small rural Public Housing Agencies

Sec.
902.101 Definitions of small rural PHAs.
902.103 Public Housing assessment of small rural PHAs.
902.105 Troubled Small rural PHAs.
902.107 Withholding, denying, and rescinding troubled designation.
902.109 Right to petition and appeal troubled designation.
902.111 Sanctions for troubled small rural PHAs.
902.113 Incentives for small rural PHAs high-performers.

Authority: 42 U.S.C. 1437d(j), 42 U.S.C. 3535(d), 1437z–10.

§ 902.101 Definition of small rural PHAs.

(a) *Definition.* A PHA is a small rural PHA if it administers 550 or fewer combined public housing units and vouchers under section 8(o), and either:

(1) Has a primary administrative building as determined with a physical address in a rural area as described in 12 CFR § 1026.35(b)(2)(iv)(A); or

(2) More than 50 percent of its combined public housing units and voucher units under section 8(o) are in rural areas as described in 12 CFR § 1026.35(b)(2)(iv)(A).

(b) *Determination.* (1) HUD will make the initial determination of PHAs that qualify as small rural as defined in § 902.101 of this title no later than [insert 120 days after the effective date of the final rule].

(2) HUD will determine if a PHA qualifies as a small rural PHA under paragraph (a) every 3 years.

(c) *Appeals.* A PHA may challenge HUD's determination concerning whether the PHA qualifies as small rural PHA by presenting an objectively verifiable material error which resulted in the incorrect determination, or by presenting information showing that the status of the PHA has changed to justify a redetermination.

§ 902.103 Public housing assessment of small rural PHAs.

(a) *Small rural Public Housing Assessment.* The public housing program of small rural PHAs as defined in § 902.101 shall be assessed and scored based only on the physical condition of their public housing properties in accordance with part 5, subpart G of this title. Such agencies shall not be subject to PHAS except as noted below.

(b) *Triennial assessment.* Public Housing programs operated by small rural Public Housing Authorities will be assessed no more than once every three years, except that a small rural Public Housing Authority shall be subject to annual inspection if it is designated by the Secretary as troubled as defined in § 902.105.

(c) *Initial Public Housing assessment.* (1) For PHAs subject to small PHA deregulation, the first assessment and inspections will be determined based on the PHA's next scheduled PHAS assessment (*e.g.,* a higher performing PHA would receive the first inspection 3 years after the most recent PHAS assessment, a standard or substandard performer would receive the first inspection 2 years after the most recent PHAS assessment, etc.).

(2) For PHAs not subject to small PHA deregulation, the first inspection is based on the PHA's overall weighted project PASS score (*e.g.,* a PHA with a PASS score of 90 or greater would receive the first inspection three years after most recent PHAS assessment, a PHA with a PASS score of 80–89 would receive the first inspection two years after most recent PHAS assessment, etc.).

§ 902.105 Troubled small rural PHAs.

(a) *Definition of Troubled Small rural PHA.* A small rural PHA will be determined to be troubled under the public housing program if the weighted average score of all property inspections is below 70 percent of the total available points, or if a small rural PHA has a weighted average score of between 70 and 80 percent of the total available points, and has at least one property that receives fewer than 70 percent of the total available points.

(b) *Referral to the Local Field Office.* Upon a PHA's designation as a troubled performer HUD must notify the PHA and shall refer the troubled performer PHA to the PHA's field office, or other designated office(s) at HUD, for remedial action, oversight, and monitoring. The actions to be taken by HUD and the PHA will include statutorily required actions, and such other actions as may be determined appropriate by HUD.

(c) *Corrective Action Agreement (CAA).* Within 30 days of notification of a PHA's designation as a troubled performer, HUD will initiate activities to negotiate and develop an CAA. A CAA is required for a troubled performer. The final CAA is a binding contractual agreement between HUD and a PHA. The scope of the CAA may vary depending upon the extent of the problems present in the PHA. The term of the CAA will not exceed one year, and is subject to renewal at the discretion of HUD if HUD determines that the circumstances requiring the CAA still exist at the expiration of the term of the CAA based on the annual assessment frequency as included in § 902.103. It shall include, but not be limited to:

(1) Baseline data, which should be data without adjustments or weighting but may be the PHA's score identified as a deficiency;

(2) Performance targets for such periods specified by HUD (*e.g.,* annual, semiannual, quarterly, monthly), which may be the attainment of a higher score or the description of a goal to be achieved; however, safety, health, and environmental performance targets and deadlines otherwise specified by regulation, including the lead safety regulations at 24 CFR 35, are not superseded by the CAA performance targets;

(3) Strategies to be used by the PHA in achieving the performance targets within the time period of the CAA, including the identification of the party responsible for the completion of each task and for reporting progress;

(4) Technical assistance to the PHA provided or facilitated by HUD;

(5) The PHA's commitment to take all actions within its control to achieve the targets;

(6) The consequences of failing to meet the targets; and

(7) A description of the involvement of local public and private entities, including PHA resident leaders, in carrying out the agreement and rectifying the PHA's problems. A PHA shall have primary responsibility for obtaining active local public and private entity participation, including the involvement of public housing resident leaders, in assisting PHA improvement efforts. Local public and private entity participation should be premised upon

the participant's knowledge of the PHA, ability to contribute technical expertise with regard to the PHA's specific problem areas, and authority to make preliminary commitments of support, financial or otherwise.

(d) *PHA review of the CAA.* The PHA will have 10 days to review the CAA. During this 10-day period, the PHA shall resolve any claimed discrepancies in the CAA with HUD, and discuss any recommended changes and target dates for improvement to be incorporated in the final CAA. Unless the time period is extended by HUD, the CAA is to be executed 30 days following issuance of the draft CAA.

(e) *Maximum recovery period.* (1) Upon the expiration of the one-year period that started on the date on which the PHA receives initial notice of a troubled performer designation, the PHA shall improve its performance in order to no longer be considered troubled under the assessment.

(2) [Reserved].

(f) *Parties to the CAA.* A CAA shall be executed by:

(1) The PHA Board Chairperson (supported by a Board resolution), or a receiver (pursuant to a court-ordered receivership agreement, if applicable) or other AME acting in lieu of the PHA Board;

(2) The PHA Executive Director, or a designated receiver (pursuant to a court-ordered receivership agreement, if applicable), or other AME-designated Chief Executive Officer; and

(3) The field office.

(g) *Involvement of resident leadership in the CAA.* HUD encourages the inclusion of the resident leadership in the execution of the CAA.

(h) *Failure to execute CAA or make substantial improvement under CAA.* (1) If a troubled performer PHA fails or refuses to execute an CAA within the period provided in paragraph (d) of this section, or a troubled performer PHA operating under an executed CAA does not achieve a passing physical inspection score, as provided in paragraph (e) of this section, the field office shall refer the PHA to the Assistant Secretary to determine such remedial actions, consistent with the provisions of the ACC and other HUD regulations, including, but not limited to, remedies available for substantial default.

(i) Continuation of services to residents. To the extent feasible, while a PHA is in a troubled performer status, all services to residents will continue uninterrupted.

§ 902.107 Withholding, denying, and rescinding troubled designation.

(a) *Withholding designation.* In exceptional circumstances, even though a PHA has satisfied the requirements for high performer or non-troubled designations, HUD may conduct any review as it may determine necessary, and may deny or rescind incentives or high performer designation or non-troubled performer designation, in the case of a PHA that:

(1) Is operating under a special agreement with HUD (*e.g.,* a civil rights compliance agreement);

(2) Is involved in litigation that bears directly upon the physical performance of a PHA;

(3) Is operating under a court order;

(4) Demonstrates substantial evidence of fraud or misconduct, including evidence that the PHA's certifications, submitted in accordance with this part, are not supported by the facts, as evidenced by such sources as a HUD review, routine reports, an Office of Inspector General investigation/audit, an independent auditor's audit, or an investigation by any appropriate legal authority; or

(5) Demonstrates substantial noncompliance in one or more areas of a PHA's required compliance with applicable laws and regulations, including areas not assessed under the small rural assessment. Areas of substantial noncompliance include, but are not limited to, noncompliance with civil rights, nondiscrimination and fair housing laws and regulations, or the ACC. Substantial noncompliance casts doubt on the capacity of a PHA to preserve and protect its public housing projects and operate them consistent with federal laws and regulations.

(b) *High performer and standard designations.* If a high performer designation is denied or rescinded, the PHA shall be designated either a non-troubled performer, or troubled performer, depending on the nature and seriousness of the matter or matters constituting the basis for HUD's action. If a non-troubled performer designation is denied or rescinded, the PHA shall be designated as a troubled performer.

(c) *Effect on score.* The denial or rescission of a designation of high performer or non-troubled performer shall not affect the PHA's numerical small rural assessment score, except where the denial or rescission is under paragraph (a)(4) of this section.

§ 902.109 Right to petition and appeal troubled designation.

(a) *Appeal of troubled performer designation and petition for removal of troubled performer designation.* A PHA may take any of the following actions:

(1) Appeal its troubled performer designation;

(2) Petition for removal of troubled performer designation; and

(3) Appeal any refusal of a petition to remove troubled performer designation.

(b) *Appeal of small rural Assessment score.* (1) If a PHA believes that an objectively verifiable and material error(s) exists in its small rural assessment score, which, if corrected, will result in a significant change in the PHA's score and its designation, the PHA may appeal its score in accordance with the procedures of paragraphs (c), (d), and (e) of this section. A significant change in a score is a change that would cause the PHA's score to increase, resulting in a higher designation for the PHA (*i.e.,* from troubled performer to non-troubled performer, or from non-troubled to high performer).

(2) A PHA may not appeal its score or designation based on the subsequent correction of deficiencies identified as a result of a project's physical inspection.

(c) *Appeal and petition procedures.*

(1) To appeal a troubled performer designation or petition for the removal of a troubled performer designation, a PHA must submit a request in writing to the Deputy Assistant Secretary of the Real Estate Assessment Center, which must be received by HUD no later than 30 days following the issuance of the score to the PHA.

(2) To appeal the denial of a petition to remove a troubled performer designation, a PHA must submit a written request to the Deputy Assistant Secretary of the Real Estate Assessment Center, which must be received by HUD no later than 30 days after HUD's decision to refuse to remove the PHA's troubled performer designation.

(3) An appeal of a troubled performer designation or an appeal of the denial of a petition for removal of a troubled performer designation must include the PHA's supporting documentation and reasons for the appeal or petition. An appeal of an assessment score must be accompanied by the PHA's evidence that a material error occurred. An appeal or petition submitted to HUD without supporting documentation will not be considered and will be returned to the PHA.

(d) *Denial, withholding, or rescission.* A PHA that disagrees with the basis for denial, withholding, or rescission of its designation under § 902.66 may make a written request for reinstatement within 30 days of notification by HUD of the denial or rescission of the designation to the Assistant Secretary, and the request

shall include reasons for the reinstatement.

(e) *Consideration of petitions and appeals.* (1) Consideration of a petition or the appeal of a final overall assessment score, of a troubled performer designation, or of a petition to remove troubled performer designation. Upon receipt of such an appeal or a petition from a PHA, HUD will evaluate the appeal and its merits for purposes of determining whether a reassessment of the PHA is warranted. HUD will review the PHA's file and the evidence submitted by the PHA to determine whether an error occurred.

(2) Consideration of an appeal of refusal to remove a troubled performer designation. Upon receipt of an appeal of refusal to remove a troubled performer designation, HUD will evaluate the appeal and its merits for the purposes of determining whether a reassessment of the PHA is warranted. The HUD staff initially evaluating an appeal of refusal to remove a troubled performer designation will not be the same HUD staff who evaluated the PHA's petition to remove the troubled performer designation. The Assistant Secretary will render the final determination of such an appeal.

(f) *Notice and finality of decisions.* (1) If HUD determines that one or more objectively verifiable and material error has occurred, HUD will undertake a new inspection of the project, adjust the PHA's score, or perform other reexamination of information, as appropriate in light of the nature of the error that occurred. A new score will be issued and an appropriate performance designation made by HUD. HUD's decision on appeal of an assessment score, issuance of a troubled performer designation, or refusal to remove a troubled performer designation will be final agency action. No reconsideration will be given by HUD of such decisions.

(2) HUD will issue a written decision on all appeals and petitions made under this section.

§ 902.111 Sanctions for troubled small rural PHAs.

The sanctions for small rural PHAs with troubled public housing programs that remain troubled as required by § 902.108 will be the same as those sanctions for PHAs assessed under PHAs as described in § 902.83.

§ 902.113 Incentives for small rural PHAs high performers.

(a) *High performer.* PHAs with a weighted average score for all inspections of at least 90 percent of all available points will be considered high performers and will be eligible for benefits as described in § 902.110(b) and § 905.400(l) of this title.

(b) *Incentives.* High performer small rural PHAs under the public housing program will be eligible for the same incentives as high performer PHAs under PHAS as described in § 902.71.

PART 982—SECTION 8 TENANT-BASED ASSISTANCE: HOUSING CHOICE VOUCHER PROGRAM

■ 38. The authority for 24 CFR part 982 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 39. In § 982.4, amend paragraph (b) by revising the definition of ''Housing quality standards (HQS)'' to read as follows:

§ 982.4 Definitions.

* * * * *

(b) * * *

Housing quality standards (HQS). ''The minimum quality standards developed by HUD in accordance with § 5.703 of this title for the PBV program or the HUD approved alternative standard for the PHA under § 5.703(g) of this title.''

* * * * *

■ 40. In § 982.352, revise paragraph (b)(1)(iv)(A)(*3*) to read as follows:

§ 982.352 Eligible housing.

* * * * *

(b) * * *

(1) * * *

(iv) * * *

(A) * * *

(*3*) To inspect the unit for compliance with the HQS in accordance with § 982.305(a) and § 982.405. The independent agency shall communicate the results of each such inspection to the family and the PHA.

* * * * *

■ 41. Revise § 982.401 to read as follows:

§ 982.401 Housing quality standards.

As defined in § 982.4, housing quality standards (HQS) refers to the minimum quality standards developed by HUD in accordance with § 5.703 of this title for housing assisted under the HCV program or a HUD approved alternative standard for the PHA under § 5.703(g).

■ 42. In § 982.405, revise paragraph (a) to read as follows:

§ 982.405 PHA initial and periodic unit inspection.

(a)(1) *General Requirements.* The PHA must inspect the unit leased to a family prior to the initial term of the lease, at least biennially during assisted occupancy, and at other times as needed, to determine if the unit meets the HQS. (See § 982.305(b)(2) concerning timing of initial inspection by the PHA.)

(2) *Small rural PHAs.* Instead of biennially, a small rural PHA as defined in § 902.101 of this chapter must inspect a unit during occupancy at least once every three years.

* * * * *

PART 983—PROJECT-BASED VOUCHER (PBV) PROGRAM

■ 43. The authority for 24 CFR part 983 continues to read as follows:

Authority: 42 U.S.C. 1437f and 3535(d).

■ 44. In § 983.3, amend paragraph (b) by revising the definition of ''Housing Quality Standards (HQS)'' to read as follows:

§ 983.3 PBV definitions.

* * * * *

(b) * * *

Housing quality standards (HQS). ''The minimum quality standards developed by HUD in accordance with § 5.703 of this title for the PBV program or the HUD approved alternative standard for the PHA under § 5.703(g) of this title.''

* * * * *

■ 45. In § 983.10, revise paragraph (b)(2)(ii) to read as follows:

§ 983.10 Project-based certificate (PBC) program.

* * * * *

(b) * * *

(2) * * *

(ii) *Lead-based paint requirements.* The Lead-based Paint Poisoning Prevention Act (42 U.S.C. 4821–4846), the Residential Lead-based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4851–4856), and implementing regulations at part 35, subparts A, B, H, and R of this title, apply to the PBC program.

* * * * *

■ 46. Revise § 983.101 to read as follows:

§ 983.101 Housing quality standards.

As defined in § 983.3, housing quality standards (HQS) refers to the minimum quality standards developed by HUD in accordance with § 5.703 of this title for housing assisted under the HCV program or a HUD approved alternative standard for the PHA under § 5.703(g) of this title.

■ 47. In § 983.103, revise the heading of paragraph (d) and add paragraph (d)(4) to read as follows:

§ 983.103 Inspecting units.

* * * * *

(d) *Periodic inspections.* * * *

(4) Instead of biennially, a small rural PHA as defined in § 902.101 of this title

must inspect the random sample of units in accordance with paragraph (d)(1) at least once every three years.

* * * * *

PART 985—SECTION 8 MANAGEMENT ASSESSMENT PROGRAM (SEMAP) AND SMALL RURAL PHA ASSESSMENTS

■ 48. The authority citation for 24 CFR part 985 is revised to read as follows:

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 1437z–10, and 3535(d).

■ 49. Revise the heading of Part 985 to read as set forth above.

■ 50. In § 985.1, revise paragraph (b) and add paragraph (c) to read as follows:

§ 985.1 Purpose and applicability.

* * * * *

(b) *Applicability.* This rule applies to PHA administration of the tenant-based Section 8 rental program (part 982 of this title), the project-based voucher program (part 983 of this title) to the extent that PBV family and unit data are reported and measured under the stated HUD verification method, and enrollment levels and contributions to escrow accounts for Section 8 participants under the family self-sufficiency program (FSS) (part 984 of this title).

(c) *Small rural PHA assessments.* Subpart D covers the HCV and PBV assessment for a small rural PHA as defined in § 902.101 of this title. Section 985.3 and subparts B and C of this part do not apply to small rural PHAs.

■ 51. Add subpart D to read as follows:

Subpart D—Small rural PHA Assessment

Sec.
985.201 Applicability.
985.203 Assessment indicators and HUD verification methods.
985.205 Determination of assessment rating.
985.207 Frequency of assessments.
985.209 Troubled small rural PHAs.
985.211 Small rural PHAs assessment records.

Authority: 42 U.S.C. 1437a, 1437c, 1437f, 1437z–10, and 3535(d).

§ 985.201 Applicability.

(a) This subpart applies to small rural PHAs as defined in § 902.101 of this title.

(b) Small rural PHAs shall be assessed and rated on the indicators and methodology of this subpart and shall not be subject to the SEMAP requirements.

§ 985.203 Assessment indicators and HUD verification methods.

(a) This section describes the performance indicators used to assess a PHA's designation as troubled resulting from the small rural PHA assessment. HUD will use the verification method identified for each indicator. The four indicators are determined on a pass or fail basis.

(b)(1) *Inspection standards.* This indicator shows whether the PHA applies the correct inspection standards to HCV and PBV unit inspections

(2) *HUD verification method.* The PHA's assessment certification and on-site HUD review when applicable.

(3) *Rating.* The PHA passes the indicator if it applied the correct inspection standards for all unit HCV and PBV unit inspections conducted during the assessment period. If the PHA applied the incorrect inspection standards for any HCV or PBV unit inspection during the assessment period, the PHA fails the indicator.

(c)(1) *Initial unit inspections.* This indicator determines if the PHA conducted the initial HQS inspections within the required time period.

(2) *HUD verification method.* HUD systems show percent of newly leased units where the beginning date of the assistance contract is before the date the unit passed the initial unit inspection or, if the PHA employed the PHA initial inspection option for non-life threatening deficiencies or alternative inspections, the timing requirements for the applicable PHA initial inspection option.

(3) *Rating.* The PHA passes the indicator if at least 98 percent of units placed under HAP contract during the assessment period passed the initial PHA HQS inspection within the required time period. If fewer than 98 percent of units placed under HAP contract during the assessment period passed the HQS inspection within the required time periods, the PHA fails the indicator.

(d)(1) *Frequency of HQS inspections.* This indicator determines, for units that have been under HAP contract for at least three years, whether the PHA re-inspected tenant-based units under HAP contract and the required sample of PBV units at least once during the three year period from the last PHA inspection.

(2) *HUD verification method.* HUD systems show that the percentage of units above that have been re-inspected within the required three-year period from the last inspection.

(3) *Rating.* The PHA passes the indicator if at least 98 percent of the units described above have been re-inspected within the required three-year period from the last inspection. The PHA fails the indicator if fewer than 98 percent of the units described above have been re-inspected within the required three-year period.

(e)(1) *Unit condition enforcement.* This indicator shows whether, following the inspection of a unit under contract where the unit fails to meet the required standards, any cited life-threatening and non-life threatening deficiencies are corrected within the required cure period in accordance with §§ 982.404 and 983.103 of this title. In addition, if HQS deficiencies are not corrected timely, the indicator shows whether the PHA stops (abates) housing assistance payments beginning no later than the first of the month following the specified correction period or terminates the HAP contract or, for family-caused defects, takes prompt and vigorous action to enforce the family obligations. (§ 982.404 of this title)

(2) *HUD verification method.* The PHA certification and on-site HUD review (if performed), and HUD system data.

(3) *Rating.* In order to pass the indicator, the applicable verification method, which may include sampling, determines that the PHA took corrective action within the required timeframes for at least 98% of inspections with identified life-threatening or other HQS deficiencies.

(f)(1) *PHA submission of certifications.* The PHA must submit its certifications for the applicable indicators within the designated timeframe required by HUD, and in the form and manner as required by HUD. HUD will issue instructions on the submission of PHA certifications by **Federal Register** notice, which will be subject to public comment.

(2) *Failure to submit.* Failure of the PHA to submit any certification in accordance with this paragraph will result in the PHA failing the indicator and the PHA will be designated as troubled under the small rural PHA assessment.

§ 985.205 Determination of assessment rating.

(a) *High performer designation.* (1) A PHA is designated a high performer under the small rural PHA assessment if the PHA has passed all four indicators identified in § 985.203 and the PHA has:

(i) Utilized at least 98 percent of its HCV budget authority based on the most recent calendar year data or the percent of HCV units leased by renters or occupied by homeowners for the most recent calendar year was at least 98 percent;

(ii) Did not end that calendar year with excess HAP reserves; and

(iii) Did not end that calendar year in a funding shortfall or receive shortfall prevention funding from HUD.

(2) HUD shall publish the calculation for determining excess HAP reserve in the **Federal Register**, and such notice shall provide for public comment before becoming effective.

(b) *Standard performer designation.* A PHA that passed all for indicators but did not meet the funding utilization criteria for a high performer designation in paragraph (a) is designated as a standard performer.

(c) *Troubled PHA designation.* A PHA that failed any of the four indicators under § 985.201 is designated as troubled PHA under the small rural PHA assessment.

§ 985.207 Frequency of assessments.

(a) *Frequency of small rural PHA assessments.* (1) *Initial Assessment.* The initial small rural PHA assessment will be effective when the PHA's next SEMAP assessment would have been applied. For PHAs that under SEMAP qualify for biennial review as a small PHA (less than 250 assisted units), the transition to the small rural PHA assessment will occur when the PHA's next biennial SEMAP assessment is required.

(2) *Triennial assessments.* HUD shall assess small rural PHAs no more than once every three years, except that a troubled small rural PHA shall be subject to an annual assessment in accordance with § 985.204.

§ 985.209 Troubled small rural PHAs.

(a) *Appeals*—(1) *HUD action.* HUD must review, consider, and provide a final written determination to a small rural PHA that appeals its designation as a troubled PHA.

(2) *Deciding HUD official.* The HUD decision on the PHA appeal shall be made by a HUD official who has not been involved in and is not subordinate to any person who has been involved in the original determination to designate the PHA as a troubled PHA under the small rural PHA assessment.

(b) *Corrective action agreement.* No later than 60 days after the date on which the PHA is designated a troubled PHA, the PHA and HUD will enter into a corrective action agreement (CAA) under which he PHA shall take actions to correct the deficiencies upon which the troubled PHA designation is based. The PHA must comply with HUD requirements for the submission of the CAA, including but not limited to the date by which the CAA must be submitted to HUD. The CAA must:

(1) Have a term of one year, and shall be renewable at the option of HUD;

(2) Specify goals to be achieved;

(3) Identify obstacles to goal achievement and ways to eliminate or avoid them;

(4) Identify resources that will be used or sought to achieve goals;

(5) Provide, where feasible, for technical assistance to assist the PHA in curing its deficiencies;

(6) Identify an PHA staff person with lead responsibility for completing each goal;

(7) Identify key tasks to reach each goal;

(8) Specify time frames for achievement of each goal, including intermediate time frames to complete each key task;

(9) Provide for regular evaluation of progress toward improvement;

(10) Provide for the reconsideration of the PHA's designation as a troubled PHA no less than annually, and provide for the termination of the agreement when HUD determines the PHA is no longer troubled;

(11) Provide that in the event of substantial noncompliance by the PHA under the agreement, HUD may (i) contract with another PHA or a private entity to administer the HCV program; and (ii) withhold funds otherwise distributable to the troubled PHA;

(12) Be signed by the PHA board of commissioners chairperson and by the PHA executive director. If the PHA is a unit of local government or a state, the corrective action plan must be signed by the Section 8 program director and by the chief executive officer of the unit of government or his or her designee.

(c) *Monitoring.* The PHA and HUD must monitor the PHA's implementation of its CAA to ensure performance targets are met.

(d) *Annual small rural assessment.* A troubled PHA shall be subject to the small rural assessment on an annual basis.

(e) *Use of administrative fee reserve prohibited.* Any PHA assigned designated troubled may not use any part of the administrative fee reserve for other housing purposes (see § 982.155(b) of this title).

(f) *Upgrading poor performance rating.* HUD shall change an PHA's overall performance rating from troubled to standard or high performer if HUD determines that a change in the rating is warranted because of improved PHA performance and a standard or high designation on a subsequent small rural PHA assessment.

(g) *Default under the Annual Contributions Contract (ACC).* HUD may determine that a PHA's failure to correct identified deficiencies resulting from its small rural PHA assessment or to execute and implement a corrective action agreement as required by HUD constitutes a default under the ACC.

§ 985.211 Small rural PHA assessment records.

HUD shall maintain small rural PHA assessment files, including designations, notifications, appeals, corrective action agreements, and related correspondence for at least 3 years.

Brian D. Montgomery,

Deputy Secretary.

[FR Doc. 2021–00098 Filed 1–12–21; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[REG–115057–20]

RIN 1545–BP98

Mandatory 60-Day Postponement of Certain Tax-Related Deadlines by Reason of a Federally Declared Disaster

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTIONS: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the new mandatory 60-day postponement of certain time-sensitive tax-related deadlines by reason of a Federally declared disaster. This document also contains proposed regulations clarifying the definition of ''Federally declared disaster.'' These proposed regulations affect individuals who reside in or were killed or injured in a disaster area, businesses that have a principal place of business in a disaster area, relief workers who provide assistance in a disaster area, or any taxpayer whose tax records necessary to meet a tax deadline are located in a disaster area. This document invites comments from the public regarding these proposed regulations.

DATES: Written or electronic comments and requests for a public hearing must be received by March 15, 2021. Requests for a public hearing must be submitted as prescribed in the ''Comments and Requests for a Public Hearing'' section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and

REG–115057–20) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG–115057–20), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, William V. Spatz at (202) 317–5461; concerning submission of comments, Regina Johnson, (202) 317–5177; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

These proposed regulations amend the Procedure and Administration Regulations (26 CFR part 301) under section 7508A of the Internal Revenue Code (Code) relating to the discretionary authority of the Secretary of the Treasury or his delegate (Secretary) to postpone certain time-sensitive tax deadlines by reason of a Federally declared disaster. These proposed regulations also amend the Income Tax Regulations (26 CFR part 1) under section 165 to clarify the definition of Federally declared disaster.

I. FEMA Procedures for Declaring a Disaster and Providing Relief

When it is apparent that a Federal disaster declaration, pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), Public Law 93–288, as amended, 42 U.S.C. 5121 et seq, may be necessary to assist in the recovery of an affected area, a state, territory, or tribal government may contact the appropriate regional office of the Federal Emergency Management Agency (FEMA) and request a joint Federal-state, territory, or tribal government Preliminary Damage Assessment (PDA). Local government representatives are also included, if possible. Together, the team conducts an assessment of the affected area to determine the extent of the disaster, its impact on individuals and public facilities, and the types of Federal assistance that may be needed. This information is gathered to show whether the disaster is of such severity and magnitude that an effective response is beyond the capabilities of the state, territory, or tribal governments and the affected local governments and that supplemental Federal assistance is necessary. *See* 44 CFR 206.33.

After the PDA is complete and the chief executive of the state, territory, or tribal government determines that the damage from the major disaster exceeds the state's, territory's, or tribal government's resources, the executive may submit a declaration request to the President through the applicable FEMA Regional Office.[1] As part of the request, the chief executive must furnish information on the nature and amount of state, territory, or tribal government and local resources that have been or will be committed to alleviating the results of the disaster, provide an estimate of the amount and severity of damage and the impact on the private and public sectors, and provide an estimate of the type and amount of assistance needed under the Stafford Act. The President determines whether a disaster has caused damage of such severity that it is beyond the combined capabilities of state, territory, or tribal governments and local governments to respond. A major disaster declaration provides a wide range of Federal assistance programs for individuals and public infrastructure. *See* Stafford Act section 401 (42 U.S.C. 5170). A similar declaration request may be submitted to the President in the event of an emergency of such severity and magnitude that effective response is beyond the capabilities of the state, territory, or tribal governments. If the United States has the primary responsibility for response to an emergency, the President may issue an emergency declaration without a request from the chief executive of a state, territory, or tribal government. *See* Stafford Act section 501 (42 U.S.C. 5191).[2]

Once a declaration is made, affected areas and eligible assistance are determined. *See* 44 CFR 206.40. FEMA announces on its website and in the **Federal Register** whether specific counties, parishes, boroughs, tribal lands, or municipalities (counties) within a state that were affected by a major disaster are eligible for Federal ''public assistance'' and/or ''individual assistance.''[3] ''Public assistance'' relief is described in Stafford Act sections 406 and 407 as including Federal assistance to repair, restore, and replace disaster-damaged public facilities, which may include debris removal, roads and bridges, water control facilities, buildings and equipment, utilities, parks, and recreational facilities. 42 U.S.C. 5172 and 5173. Emergency protective measures, described in Stafford Act section 403 (42 U.S.C. 5170b), are actions taken by state, tribal, territorial and local governments to meet immediate threats to life and property resulting from a major disaster. ''Individual assistance'' relief is described in Stafford Act section 408 as Federal assistance to individuals and households, including disaster programs for crisis counseling, unemployment assistance, legal services, and supplemental nutrition assistance. 42 U.S.C. 5174. FEMA defines an ''incident'' as any condition which meets the definition of a major disaster or emergency under the Stafford Act and which causes damage or hardship that may result in a Presidential declaration of a major disaster or an emergency. 44 CFR 206.32(e). FEMA also defines an ''incident period'' as ''[t]he time interval during which the disaster-causing incident occurs.'' 44 CFR 206.32(f).

II. Disaster Relief Under Section 7508A(a)

A. Overview

Under section 7508A(a), the Secretary has discretionary authority to determine which taxpayers can have acts postponed by reason of being affected by a Federally declared disaster and to specify both the time-sensitive acts that are postponed and a period of time that may be disregarded, up to one year, in determining whether such acts were timely performed. The time-sensitive acts that may be postponed under section 7508A(a) include acts due to be performed by taxpayers or the government. *See* § 301.7508A–1(c).

The term ''Federally declared disaster'' is defined in section 165(i)(5) as ''any disaster subsequently determined by the President of the

[1] In rare catastrophic events, the PDA may not be completed before the disaster is declared. Tribal governments may seek assistance either under a state declaration request or tribal leaders may independently choose to request a major disaster declaration from the President.

[2] More information about the process for declaring major disasters or emergencies under the Stafford Act can be found at 44 CFR 206.31 *et seq.* and on the FEMA website: *https://www.fema.gov/disasters/how-declared.* It is rare for the President to declare an emergency without a request from a state, territory, or tribal government. Examples include the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in 1995, the loss of the Space Shuttle Columbia in 2003, and the COVID–19 pandemic in 2020.

[3] *https://www.fema.gov/disasters/disaster-declarations.*

United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.'' The Stafford Act does not use the term ''Federally declared disaster.'' It uses the defined terms ''emergency'' and ''major disaster'' and also uses the generic term ''disaster'' to refer to both emergencies and major disasters. *See* Stafford Act § 101, 42 U.S.C. 5121 (using the term ''disaster''); Stafford Act § 102, 42 U.S.C. 5122 (defining the terms ''emergency'' and ''major disaster''); H.R. Rep. 93–1037, p. 26 (May 13, 1974) 120 Cong. Rec. 14156 (clarifying that the term ''disaster'' as used in the Stafford Act ''includes an emergency or a major disaster''). As described above, the declaration of either an emergency or a major disaster requires a determination by the President that Federal assistance is warranted under the Stafford Act. Accordingly, the IRS has previously acknowledged that a Federally declared disaster under section 165(i)(5) includes either an emergency or a major disaster declared under the Stafford Act. *See* Rev. Rul. 2003–29, 2003–11 I.R.B. 587 (Mar. 17, 2003); Rev. Rul. 2002–11, 2002–10 I.R.B. 608 (Mar. 11, 2002); Rev. Rul. 2001–15, 2001–13 I.R.B. 922 (Mar. 26, 2001); and Rev. Rul. 2000–15, 2000–12 I.R.B. 774 (Mar. 20, 2000).

Section 7508A(a) of the Code neither mentions FEMA, nor the concept of the ''incident period'' as determined by FEMA. As noted above, section 7508A(a) leaves it to the Secretary's discretion to identify the period of postponement, that is, the start and end dates of the ''incident,'' and the type of relief to provide, from a tax administration perspective. The Secretary has historically looked to FEMA declarations to identify which counties are sufficiently affected by a major disaster for the Secretary to exercise the discretion under section 7508A(a) to postpone periods of time for the taxpayers in these disaster-affected counties to perform certain specified time-sensitive tax actions.

Section 7508A(a) is not self-executing; it does not operate, on its own, to postpone any time-sensitive act in the event of a Federally declared disaster. Instead, the statute authorizes the Secretary to determine who is affected by a Federally declared disaster for purposes of section 7508A, what time-sensitive acts performed by these taxpayers (or performed by the government with respect to these taxpayers)should be postponed, and for what period of time the postponement period should run.

Section 7508(a)(1) enumerates time-sensitive acts that are postponed with respect to a taxpayer serving in a combat zone (and which the Secretary may postpone with respect to taxpayers affected by a Federally declared disaster, via section 7508A(a)(1)). These acts include filing any income, estate, gift, employment, or excise tax return; making any income, estate, gift, employment, or excise tax payment or any installment thereof; filing a petition with the Tax Court for redetermination of a deficiency, or for review of a Tax Court decision; allowing a credit or refund of any tax; filing a claim for credit or refund of any tax; bringing suit upon a claim for credit or refund; making an assessment of any tax; giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax; collecting, by levy or otherwise, the amount of any liability in respect of any tax; bringing suit by the United States, or any officer on its behalf, in respect of any liability in respect of any tax; and any other act required or permitted under the internal revenue laws specified by the Secretary. Additional acts that may be postponed in the event of a Federally declared disaster are listed in Rev. Proc. 2018–58, 2018–50 I.R.B. 990, which is the current version of a revenue procedure that is updated periodically to reflect additional acts or other changes. The revenue procedure provides that in order for taxpayers to be entitled to a postponement of the time-sensitive acts listed in the revenue procedure, the IRS needs to issue guidance providing such relief with respect to a Federally declared disaster, typically by cross-referencing the revenue procedure in an IRS news release. This is the case not just for acts listed in the revenue procedure, but for all acts listed in section 7508(a)(1). As a result, in the event of a Federally declared disaster, the IRS generally issues a news release or other guidance identifying the affected taxpayers for purposes of section 7508A (typically by reference to counties or states), the time-sensitive acts postponed, and the period of time for the postponement.

B. Historical Application

The historical practice before the enactment of section 7508A(d) was generally to postpone time-sensitive tax acts under section 7508A(a) without regard to the latest incident date for a disaster as described by FEMA. The postponement period set by the Secretary generally began on the earliest incident date specified in a FEMA disaster declaration and ended 120 days later, although a longer period for relief could be selected if the disaster coincided with any major filing deadlines. *See* IRM 25.16.1.5.2(2) (rev. 06–26–2018) (''The severity of the disaster and proximity of tax deadlines are primary factors in determining the level of tax relief that is provided.''). These postponement periods typically extended more than 60 days after the latest incident date specified in a FEMA disaster declaration. For example, an end date for the major disaster incident was indicated in FEMA's initial disaster declarations for 48 of FEMA's 53 major disaster declarations issued for disasters occurring in 2019 and declared before December 19, 2019. For these 48 FEMA major disaster declarations in 2019 with initial ending incident dates assigned to them by FEMA, the incident period ranged from one day to 130 days, with a median incident period of nine days. For the five 2019-year major disasters where FEMA's initial declarations did not specify an end date for the disaster, FEMA later amended the declarations to provide an end date to the incident period for the disaster. FEMA major disaster declarations and any amendments thereto are posted on the FEMA website [4] and published in the **Federal Register**.

III. Section 7508A(d)

On December 20, 2019, section 7508A(d) was added to the Code by section 205 of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, enacted as Division Q of the Further Consolidated Appropriations Act, 2020, Public Law 116–94, 133 Stat. 2534, 3226 (FCAA). Section 7508A(d) provides qualified taxpayers a mandatory 60-day period that is to be disregarded ''in the same manner as a period specified under [section 7508A(a)]'' (mandatory 60-day postponement period). Section 7508A(d)(1). Section 7508A(d) does not identify the acts for which a period is disregarded under section 7508A(a). Section 7508A(d)(4) provides that a rule similar to section 7508A(d)(1) applies with respect to any person described in section 7508A(b) for certain pension-related acts. In contrast to the rest of section 7508A(d), section 7508A(d)(4) identifies specific pension-related acts to which the mandatory 60-day postponement period provided in section 7508A(d)(1) applies. In addition, section 7508A(d)(5) coordinates the mandatory 60-day postponement period with a period specified by the Secretary by providing that the mandatory 60-day postponement period with respect to a person (including by reason of the application of section 7508A(d)(4)) is in

[4] *https://www.fema.gov/disasters/disaster-declarations.*

addition to (or concurrent with, as the case may be) any period specified by the Secretary under section 7508A(a) or (b) with respect to such person.

Because section 7508A(a) does not, on its own, operate to postpone any acts, the Secretary must determine which acts to postpone. As a result, the requirement in section 7508A(d)(1) that the mandatory 60-day postponement period be disregarded ''in the same manner as a period specified under [section 7508A(a)]'' indicates that the acts covered by the mandatory 60-day postponement period under section 7508A(d)(1) must also be determined by the Secretary in the manner required under section 7508A(a).

Under section 7508A(d)(5), the mandatory 60-day postponement period in section 7508A(d) runs concurrently with the postponement period determined by the Secretary under section 7508A(a) if the period determined by the Secretary under section 7508A(a) is equal to or longer than 60 days. If the Secretary's postponement period under section 7508A(a) is less than 60 days, the mandatory 60-day postponement period would run concurrently for the length of the Secretary's postponement period under section 7508A(a) and then continue running in addition to the Secretary's postponement period. The mandatory 60-day postponement period generally begins on the earliest incident date specified in a FEMA disaster declaration and ends on the date which is 60 days after the latest incident date.

IV. Legislative History of Section 7508A(d)

The legislative history of section 7508A(d) of the Code is sparse. There are no House, Senate, or Conference Reports concerning the FCAA. The identical text of section 7508A(d) was included in the same session of Congress in H.R. 3301, which was not enacted. Before H.R. 3301 was set to be marked up by the House Ways and Means Committee on June 30, 2019, the staff of the Joint Committee on Taxation prepared a partial description of proposed section 7508A(d) in JCX 30–19 (June 18, 2019) (Joint Committee Report).

The Joint Committee Report (at 86–87) described twelve categories of time-sensitive acts that could be postponed which are performed by taxpayers (for example, filing any return or paying any tax) or by the IRS (for example, assessment or collection of any tax), which are the same eleven items described in section 7508(a)(1)(A)–(K) (for taxpayers serving in a combat zone), plus the set of acts regarding pensions that are described in § 301.7508A–1(c)(1)(iii). The Joint Committee Report did not discuss why section 7508A(d) only refers to the acts regarding pensions in section 7508A(d)(4) to be postponed, but not the eleven categories of acts described in section 7508(a)(1)(A)–(K). The Joint Committee Report also did not discuss the intended meaning of section 7508A(d)(1)'s provision that periods of time ''shall be disregarded in the same manner as under [section 7508A(a)].''

As regards the proposed length of the mandatory 60-day postponement period, the Joint Committee (at 87) stated only that ''[t]he 60-day period begins on the earliest incident date specified in the declaration of the relevant disaster and ends on the date which is 60 days after the latest incident date so specified.'' The Joint Committee Report did not refer to or explain how the new proposed section 7508A(d) might be applied in the event that a declaration did not specify an incident date, or in the event of a prolonged and uncertain disaster period, such as in the case of a drought or pandemic.

On January 21, 2020, a month after the enactment of section 7508A(d), the House Ways and Means Committee released a report on H.R. 3301, H. Rept. No. 116–379 (2020) (House Committee Report), which largely repeated (at 97–100) the explanations previously provided by the Joint Committee Report regarding the features of section 7508A(d). In this report, the Ways and Means Committee titled the section discussing the text of what had been enacted as section 7508A(d), ''Automatic Extension of Filing Deadlines in Case of Certain Taxpayers Affected by Federally Declared Disasters.'' H.R. Rep. No. 116–379, at 97 (2020). Next, the House Committee Report described the current law (prior to enactment of section 7508A(d)), beginning with a discussion of the filing deadlines for Federal income tax returns and quarterly estimated tax payments, and ending with a listing of all of the items in section 7508(a)(1) and section 7508A(a) that the Secretary may postpone in the event of a Federally declared disaster. *Id.* at 97–98. Then, the report identified the reason for change as follows:

> The Committee believes that the certainty and additional time provided by an automatic extension of filing deadlines for taxpayers affected by Federally declared disasters will ease the burden of tax compliance for taxpayers dealing with the hardship of disaster recovery.

Id. at 99. Again, the House Committee Report only identified an automatic extension of filing deadlines as the purpose for the new statutory text. However, in the Explanation of Provision section that followed, the House Committee Report seems to indicate that the statute was meant to postpone all of the deadlines that it had listed in its description of current law:

> The provision provides to qualified taxpayers in the case of a Federally declared disaster a mandatory 60-day period that is disregarded in determining whether the acts listed above were performed in the time prescribed; the amount of interest, penalty, additional amount, or addition to tax; and the amount of credit or refund. The 60-day period begins on the earliest incident date specified in the declaration of the relevant disaster and ends on the date which is 60 days after the latest incident date so specified.

Id. at 99. The ''Explanation of Provision'' section of the House Committee Report is inconsistent with the report's ''Reason for Change'' section, and neither section comports with the statutory text of section 7508A(d) as enacted, because the statutory text does not reference which specified acts (let alone all) are postponed under section 7508A(a).

Explanation of Provisions

The Treasury Department and the IRS have determined it necessary to propose regulations addressing the enactment of section 7508A(d) because the statutory text is ambiguous in at least two respects. First, it is unclear what time-sensitive acts are to be postponed. Second, it is unclear how the mandatory 60-day postponement period is to be calculated when the declaration specified in section 7508A(d) does not contain an incident date. Further, the legislative history described in the Background section is insufficient to explain these areas of ambiguity. The Treasury Department and the IRS have also determined it necessary to propose regulations addressing the ambiguity between the different terms used in the Code and in the Stafford Act to refer to disasters determined by the President to warrant Federal assistance. This Explanation of Provisions section discusses the proposed regulations addressing each of these areas of ambiguity.

I. Time-Sensitive Tax Acts

Section 7508A(d) provides a mandatory 60-day period during which qualified taxpayers will receive disaster relief. Except for the rules regarding pensions described in section 7508A(d)(4), section 7508A(d) does not specify the time-sensitive tax acts to be postponed during the mandatory 60-day postponement period. Section

7508A(d)(1), however, provides that this mandatory 60-day postponement period ''shall be disregarded in the same manner as a period specified under [section 7508A(a)].'' Section 7508A(a) is not self-executing. Rather, it requires the Secretary to determine whether a taxpayer is affected by a Federally declared disaster for purposes of section 7508A(a), whether any time-sensitive tax acts are to be postponed for such taxpayers, and the duration of such postponement. Section 7508A(d)(1)'s reference to section 7508A(a) thus requires a determination by the Secretary of the time-sensitive tax acts, if any, to be postponed under section 7508A(a). Therefore, these proposed regulations provide that the Secretary's determination under section 7508A(a) of the acts subject to postponement due to a Federally declared disaster is an essential prerequisite to determining the acts to which the mandatory 60-day postponement period applies with respect to that Federally declared disaster for qualified taxpayers.

There are circumstances when the Secretary has chosen to limit the extent to which the discretion to postpone time-sensitive acts under section 7508A(a) might otherwise be exercised. For example, section 7508A(a)(1) (through its reference to acts described in section 7508(a)(1)) lists several time sensitive acts performed by the IRS—not by taxpayers—that are available for postponement in the event of a Federally declared disaster, including the assessment of any tax, making of notice and demand for payment of any tax, collection of any tax, and initiating litigation with respect to any tax liability. Although all of these acts can be postponed under section 7508A(a) in the same manner as time-sensitive acts performed by taxpayers, the Secretary rarely chooses to postpone them. Over the past 20 years, time-sensitive government acts were only postponed under section 7508A(a) in connection with four Federally declared disasters: the September 11, 2001 terrorist attacks (Notice 2001–68, 2001–47 I.R.B. 504), Hurricane Katrina (Notice 2005–66, 2005–40 I.R.B. 620 and Notice 2005–81, 2005–47 I.R.B. 977), Hurricane Rita (Notice 2005–82, 2005–47 I.R.B. 978), and the COVID–19 pandemic (Notice 2020–23, 2020–18 I.R.B. 742). The statutory text of section 7508A(d) provides no indication that Congress intended to postpone all time-sensitive acts for which relief potentially could be provided under section 7508A(a), including those acts due to be performed by the government with respect to a qualified taxpayer. It has generally not been the practice of the Secretary to exercise all of the authority given under section 7508A(a) to postpone all time-sensitive government acts with respect to taxpayers affected by a Federally declared disaster.

The Secretary generally also chooses not to exercise the discretion under section 7508A(a) with respect to many time-sensitive acts carried out by taxpayers. For example, section 7508(a)(1)(A)–(B) and section 7508A(a)(1) combine to provide, among other things, that the Secretary has the discretion to specify a period of up to one year that may be disregarded in determining whether an affected taxpayer with respect to a qualifying disaster has timely filed any return of income tax or paid the United States any employment or excise taxes. The Secretary may exercise the discretion under section 7508A(a) to not provide postponement periods for the filing of certain information returns with respect to income, such as Forms W–2 (Wage and Tax Statement) and forms in the 1099 series. These information returns with respect to income are required by most income tax filers in order to timely prepare their own income tax returns, such as Forms 1040 (U.S. Individual Income Tax Returns) or Forms 1120 (U.S. Corporation Income Tax Returns). These information returns may also be used by the IRS to verify withheld amounts that were claimed on an income tax return before tax refunds are issued. As a result, for tax administration reasons, the Secretary generally does not postpone the time-sensitive acts of filing and furnishing these information returns, except for certain information returns relating to individual retirement accounts (IRAs) and certain other tax-exempt accounts.

Finally, the Secretary may choose not to provide any relief under section 7508A in response to a Federally declared disaster. For example, when a disaster is eligible for assistance that is limited to only the clean-up of public property or other short-term public services, the Secretary may determine that relief is not warranted under section 7508A.

For the foregoing reasons, these proposed regulations provide that the phrase, ''shall be disregarded in the same manner as a period specified under [section 7508A(a)]'' in section 7508A(d)(1) first requires the Secretary's exercise of discretion under section 7508A(a) to specify the postponed set of time-sensitive acts for taxpayers (and potentially for the government) during the entirety of the postponement period under both section 7508A(a) and (d). Accordingly, if the Secretary determines not to postpone a time-sensitive act pursuant to the discretionary authority under section 7508A(a), that act will also not be postponed under section 7508A(d). Similarly, if no time-sensitive acts are postponed under section 7508A(a), then none will be postponed under section 7508A(d).

II. Calculation of the Mandatory 60-Day Postponement Period

The earliest and latest incident dates referred to in subsections 7508A(d)(1)(A)–(B) for a Federally declared disaster are the dates for these events set forth in the declaration establishing the Federally declared disaster for purposes of section 7508A. In the circumstances where there is a certain event with an incident date or incident dates stated in the declaration, as described in Examples (1)–(3) of the proposed regulation, the period described in section 7508A(d)(1) will generally run concurrently with the discretionary periods specified by the Secretary under section 7508A(a) or (b), when the postponement period provided by the Secretary is equal to or greater than 60 days. (As explained previously, the postponement period provided by the Secretary is generally 120 days.) If the postponement period provided by the Secretary is less than 60 days, then section 7508A(d) would apply to provide a mandatory 60-day postponement period, running concurrently with the Secretary's postponement period at the start, and then after the period prescribed under section 7508A(a) ran out, the mandatory period under section 7508A(d) would continue to run for the remainder of the 60-day period.

In flooding, wildfire, or earthquake disasters, it is not unusual for FEMA initially to issue a major disaster declaration with no known end date for the disaster incident period. However, insofar as Congress could have been aware when section 7508A(d) was enacted, these open-ended disaster incident periods were generally resolved with the addition by FEMA of a closing date within a short time (usually less than 60 days) after the first reported incident date. Also, it is clear from the legislative history that Congress did not anticipate a situation such as a pandemic or drought, where the beginning date and end dates are not clear, or a situation where the declaration does not specify an incident date.

Ambiguities in applying section 7508A(d) arise when the incident date is specified in the declaration as beginning on a certain date but remaining open-ended for an extended

period of time. In those cases, the calculation of the mandatory 60-day postponement period could result in a prolonged postponement of specified time-sensitive acts that could span well beyond the one-year discretionary period authorized under section 7508A(a). It defies logic for the Secretary's discretionary postponement period under section 7508A(a) to be limited to ''a period of up to 1 year,'' and there be no limit on the mandatory *60-day* postponement period under section 7508A(d). If section 7508A(d) were interpreted as requiring such prolonged postponement periods, that interpretation would be contrary to the directive of section 7508A(d)(1) that the mandatory 60-day postponement period must ''be disregarded in the same manner as a period specified under [section 7508A(a)].'' For the foregoing reasons, these proposed regulations provide that the phrase ''shall be disregarded in the same manner as a period specified under subsection (a)'' in section 7508A(d)(1) means that the mandatory postponement period cannot exceed the one-year period authorized under section 7508A(a).

Further ambiguities arise when the declaration establishing a Federally declared disaster for purposes of section 7508A does not specify any incident date. Under such circumstances, it is not possible to apply the statutory language in section 7508A(d)(1) to provide relief ''beginning on the earliest incident date specified in the declaration'' and ''ending on the date which is 60 days after the latest incident date so specified.'' For that reason, these proposed regulations provide that where a declaration establishing a Federally declared disaster for purposes of section 7508A does not specify an incident date, there is no mandatory period for relief under section 7508A(d). If the Secretary determines to postpone time-sensitive tax acts in response to such a declaration, under the discretionary authority in section 7508A(a), the only postponement period will be the period determined by the Secretary under 7508A(a).

These proposed regulations apply only to the relief that is made available under section 7508A in the event of a Federally declared disaster. It does not apply to other relief provisions under other provisions of the Code that automatically arise as a result of a Federally declared disaster, such as the loss provisions under section 165 of the Code.

III. Federally Declared Disasters

As noted above, the term ''Federally declared disaster'' is defined in section 165(i)(5) as ''any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.'' The term ''Federally declared disaster'' does not appear in the Stafford Act, but the term ''disaster'' is used in the Stafford Act to refer to either an ''emergency'' or a ''major disaster'' declared by the President in accordance with the procedures contained therein. The use of different terminology between the Code and the Stafford Act could cause confusion as to whether a declaration of an emergency under the Stafford Act establishes a ''Federally declared disaster'' under the Code. Section 165(i)(5) provides that a Federally declared disaster is ''any disaster'' that is determined to warrant assistance under the Stafford Act. Under the Stafford Act, the President can declare either an emergency or a major disaster. There is no provision to declare a ''disaster,'' but the term ''disaster'' is used in the Stafford Act as an umbrella term that encompasses both an emergency and a major disaster. As a result, the term ''any disaster'' in section 165(i)(5) encompasses both an emergency and a major disaster. The IRS has previously acknowledged in multiple Revenue Rulings that Federally declared disasters include either an emergency or a major disaster declared under the Stafford Act. *See* Rev. Rul. 2003–29, 2003–11 I.R.B. 587 (Mar. 17, 2003); Rev. Rul. 2002–11, 2002–10 I.R.B. 608 (Mar. 11, 2002); Rev. Rul. 2001–15, 2001–13 I.R.B. 922 (Mar. 26, 2001); and Rev. Rul. 2000–15, 2000–12 I.R.B. 774 (Mar. 20, 2000). These proposed regulations formalize that clarification by amending the definition of ''Federally declared disaster'' in § 1.165–11(b)(1) of the Income Tax Regulations to specifically provide that the term ''Federally declared disaster'' includes both a major disaster declared under section 401 of the Stafford Act and an emergency declared under section 501 of the Stafford Act.

IV. The COVID–19 Pandemic

The disaster relief provided under section 7508A in response to the COVID–19 pandemic illustrates some of the provisions in these proposed regulations. The COVID–19 pandemic became a Federally declared disaster for purposes of section 7508A on March 13, 2020, when the President issued his nationwide emergency declaration under section 501(b) of the Stafford Act.[5] In response to that declaration, pursuant to the discretionary authority under section 7508A(a) and (b), the Secretary determined the taxpayers affected by the disaster, the time-sensitive tax acts that should be postponed, and the time period for postponement. Those determinations were reflected in several notices released to the public beginning in late March. Notice 2020–17 was issued on March 18, 2020,[6] Notice 2020–18, superseding Notice 2020–17, was issued on March 20, 2020,[7] Notice 2020–20, amplifying Notice 2020–18, was issued on March 27, 2020,[8] and Notice 2020–23, amplifying Notices 2020–18 and 2020–20, was issued on April 9, 2020.[9] Additional notices continued to be released thereafter, as the Secretary continued to exercise his discretionary authority under section 7508A(a) and (b) in response to the President's March 13 declaration, including a joint notice with the Department of Labor published on May 4, 2020,[10] and Notice 2020–35, issued on May 28, 2020.[11] Because the President's March 13 emergency declaration did not specify an incident date, there is no mandatory 60-day postponement period under section 7508A(d). The only postponement period provided under section 7508A for the time-sensitive acts postponed in response to that declaration are the periods determined by the Secretary under section 7508A(a) and (b).

Subsequent to the President's March 13 nationwide emergency declaration, beginning on March 20, 2020, and continuing on almost a daily basis until April 13, 2020, the President approved major disaster declarations under section 401 of the Stafford Act for all 50 states, the District of Columbia, and 5 U.S. territories, in connection with the COVID–19 pandemic. Those declarations specified an incident period of ''January 20, 2020 and continuing.'' The Secretary did not use his discretion under section 7508A(a) to postpone any time-sensitive tax acts in response to those state-by-state declarations. As discussed earlier, a period for performing acts cannot be disregarded under section 7508A(d) ''in the same manner as a period specified under [section 7508A(a)]'' if no period for performing such acts is in fact disregarded under section 7508A(a) in

[5] *https://www.whitehouse.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/.*

[6] 2020–15 I.R.B. 590 (April 6, 2020).

[7] 2020–15 I.R.B. 590 (April 6, 2020).

[8] 2020–16 I.R.B. 660 (April 13, 2020).

[9] 2020–18 I.R.B. 742 (April 27, 2020).

[10] 85 FR 26351 (May 4, 2020).

[11] 2020–25 I.R.B. 948 (June 15, 2020).

connection with a declaration. As a result, section 7508A(d) does not operate to postpone any acts for a mandatory 60-day period in connection with those state-by-state declarations.

Applicability Date

Section 7805(b)(1)(A) and (B) of the Code generally provide that no temporary, proposed, or final regulation relating to the internal revenue laws may apply to any taxable period ending before the earliest of (A) the date on which such regulation is filed with the **Federal Register**, or (B) in the case of a final regulation, the date on which a proposed or temporary regulation to which the final regulation relates was filed with the **Federal Register**. However, section 7805(b)(2) provides that regulations filed or issued within 18 months of the date of the enactment of the statutory provision to which they relate are not prohibited from applying to taxable periods prior to those described in section 7805(b)(1). As noted above, section 7508A(d) was enacted on December 20, 2019, as part of the FCAA.

Accordingly, as provided in section 7805(b)(2) of the Code, these proposed regulations are proposed to apply to disasters declared on or after December 21, 2019.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and affirmed by Executive Order 13563. Therefore, a regulatory assessment is not required.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. The proposed regulations clarify how the Secretary may postpone certain time-sensitive tax deadlines by reason of a Federally declared disaster. Such postponements provide more time for affected taxpayers to complete time-sensitive acts than they otherwise would have under the internal revenue laws. In addition, the proposed regulations would not impose a collection of information on any person, including small entities, for purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6). Accordingly, the Secretary certifies that the regulations will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Internal Revenue Code, the IRS will submit the proposed regulations to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comments on the regulations' impact on small businesses.

Comments and Request for a Public Hearing

Before these proposed regulations are adopted as final, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, I.R.B. 2020–17, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal author of these regulations is William V. Spatz of the Office of Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in the development of the regulations.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 301 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

■ **Par. 2.** Section 1.165–11 is amended by revising paragraph (b)(1) to read as follows:

§ 1.165–11 Election to take disaster loss deduction for preceding year.

* * * * *

(b) * * *

(1) A *federally declared disaster* means any disaster subsequently determined by the President of the United States to warrant assistance by the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). A federally declared disaster includes both a major disaster declared under section 401 of the Stafford Act and an emergency declared under section 501 of the Stafford Act.

PART 301—PROCEDURE AND ADMINISTRATION

■ **Par. 3.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

■ **Par. 4.** Section 301.7508A–1 is amended by revising paragraph (g) and adding paragraph (h) to read as follows::

§ 301.7508A–1 Postponement of certain tax-related deadlines by reasons of a Federally declared disaster or terroristic or military action.

* * * * *

(g) *Mandatory 60-day postponement*—(1) *In general.* In addition to (or concurrent with) the postponement period specified by the Secretary in an exercise of the authority under section 7508A(a) to postpone time-sensitive acts by reason of a Federally declared disaster, qualified taxpayers (as defined in section 7508A(d)(2)) are entitled to a mandatory 60-day postponement period during which the time to perform those time-sensitive acts is disregarded in the same manner as under section 7508A(a). A similar rule applies with respect to a postponement period specified by the Secretary under section 7508A(b), to postpone acts as provided in section 7508A(d)(4). Except for the acts set forth in paragraph (g)(2) of this section, section 7508A(d) does not apply to postpone any acts.

(2) *Acts postponed.* The time-sensitive acts that are postponed for the mandatory 60-day postponement period are the acts determined to be postponed by the Secretary's exercise of authority under section 7508A(a) or (b). In addition, in the case of any person described in 7508A(b), the time-sensitive acts postponed for the mandatory 60-day postponement period include those described in section 7508A(d)(4):

(i) Making contributions to a qualified retirement plan (within the meaning of

section 4974(c)) under section 219(f)(3), 404(a)(6), 404(h)(1)(B), or 404(m)(2);

(ii) Making distributions under section 408(d)(4);

(iii) Recharacterizing contributions under section 408A(d)(6); and

(iv) Making a rollover under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3).

(3) *Calculation of mandatory 60-day postponement period*—(i) *In general.* The mandatory 60-day postponement period begins on the earliest incident date specified in a disaster declaration for a Federally declared disaster and ends on the date that is 60 days after the latest incident date specified in the disaster declaration. In accordance with section 7508A(d)(5), if the period determined by the Secretary in exercising discretion under 7508A(a) is equal to or longer than 60 days, the mandatory 60-day postponement period under section 7508A(d) runs concurrently with the postponement period determined by the Secretary under section 7508A(a). If the period determined by the Secretary in exercising discretion under 7508A(a) is less than 60 days, in accordance with section 7508A(d)(5), the mandatory 60-day postponement period will run concurrently for the length of the period determined by the Secretary under section 7508A(a) and then continue running in addition to the period determined by the Secretary under section 7508A(a).

(ii) *Limitations on the mandatory 60-day postponement period.* (A) In no event will the mandatory 60-day postponement period be calculated to exceed one year.

(B) In the event the Secretary determines to postpone time-sensitive acts pursuant to a declaration establishing a Federally declared disaster for purposes of section 7508A that does not specify an incident date, there is no mandatory postponement period under section 7508A(d). In such cases, the only postponement period will be the period determined by the Secretary under 7508A(a).

(5) *Examples.* The rules of this paragraph (g) are illustrated by the following examples:

(i) *Example (1).* Individual A lives in a state that experienced severe but isolated tornado damage on March 15. On March 20, FEMA issued a **Federal Register** Notice announcing a major disaster declaration approved by the President for the state where Individual A lives, describing the incident date for the tornado as March 15. Based upon that major disaster declaration, the IRS published a news release identifying the taxpayers (by county) affected by the disaster for purposes of section 7508A and specifying the time-sensitive acts that are postponed and a period of postponement from March 15 through July 31, pursuant to section 7508A(a). Under section 7508A(d), the mandatory 60-day postponement period that Individual A is entitled to begins on March 15 and ends 60 days after March 15, on May 14. The mandatory postponement period applies to the same time-sensitive acts and runs concurrently with the relief the IRS provided to Individual A under section 7508A(a).

(ii) *Example (2).* Individual B lives in a coastal state which experienced harmful effects from a hurricane that began to affect the weather in his state on August 15 and ceased to be a weather factor in his state on August 19. On August 22, FEMA issued a **Federal Register** Notice announcing a major disaster declaration approved by the President, determining that the coastline counties in the state where Individual B lives were severely affected and that these counties were entitled to both individual assistance and public assistance. The major disaster declaration specified the earliest incident date for the hurricane in the state where Individual B lives as August 15 and the latest incident date as August 19. Based upon that major disaster declaration, the IRS published a news release identifying the taxpayers affected by the disaster for purposes of section 7508A and specifying the time-sensitive acts that are postponed and a period of postponement from August 15 through December 31, pursuant to section 7508A(a). Under section 7508A(d), the mandatory 60-day postponement period that Individual B is entitled to begins on August 15 and ends 60 days after August 19, on October 18. The mandatory postponement period applies to the same time-sensitive acts and runs concurrently with the relief the IRS provided to Individual B under section 7508A(a).

(iii) *Example (3).* Individual C lives in a state that is experiencing multiple ongoing wildfires. On August 14, FEMA issued a **Federal Register** Notice announcing a major disaster declaration approved by the President for the state where Individual C lives, specifying the earliest incident date for the wildfires as August 14 and the incident was ongoing. Based upon that major disaster declaration, the IRS published a news release identifying the taxpayers (by county) affected by the disaster for purposes of section 7508A and specifying the time-sensitive acts that are postponed and a period of postponement from August 14 through December 15, pursuant to section 7508A(a). The wildfire disaster remains ongoing, with no ending incident date specified, for several months. The IRS publishes a second news release postponing the time-sensitive acts through January 15. FEMA amends the major disaster declaration to specify the latest incident date of November 19. Under section 7508A(d), the mandatory 60-day postponement period that Individual D is entitled to begins on August 14 and ends 60 days after the latest incident date of November 19. The mandatory postponement period applies to the same time-sensitive acts and runs concurrently with the relief the IRS provided to Individual D under section 7508A(a), and ends on January 18, which is 60 days after the latest incident date and three days beyond the postponement period specified by the IRS under section 7508A(a) in its news release.

(iv) *Example (4).* Individual D lives in the United States, which is experiencing a nationwide emergency as a result of its residents being exposed to a highly infectious and dangerous pandemic disease. On March 13, the President declared a nationwide emergency under section 501(b) of the Stafford Act. The pandemic became a Federally declared disaster for purposes of section 7508A on March 13, however, no incident date was specified in the President's emergency declaration. Pursuant to the President's March 13 emergency declaration, the IRS published several notices identifying the taxpayers affected by the disaster for purposes of section 7508A and specifying the time-sensitive acts that are postponed and a period of postponement that generally ran from April 1 through July 15, pursuant to section 7508A(a). Because, in this circumstance, the emergency declaration pursuant to which the notices were published did not specify an incident date, there is no mandatory postponement period under section 7508A(d). The only postponement period is the period determined by the Secretary pursuant to the discretionary authority under section 7508A(a).

(h) *Applicability dates*—(1) *In general.* Except as provided in paragraph (h)(2) of this section, this section applies to disasters declared after January 15, 2009.

(2) *Paragraph (g).* Paragraph (g) of this section applies to disasters declared on or after December 21, 2019.

Sunita Lough,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2021–00185 Filed 1–11–21; 4:15 pm]

BILLING CODE P

DEPARTMENT OF EDUCATION

34 CFR Part 300

[Docket ID ED–2020–OSERS–0191]

Proposed Guidance; Questions and Answers on Serving Children With Disabilities Placed by Their Parents in Private Schools

Correction

In proposed rule document 2020–27872 appearing on pages 82994–82995 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 82994, in the third column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27872 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R07–OAR–2020–0620; FRL–10017–81–Region 7]

Air Plan Approval; Missouri; Removal of Control of Emissions From Solvent Cleanup Operations

Correction

In proposed rule document 2020–28121 appearing on pages 82995 through 82998 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 82995, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28121 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2020–0053; FRL–10016–93]

Receipt of Several Pesticide Petitions Filed for Residues of Pesticide Chemicals in or on Various Commodities (October 2020)

Correction

In proposed rule document 2020–28117 appearing on pages 82998 through 83000 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 82998, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28117 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Parts 46 and 75

RIN 0991–AC15

Establishment of Safeguards and Program Integrity Requirements for Health and Human Services-Funded Extramural Research Involving Human Fetal Tissue

AGENCY: Office of the Secretary, Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: This is a notice of proposed rulemaking to amend certain regulatory provisions in order to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue from elective abortions.

DATES: Comments must be submitted on or before February 12, 2021.

ADDRESSES: Comments must be identified by RIN 0991–AC15. Because of staff and resource limitations, comments must be submitted electronically to *www.regulations.gov.* Follow the ''Submit a comment'' instructions.

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including personally identifiable or confidential business information that is included in a comment. Before or after the close of the comment period, the Department of Health and Human Services will post all comments that were received before the end of the comment period on *www.regulations.gov.* Follow the search instructions on that website to view the public comments.

FOR FURTHER INFORMATION CONTACT: Daniel Barry at *daniel.barry@hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

In September 2018, the Department of Health and Human Services (HHS) terminated a contract that provided human fetal tissue from elective abortions to the Food and Drug Administration (FDA) for the development of testing protocols. HHS terminated the contract because it was not sufficiently assured that the contract included the appropriate protections applicable to fetal tissue research or met all other procurement requirements. HHS subsequently initiated a comprehensive review of all HHS research involving human fetal tissue from elective abortions to ensure consistency with the statutes and regulations governing such research and to ensure the adequacy of procedures and oversight in light of the serious regulatory, moral, and ethical considerations involved.

Promoting the dignity of human life from conception to natural death is one of the top priorities of President Trump's administration. The audit and review informed the policy process that led to the administration's decision, announced June 5, 2019,[1] to discontinue National Institutes of Health (NIH) intramural research—research conducted within NIH by NIH researchers—involving the use of human fetal tissue from elective abortion. With respect to extramural research (research conducted outside of, but funded by, NIH, *e.g.,* at universities), the administration announced that, for new extramural research grant applications or current research projects in the competitive renewal process (generally every five years) that propose to use fetal tissue from elective abortions and that are recommended for potential funding through NIH's two-level external scientific review process, an ethics advisory board will be convened to review the research proposal and recommend whether, in light of the ethical considerations, NIH should fund the research project—pursuant to a law passed by Congress (42 U.S.C 289a–1).

In the same policy statement, HHS announced that it would also undertake changes to its regulations and to NIH grants policy to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue from elective abortions.[2] In this notice of proposed rulemaking, HHS proposes revisions to its Human Research Subjects Protection Regulations (45 CFR part 46, subpart B, Additional Protections for Pregnant Women, Human Fetuses, and Neonates) and its

[1] *See* Statement from the Department of Health and Human Services, June 5, 2019, available at *https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html.*

[2] *See* Statement from the Department of Health and Human Services, June 5, 2019, available at *https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html.*

grants regulations (45 CFR part 75) to provide additional safeguards concerning the use of such tissue in HHS-funded research. This proposed rule would strengthen informed consent requirements in Subpart B and help ensure compliance with the statutory ban on the provision of valuable consideration for human fetal tissue through clarifying recordkeeping and maintenance requirements for the acquisition of human fetal tissue for research.

II. Background

U.S. Federal regulations governing the protection of human subjects in research have been in existence for more than three decades. Nearly thirty years have passed since the ''Common Rule'' was adopted by 15 U.S. Federal departments and agencies in an effort to promote uniformity, understanding, and compliance with human subject protections. (HHS adopted the Common Rule in Subpart A of 45 CFR part 46.)

The history of contemporary human subjects protections began in 1947 with the Nuremberg Code, developed for the Nuremberg Military Tribunal as standards by which to judge the human experimentation conducted by the Nazis.[3] The Nuremberg Code set forth many of the basic principles governing the ethical conduct of human subjects research. Similar recommendations were made by the World Medical Association in its Declaration of Helsinki: Recommendations Guiding Medical Doctors in Biomedical Research Involving Human Subjects (Helsinki Declaration), first adopted in 1964 and subsequently revised many times.[4]

Basic regulations governing the protection of human subjects in research supported or conducted by HHS (then the Department of Health, Education and Welfare) were first published in 1974, after a series of highly publicized research abuses. The enactment of the 1974 National Research Act (Pub. L. 93–348) created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (National Commission). One of the charges of the National Commission was to identify the basic ethical principles that should underlie the conduct of biomedical and behavioral research involving human subjects and to develop guidelines to assure that such research is conducted in accordance with those principles. In 1979, the National Commission published ''Ethical Principles and Guidelines for the Protection of Human Subjects of Research,'' also known as the Belmont Report (*http://www.hhs.gov/ohrp/policy/belmont.html*). The Belmont Report identified three fundamental ethical principles for all human subjects research: Respect for persons, beneficence, and justice. Like the Nuremberg Code and Helsinki Declaration, the Belmont Report stressed the importance of obtaining informed consent before engaging in human subjects research.

Based on the Belmont Report and other work of the National Commission, HHS revised and expanded its regulations for the protection of human subjects in the late 1970s and early 1980s. The HHS regulations are codified at 45 CFR part 46, subparts A through E:

- Subpart A: Basic HHS Policy for Protection of Human Research Subjects
- Subpart B: Additional Protections for Pregnant Women, Human Fetuses, and Neonates Involved in Research
- Subpart C: Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects
- Subpart D: Additional Protections for Children Involved in Research
- Subpart E: Registration of Institutional Review Boards

The statutory authority for the HHS regulations derives from 5 U.S.C. 301; 42 U.S.C. 300v–1(b); and 42 U.S.C. 289.

In 1991, 14 other Federal departments and agencies joined HHS in adopting a uniform set of rules for the protection of human subjects, known as the ''Common Rule,'' identical to subpart A of 45 CFR part 46 of the HHS regulations.

The Common Rule requires that Federally funded investigators in most instances obtain and document the informed consent of research subjects; requires Federally funded research be reviewed by an institutional review board (IRB); and describes the requirements for IRB membership, function, operations, research review, and recordkeeping. The regulations also delineate criteria for, and levels of, IRB review. Currently, except for human subjects research that is determined to be exempt from the regulations, Federally funded research involving human subjects is reviewed by an IRB in one of two ways: (1) By a convened IRB, or (2) through an expedited review process.

Since the Common Rule was first developed, the landscape of research activities has changed dramatically, accompanied by a marked increase in the volume of research. It is estimated that total spending on health-related research and development by the drug industry and the Federal government has more than tripled since 1990.[5] While traditional biomedical research conducted in academic medical centers continues to flourish, many studies are now also conducted at community hospitals, outpatient clinics, or physician-based practices. Clinical research is regularly conducted at multiple institutions across the U.S. and other countries. Recruitment firms, bioinformatics specialists, clinical trial coordinating centers, protocol developers, data analysts, contract research organizations (CROs), data and safety monitoring boards, community-based organizations, and other entities have joined investigators and sponsors as part of the clinical research enterprise.

The rapid growth and expansion of human subjects research generated many questions about whether the regulatory framework is adequate and appropriate for the protection of human subjects in the 21st century. Furthermore, decades of experience have revealed a great deal about the functioning—and limitations—of existing regulations, and prompted critical evaluations by the Institute of Medicine (IOM),[6] [7] the U.S. Government Accountability Office,[8] [9] [10] and many scholars.[11] [12] [13] Federal consideration of such revisions to the regulatory schema,

[3] *See* Nuremberg Code, *available at https://history.nih.gov/display/history/Nuremberg+Code.*

[4] *See* World Medical Association, Declaration of Helsinki—Ethical Principles for Medical Research Involving Human Subjects, *available at www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/.*

[5] Congressional Budget Office. *Research and Development in the Pharmaceutical Industry.* October 2006.

[6] Federman DD, Hanna KE, Rodriguez LL, eds. *Responsible Research: A Systems Approach to Protecting Research Participants.* Washington, DC: National Academies Press; 2002.

[7] Nass SJ, Levit LA, Gostin LO, eds. *Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research.* Washington, DC: National Academies Press; 2009.

[8] Human Subjects Research: HHS Takes Steps to Strengthen Protections, But Concerns Remain. GAO–01–775T, May 23, 2001.

[9] Scientific Research: Continued Vigilance Critical to Protecting Human Subjects. T–HEHS–96–102, Mar 12, 1996.

[10] Scientific Research: Continued Vigilance Critical to Protecting Human Subjects. HEHS–96–72, Mar 8, 1996.

[11] Kim S, Ubel P, De Vries R. Pruning the regulatory tree: For human-subjects research, maximum regulation does not mean maximum protection. *Nature* 2009;457: 534–535.

[12] Emanuel EJ, Wood A, Fleischman A, *et al.* Oversight of human participants research: Identifying problems to evaluate reform proposals. *Ann Int Med* 2004; 141(4): 282–291.

[13] Lynn J, Baily MA, Bottrell M, *et al.* The ethics of using quality improvement methods in health care. *Ann Int Med* 2007;146(9):666– 673.

in addition to the issues that suggest a need for revision, is not without precedent. In its 2001 concluding report, the National Bioethics Advisory Commission (NBAC) made 30 recommendations that addressed areas including the scope and structure of the oversight system and the level of review applied to research; it emphasized the importance of the informed consent process, documentation and waiver of informed consent, protecting privacy and confidentiality, adverse event reporting, and review of cooperative or multi-site research studies.[14]

In January 2017, as part of an Executive Branch-wide update to the Common Rule, HHS promulgated revisions to Subpart A in order to modernize, strengthen, and make the Common Rule more effective. Among other things, the revisions established new requirements regarding the information that must be given as part of the informed consent process to prospective research subjects.[15] The executive summary of the 2017 final rule noted that, ''to the extent appropriate, the intent is to eventually amend the other subparts of the HHS human subjects protection regulations in 45 CFR part 46 (subparts B, C, D, and E).'' [16]

The notice of proposed rulemaking which led to the January 2017 revisions to the Common Rule proposed requiring consent for the use of de-identified biospecimens (but not for the use of biospecimens from deceased individuals, which was outside the scope of the Common Rule). As a result of comments, the Common Rule agencies declined to finalized such requirements in the 2017 Common Rule. *See* Federal Policy for the Protection of Human Subjects, 82 FR 7149, 7150, 7153 (Jan. 17, 2017).[17]

However, federal and state courts have recognized the importance of obtaining informed consent prior to conducting medical procedures or research on human subjects, or before tissue taken from an individual is used in research. In the seminal case of *Canterbury* v. *Spence,* the D.C. Circuit Court of Appeals observed that '' '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . .' True consent to what happens to one's self is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.'' [18] Moreover, it is ''normally impossible to obtain a consent worthy of the name unless the physician first elucidates the options and the perils for the patient's edification. Thus the physician has long borne a duty, on pain of liability for unauthorized treatment, to make adequate disclosure to the patient.'' [19]

Subsequent courts have expounded that informed consent is necessary if a patient's tissue is to be used in research, especially where the physician extracting the tissue or his or her institution has a research or commercial interest. For example, in *Moore* v. *Regents of University of California,* the California Supreme Court held that, prior to providing medical treatment, a physician must obtain the patient's informed consent, which requires disclosing all of the physician's research and economic interests.[20] As *Moore* recognized, informed consent is particularly important where the physician extracts human cells for use in subsequent research, since ''a physician who treats a patient in whom he also has a research interest has potentially conflicting loyalties. This is because medical treatment decisions are made on the basis of proportionality—weighing the benefits *to the patient* against the risks *to the patient.* . . . A physician who adds his own research interests to this balance may be tempted to order a scientifically useful procedure or test that offers marginal, or no, benefits to the patient.'' [21] Courts in other states have since recognized that informed consent is required prior to conducting research or performing various medical procedures.[22]

Many states have banned or placed strict limits on using human fetal tissue in research.[23] Those states that have not banned human fetal tissue research often require the consent of the pregnant woman for the fetal tissue donation.[24]

The research and medical communities have also recognized the importance of obtaining informed consent before engaging in human fetal tissue research. In June 2016, the American Medical Association (AMA) issued a Code of Medical Ethics Opinion (Code of Ethics Opinion) that listed several steps that physicians involved in human fetal tissue research should take, including obtaining the informed consent of the pregnant woman.[25] The AMA recognized that the use of fetal tissue for research purposes ''raises a number of ethical considerations, including the degree to which a woman's decision to have an abortion might be influenced by the opportunity to donate fetal tissue.'' [26] It further recognized that ''[c]oncerns have also been raised about potential conflicts of interest when there is possible financial benefit to those who are involved in the retrieval, storage, testing, preparation, and delivery of fetal tissues.'' Consequently, ''[t]o protect the interests of pregnant women as well as the integrity of science,'' the Code of Ethics Opinion stated that physicians who are involved in research that uses human fetal tissue should:

- Not ''offer[ ] money in exchange for fetal tissue.''
- ''In all instances, obtain the woman's voluntary, informed consent,'' including for fetal tissue from a miscarriage (spontaneous abortion) for research. Under the Code of Ethics Opinion, informed consent includes a ''disclosure of the nature of the research including the purpose of using fetal tissue, as well as informing the woman of a right to refuse to participate.''
- When fetal tissue from an induced abortion is used for research purposes, ensure that:
  - ''The woman's decision to terminate the pregnancy is made prior to and independent of any discussion of

[14] National Bioethics Advisory Commission, *Ethical and Policy Issues in Research Involving Human Participants.* Bethesda, MD; 2001.

[15] 82 FR 7150. Examples of provisions of the Common Rule governing informed consent can currently be found at 75 CFR 46.116, 46.117, 46.204, and 46.205.

[16] 82 FR 7151.

[17] For purposes of the 2017 Common Rule, a human subject includes a living person from whom a researcher obtains a biospecimen and, thus, requires informed consent with respect to the use of identifiable biospecimens in research. *See, e.g.,* 45 CFR 46.101(a), 46.102(e) (definition of human subject), 46.104(d)(7), (d)(8). Similarly, under Subpart B, if information associated with fetal material is recorded for research purposes in a manner that living individuals can be identified, they are research subjects. 45 CFR 46.206(b).

[18] *Canterbury* v. *Spence,* 464 F.2d 772, 780 (D.C. Cir. 1972).

[19] *Id.* at 783.

[20] *See Moore* v. *Regents of Univ. of Cal.,* 793 P.2d 479, 483 (Cal. 1990).

[21] *Id.* at 484 (emphasis in original).

[22] *See, e.g., T.D.* v. *N.Y. State Office of Mental Health,* 228 A.D.2d 95, 116 (N.Y. App. Div. 1996) (describing New York law regarding informed consent for being a human research subject); *DeGennaro* v. *Tandon,* 873 A.2d 191, 189–197 (Conn. App. 2005) (collecting cases requiring informed consent prior to undergoing medical procedures).

[23] *E.g.,* Ariz. Rev. Stat. Ann. § 36–2302 (2016); Ark. Code Ann. § 20–17–802 (2019); Fla. Stat. Ann. § 390.0111 (2018); Ky. Rev. Stat. Ann. § 436.026; La. Rev. Stat. Ann. § 40:1061.24 (2015); Me. Rev. Stat. Ann. tit. 22, § 1593; Mass. Gen. Laws Ann. ch. 112, § 12J (2008); Mich. Comp. Laws § 333.2685; Minn. Stat. Ann. § 145.422; Mo. Ann. Stat. § 188.036; N.D. Cent. Code § 14–02.2–01; N.D. Cent. Code §§ 14–02.2–02; N.M. Stat. Ann. § 24–9A–3; Ohio Rev. Code Ann. § 2919.14; Okla. Stat. Ann. tit. 63, § 1–735; R.I. Gen. Laws § 11–54–1; S.D. Codified Laws § 34–23A–17; Utah Code Ann. § 76–7–310; Wyo. Stat. Ann. § 35–6–115 (2017).

[24] *E.g.,* 17 CA ADC § 100085 (2019).

[25] AMA Code of Medical Ethics Opinion 7.3.5, *available at https://www.ama-assn.org/delivering-care/ethics/research-using-human-fetal-tissue.*

[26] *Id.*

using the fetal tissue for research purposes.''

○ ''Decisions regarding the technique used to induce abortion and the timing of the abortion in relation to the gestational age of the fetus are based on concern for the safety of the pregnant woman.''

• ''Ensure that health care personnel involved in the termination of a pregnancy do not benefit from their participation in the termination.'' [27]

HHS research and human research protection components have also adopted policies and provided guidance on research involving human fetal tissue. Subpart B requires that such research ''be conducted only in accord with any applicable Federal, State, or local laws and regulations regarding such activities''; the regulations further direct that ''[n]o inducements, monetary or otherwise, will be offered to terminate a pregnancy'' and that ''[i]ndividuals engaged in the research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.'' 45 CFR 46.206(a), 46.204(h)–(i). Following enactment of the NIH Revitalization Act of 1993—which amended the Public Health Service Act to add (among other provisions) section 498A (42 U.S.C. 289g–1), establishing certain requirements for research on fetal tissue transplantation, and section 498B (42 U.S.C. 289g–2), barring valuable consideration in connection with the acquisition, receipt, or transfer of human fetal tissue—the Office for Human Research Protections issued guidance on fetal tissue transplantation research.[28] In the January 2007 HHS Grants Policy Statement,[29] HHS included specific provisions on research on human fetal tissue and transplantation of human fetal tissue. In the Grants Policy Statement, HHS noted that ''[t]he scientific and ethical challenges associated with research utilizing human fetal tissue make it imperative that researchers and their organizations be fully aware of and in compliance with the Federal requirements,'' noting particularly section 498B of the Public Health Service Act.[30] It also noted the additional requirements of section 498A with respect to research on human fetal tissue transplantation.[31] Given its pre-eminent role in conducting and funding biomedical research, NIH has also issued guidance on human fetal tissue in research. For example, on August 14, 2015, it released ''Reminder of Legal Requirements Regarding the Acquisition and Use of Human Fetal Tissue for Research Purposes,'' NOT–OD–15–143. In that notice, NIH reminded its grantees and contractors that ''research involving human fetal tissue must be conducted in accordance with applicable Federal, State and local laws, regulations, and policies, including the NIH Grants Policy Statement,'' making specific reference to the Public Health Service Act provisions and to 45 CFR 46.204(h)–(j) and 46.206.[32] Early the following year, in 2016, NIH released its policy, applicable to both NIH intramural research investigators and extramural researchers, NIH ''Policy on Informed Consent for Human Fetal Tissue Research.'' [33] In that notice, NIH, which is ''committed to ensuring that research involving human fetal tissue is conducted responsibly and meets the highest ethical standards,'' stated that ''NIH-funded research involving human fetal tissue must be conducted in compliance with all applicable federal, state, and local laws and regulations. . . .'' [34] NIH further noted that ''[c]urrent federal laws and regulations require informed consent for research involving the transplantation of human fetal tissue and for research with human fetal material associated with information that can identify a living individual'' and that ''[m]ost states require informed consent for the use of fetal tissue in research. Accordingly, NIH expects *informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue.*[35] NIH further noted that ''[w]hen obtaining primary human fetal tissue for research purposes, NIH expects grantees and contractors to maintain appropriate documentation, such as an attestation from the health care provider or a third party supplier, that informed consent was obtained at the time of tissue collection.'' [36] In October 2018, these expectations and requirements became part of NIH's Grants Policy Statement.[37]

As noted above, in September 2018, HHS initiated a comprehensive review of all HHS research involving human fetal tissue from elective abortions to ensure consistency with statutory and regulatory requirements and to ensure the adequacy of procedures and oversight of such research in light of the serious regulatory, moral, and ethical considerations involved. As part of this audit and review, HHS personnel reviewed the contracts (or purchase orders, as applicable) executed by personnel at NIH for the acquisition of human fetal tissue from elective abortions, and sought to obtain, from the organizations that supplied such tissue to the NIH researchers, copies of the required informed consents for the donation of the fetal tissue for research purposes, as well as documentation that valuable consideration was not sought or given in connection with the transfers of fetal tissue. One tissue procurement organization, which procured human fetal tissue for a number of NIH intramural research projects, provided its template informed consent document. It, however, refused to produce any executed informed consents or documentation of its compliance with laws and NIH policies on the informed consent of the mother to donate the fetal tissue for research, and would not make any representations to HHS that such informed consents had been obtained. The organization also declined to provide HHS with financial documentation for HHS to assess compliance with federal prohibitions on valuable consideration. Informed consents were obtained from two other organizations, an academic institution that maintains a tissue bank and another private tissue procurement organization, which provided fetal tissue for two intramural research projects. While HHS's inability to obtain information from one tissue procurement organization to confirm compliance with informed consent requirements and the bar on valuable consideration occurred in the context of HHS's audit of intramural research involving human fetal tissue from elective abortions, and

[27] *Id.* The Code of Ethics Opinion also addresses the use of fetal tissue in transplantation research or clinical care.

[28] *See, e.g.,* Fetal Tissue Transplantation Research Guidance (2003), *available at https://www.hhs.gov/ohrp/regulations-and-policy/guidance/fetal-tissue-transplanation/index.html.*

[29] HHS Grants Policy Statement (Jan. 1, 2007), *available at https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

[30] *See* HHS Grants Policy Statement (Jan. 1, 2007) at II–16, *available at https://www.hhs.gov/sites/default/files/grants/grants/policies-regulations/hhsgps107.pdf.*

[31] *Id.* at II–17—II–18.

[32] *See* Reminder of Legal Requirements Regarding the Acquisition and Use of Huma Fetal Tissue for Research Purposes, NOT=OD–15.143 (Aug. 14, 2015), *available at https://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-143.html.*

[33] *See* NIH Policy on Informed Consent for Human Fetal Tissue Research, NOT–OD–16–033 (Feb. 11, 2016), *available at https://grants.nih.gov/grants/guide/notice-files/not-od-16-033.html.*

[34] *Id.*

[35] *Id.* (emphasis added).

[36] *Id.* FDA's Staff Manual Guides also contains guidance for FDA- funded or conducted research involving human fetal tissue. *See* FDA Staff Manual Guides, Volume IV—Agency Program Directive, General or Multidiscipline, Research Involving Human Fetal Tissue, SMG 9001.3 (Feb. 11, 2016).

[37] October 2018 NIH Grants Policy Statement, Section 4.1.14, *available at https://grants.nih.gov/grants/policy/nihgps/html5/section_4/4.1.14_human_fetal_tissue_research.htm.*

there are other sources from which researchers can and do obtain human fetal tissue, the organization at issue also provides human fetal tissue to a number of NIH-funded extramural researchers. As a result, HHS also became concerned that grantees, or those from whom fetal tissue had been obtained by grantees, may not always have readily available documentation of informed consents for fetal tissue research, or documentation that valuable consideration was not provided in exchange for human fetal tissue in connection with HHS-funded research, notwithstanding NIH's policy requirements and section 498B of the Public Health Service Act (42 U.S.C. 289g–2(a)), which prohibits acquiring, receiving, or otherwise transferring human fetal tissue for valuable consideration if the transfer affects interstate commerce.

Building on these developments, in June 2019, HHS announced the Administration's new policy with respect to human fetal tissue research. That announcement included a commitment to undertake changes to HHS regulations and to NIH's grants policy to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue.

NIH began implementing the Administration's policy with the issuance of Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT–OD–19–128.[38] In that notice, NIH outlined for its extramural research community the new requirements and review considerations with respect to research supported by NIH that involves the proposed use of human fetal tissue obtained from abortions in extramural applications for grants, cooperative agreements, and research and development (R&D) contracts. It ''remind[ed] the community of expectations to obtain informed consent from the donor for any NIH-funded research using [human fetal tissue].'' [39] The notice included requirements for a justification for the use of human fetal tissue for the proposed research; for planned written, voluntary, informed consent process for cell/tissue donation; and for budget information and justification for the quantity, type, and source of human fetal tissue, as well as a certification that valuable consideration has not been provided for the acquisition of such tissue. The notice outlined NIH's expectations for the contents of the informed consents (and related assurances): Language that the informed consent for donation of human fetal tissue was obtained by someone other than the person who obtained the informed consent for abortion, occurred after the informed consent for abortion, and would not affect the method of abortion; no enticements, benefits, or financial incentives were used at any level of the process to incentivize abortion or the donation of human fetal tissue; and the informed consent was signed by both the woman and the person who obtained the informed consent. NIH also indicated that the NIH award recipient should have documentation from the human fetal tissue donating organization assuring adherence to the requirements of the informed consent process and documentation that human fetal tissue was not obtained or acquired for valuable consideration; the awardee would be expected to provide such assurance for each year of the award such research is conducted for the life of the award and to maintain this documentation in accordance with the NIH Record Retention and Access policy.[40]

As the next step in this process, HHS now proposes to make modifications to 45 CFR part 46 Subpart B, which provides additional protections for pregnant women, human fetuses and neonates involved in research, and 45 CFR part 75, which implements standard requirements for administrative and financial management of Federal awards. The decision to amend HHS's regulations was the result of HHS's comprehensive review of HHS research involving human fetal tissue from elective abortions. Given the serious regulatory, moral, and ethical considerations involved, HHS concluded that it is appropriate to (1) clearly identify, in regulation, the minimum requirements for informed consent for the donation and use of human fetal tissue in research, especially when the fetal tissue is obtained from elective abortions; (2) impose certain requirements to help ensure compliance with the statutory bar on the provision of valuable consideration for human fetal tissue. These conclusions also follow from consideration of the authorities described above, the views of the medical community, State laws, and a comprehensive review of the use of human fetal tissue in research by HHS. HHS recognizes that, with respect to informed consent, this proposal goes beyond the approach taken by the Common Rule (in subpart A) with respect to biospecimens. However, HHS has long recognized the need for additional research protections for certain vulnerable populations or certain types of research—hence, the existence of Subparts B, C, and D—and believes that the additional protections proposed here are warranted to protect the interests of pregnant women and the integrity of science, as well as the serious moral and ethical considerations noted above. With respect to research involving human fetal tissue, this proposed rule would also align Subpart B more expressly with NIH policy and the AMA's Code of Ethics Opinion on the need for informed consent. HHS considered making no changes to 45 CFR part 46 subpart B and part 75, or making more limited changes. However, HHS has determined that a rulemaking is necessary to, among other things, adopt, clarify, or strengthen safeguards and program integrity requirements and, thus, to ensure compliance with the federal statutes and policies addressing the use of human fetal tissue in HHS-funded research.

III. Summary of the Notice of Proposed Rulemaking

HHS proposes to amend 45 CFR part 46, subpart B, Protection of Human Subjects, Additional Protections for Pregnant Women, Human Fetuses and Neonates Involved in Research, and 45 CFR part 75, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, in the following ways:

A. Definitions, § 46.202

HHS is proposing to add a paragraph (i) to § 46.202. Paragraph (i) would provide that, for purposes of Subpart B of 45 CFR part 46, human fetal tissue shall have the definition ascribed to it in 42 U.S.C. 289g–1(g), namely ''tissue or cells obtained from a dead human embryo or fetus after a spontaneous or induced abortion, or after a stillbirth.'' While HHS proposes to define the term consistent with the statutory definition applicable to fetal tissue transplantation research and the prohibition on valuable consideration, many of the provisions proposed below would only apply to human fetal tissue derived from elective abortions and to HHS-funded research involving such tissue.

For the purpose of implementing the June 2019 policy through NOT–OD–19–

[38] *See* Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT–OD–19–128 (July 26, 2019), *available at https://grants.nih.gov/grants/guide/notice-files/NOT-OD-19-128.html.*

[39] *Id.* (citing NOT–OD–16–033).

[40] *Id.* The notice also required that the application describe plans for the treatment of human fetal tissue and its disposal when the research was complete, as well as assurances that such treatment and disposal would be consistent with such plans. *Id.*

128, NIH provided a more technical definition of research involving human fetal tissue from elective abortions as ''research involving the study, analysis, or use of primary [human fetal tissue], cells, and derivatives, and human fetal primary cell cultures obtained from elective abortions'' and stated that it includes (1) human fetal primary or secondary cell cultures, whether derived by the investigator or obtained from a vendor; (2) animal models incorporating human fetal tissue from elective abortions, including obtaining such models from a vendor; (3) derivative products from elective abortion tissues or cells such as protein or nucleic acid extracts; and (4) any human extra-embryonic cells and tissue, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi, if obtained from the process of elective abortion.'' NIH noted that this definition is consistent with the statutory definition that HHS proposes to adopt here for purposes of these regulations. To provide further specificity about the issue, NIH excluded certain types of research from the definition of research involving human fetal tissue from elective abortion, namely (1) human fetal primary or secondary cell cultures, if cells were not derived from an elective abortion; (2) already-established (as of June 5, 2019) human fetal cell lines (*e.g.,* induced pluripotent stem cell lines from human fetal tissue, immortalized cell lines, differentiated cell lines); (3) derivative products from human fetal tissue or cells (*e.g.,* DNA, RNA, protein) if not derived from elective abortion; (4) human extra-embryonic cells and tissue, including, but not limited to, umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi if not derived from elective abortion; (5) human fetal cells present in maternal blood or other maternal sources; (6) embryonic stem cells or embryonic cell lines; and (7) research on transplantation of human fetal tissue from elective abortion for therapeutic purposes (because of the statutory provision(s) addressing such research, *i.e.,* National Institutes of Health Revitalization Act of 1993, Pub. L. 103–43, sec. 113, 107 Stat. 126 (June 10, 1993), which generally prohibits the imposition of a policy that precludes HHS from conducting or supporting any research on the transplantation of human fetal tissue for therapeutic purposes).

NIH noted that its definition of research involving human fetal tissue from elective abortions is consistent with the statutory definition. As HHS proposes to adopt the statutory definition for these regulations, HHS is of the belief that this proposed definition is consistent with the definition adopted in the NIH notice, for purpose of implementing the enhanced review requirements, including review of such research proposals that fall within a fundable scoring range by ethics advisory boards, pursuant to 42 U.S.C. 289a–1. Taking into consideration the different purposes and scope of the proposed regulation (which would apply to research involving all human fetal tissue, regardless of whether it was obtained from elective abortion) and the NIH notice (addressing research involving only human fetal tissue from elective abortion), HHS contemplates adopting the statutory definition with the express clarifications that (1) human fetal tissue includes human fetal primary tissue, cells from such tissue, and primary cell cultures; derivative products (including protein or nucleic acid extracts) from such tissues/cells; and any human extra-embryonic cells and tissues, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi; and (2) human fetal tissue does not include established human fetal cell lines (including immortalized cell lines, induced pluripotent stem cell lines from human fetal tissue, and differentiated cell lines; human fetal cells present in maternal blood or maternal sources; and secondary use of data from human fetal tissue. HHS seeks comment on whether it would be appropriate to incorporate some or all of the specificity of the definition (and/or the exclusions from the definition) contained in the NIH notice; if so, which aspects of that definition (and/or the exclusions) should be incorporated into the definition for the purpose of this proposed rule; and if the contemplated express clarifications noted immediately above strike the right balance.

B. Research Involving Pregnant Women or Fetuses, § 46.204

HHS proposes to add paragraph (k) to § 46.204, which governs research involving pregnant women or fetuses. Section 46.204 currently has two provisions which address abortion. Section 46.204(h) states that ''[n]o inducements, monetary or otherwise, will be offered to terminate a pregnancy.'' Similarly, § 46.204(i) currently requires that ''[i]ndividuals engaged in research will have no part in any decisions as to the timing, method, or procedures used to terminate a pregnancy.'' Proposed paragraph (k) would require that the pregnant woman provide informed consent before the human fetal tissue obtained from the woman is used in HHS-funded research. Subpart A of the Common Rule generally requires that, before research is conducted on a human research subject, the human subject must provide informed consent, but not for unidentifiable biospecimens.[41] As discussed previously, state law generally requires informed consent for participation in research, as well as informed consent for the donation of tissue for research. In light of the serious ethical and moral considerations presented by the use of fetal tissue for research purposes, as well as to protect the interests of pregnant women (and the integrity of science), HHS proposes that the requirement for informed consent for tissue donation should apply to research involving human fetal tissue. Because the fetus cannot provide informed consent, it is appropriate to obtain the informed consent of the woman from whom the fetal tissue would be obtained. Such a requirement was included in the 2016 AMA Code of Ethics Opinion.[42] For these reasons, HHS proposes to add these requirements in paragraph (k). HHS, however, does not propose to include in proposed paragraph (k) all statements that should be included in such an informed consent. HHS further proposes that the requirement for such informed consent would apply with respect to donations of fetal tissue by women occurring after the effective date of the final rule.

HHS proposes that paragraph (k) would also establish specific requirements in order to meet informed consent requirements in this unique context:

• *The pregnant woman's consent must be documented on a written informed consent form that is signed by the pregnant woman and written in plain language that is clear and easily understandable.* As explained in *Canterbury* v. *Spence,* true consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each.[43] This cannot occur if the pregnant woman's options are presented using complex medical jargon. For this reason, in promulgating its 2017 revisions to the Common Rule, HHS ''considered a growing body of literature that suggests informed consent forms have grown too lengthy and complex, adversely

[41] 45 CFR 46.116, 46.117.

[42] AMA Code of Medical Ethics Opinion 7.3.5, *available at https://www.ama-assn.org/delivering-care/ethics/research-using-human-fetal-tissue.*

[43] *Canterbury* v. *Spence,* 464 F.2d 772, 780 (D.C. Cir. 1972).

affecting their ability to effectively convey the information needed for prospective participants to make an informed decision about participating in research.'' [44] For the pregnant woman's consent to be informed, the consequences of her decision must be written in plain language that is clear and easily understandable. Moreover, the pregnant woman's consent should be documented in writing. Requiring such documentation would also minimize costs by reducing uncertainty and the risk of subsequent disputes or litigation.

• *The form documenting the informed consent must include a statement that there have been and will be no enticements, benefits, or financial incentives to incentivize the donation or acquisition of human fetal tissue, or the abortion (if any) from which such tissue is obtained.* This would require participants to document that they are following federal and state law. The Public Health Service Act already makes it unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce. *See* 42 U.S.C. 289g–2. Many states also forbid persons from providing enticements, benefits, or financial incentives to donate human fetal tissue.[45] HHS proposes that the statement also indicate that no enticement, benefit or financial incentive was provided to incentivize the abortion—as a mechanism to ensure that persons do not evade the statutory prohibition on providing valuable consideration for human fetal tissue by providing incentives for the abortion. Furthermore, after conducting its review, HHS has determined that it is unlikely that persons involved in human fetal tissue research would provide enticements, benefits, or financial incentives to incentivize an abortion, without also seeking to incentivize the human fetal tissue donation.

• *The form documenting the informed consent must permit the pregnant woman to choose to donate fetal tissue for research or to decline to donate fetal tissue for research.* In order for informed consent for the donation of human fetal tissue to be truly voluntary, the donor has to understand that the donation decision is truly voluntary and that she can choose to donate the fetal tissue or can choose to decline to donate the fetal tissue. HHS proposes to require including both options on the form; it believes that this would help to ensure that the informed consent is truly voluntary.

• *The form documenting the informed consent must be signed by both the pregnant woman and the individual obtaining the informed consent for the donation, with both individuals attesting to the truth of the statements in the form.* Given the serious moral and ethical considerations involved in human fetal tissue donation, it is appropriate to propose to require written documentation that the donor has provided informed consent and that the individual obtaining the informed consent has acted properly. Requiring both individuals' signatures would reduce costs by reducing the risks of litigation or other disputes—and assist HHS and the research grant recipient ensure compliance with the statutory and regulatory requirements.

These provisions would be applicable to all donations of human fetal tissue, regardless of whether the tissue was obtained from an elective abortion. This requirement is based on principals of informed consent or on a statute with respect to human fetal tissue, both of which are independent of the methods by which the fetal tissue is obtained.

Where the human fetal tissue is to be obtained from an elective abortion, HHS further proposes that the informed consent include several additional provisions:

• *The pregnant woman's informed consent must be obtained after the decision to have an abortion has been conclusively made and informed consent for the abortion has been obtained.* This proposed requirement would be consistent with Congressional intent and the views of the medical community. Congress required that research on the transplantation of human fetal tissue that is funded or conducted by HHS can only occur if the attending physician who obtains the tissue declares that the consent of the woman for the abortion was obtained prior to requesting or obtaining consent for the donation of the tissue for use in research. 42 U.S.C. 289g–(b)(2)(A)(i). Likewise, the 2016 AMA Code of Ethics Opinion states that physicians involved in research that uses human fetal tissue should ensure that the woman's decision to terminate the pregnancy is made prior to, and independent of, any discussion of using the fetal tissue for research purposes. Congress and the AMA recognize that a woman may not be truly providing informed consent to a human fetal tissue donation if the decision to donate is intermingled with the decision about whether to have an abortion.

• *The pregnant woman's informed consent must be obtained by an individual other than the individual who obtained the informed consent for the pregnant woman's abortion.* This proposed requirement would help ensure that the decision whether to donate human fetal tissue is independent of the decision whether to have an abortion.

• *The pregnant woman must be at or over the age of majority in the jurisdiction in which the pregnant woman's donation is made.* American law has long recognized that important decisions about medical procedures should generally be made by adults.[46] That is all the more so in this unique context that raises serious moral and ethical concerns. Accordingly, HHS proposes to impose this requirement with respect to the donation of human fetal tissue.

• *The form documenting the informed consent must include a statement that the decision to have an abortion and the method of abortion have not been affected by the decision whether to donate human fetal tissue.* This would require documentation that the requirement concerning the order in which the informed consents are obtained, above, has been met. It would also ensure that the pregnant woman's consent to the human fetal tissue donation is informed and independent, since the method of abortion would not be affected by the decision whether to donate human fetal tissue.

HHS proposes to provide, in an appendix to the preamble, sample informed consent form provisions, as guidance to regulated entities on the type of informed consent form

[44] 82 FR 7211.

[45] *See, e.g.,* CA HLTH & S § 125320 (''A person may not knowingly, for valuable consideration, purchase or sell embryonic or cadaveric fetal tissue for research purposes pursuant to this chapter.''); CO ST § 25–2–111.5 (''No physician or institution that performs procedures for the induced termination of pregnancy shall transfer such tissue for valuable consideration to any organization or person that conducts research using fetal tissue.''); IN ST 35–46–5–1.5 (making it a Level 5 felony to intentionally acquire, receive, sell, or transfer fetal tissue); MO ST 188.036 (''No person shall offer any inducement, monetary or otherwise, to the mother or father of an unborn child for the purpose of procuring an abortion for the medical, scientific, experimental or therapeutic use of the fetal organs or tissue.'').

[46] *See Moore,* 793 P.2d at 483 (''[A] person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment.'') (quoting *Cobbs* v. *Grant,* 8 Cal. 3d 229, 242 (1972)); *Canterbury,* 464 F.2d at 780 (''The root premise is the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.' '') (quoting *Schloendorff* v. *Soc'y of N.Y. Hosp.,* 105 NE 92, 93 (N.Y. 1914)).

provisions that would comply with the proposed informed consent requirements. This proposal would provide certainty to the regulated entities that they have sufficiently obtained informed consent and met the requirements of this proposed rule. However, the use of the sample provisions would not be required, and relevant parties would be free to use their own language in a form for informed consent for the donation of human fetal tissue as long as the form meets the proposed requirements. HHS seeks comment on the contents of sample informed consent form provisions.

C. Research Involving Pregnant Women or Fetuses, § 46.206

HHS proposes to add paragraphs (c), (d), (e), (f), (g), (h), and (i) to § 46.206.

Paragraph (c) would require that, at all stages in the process to acquire or otherwise obtain human fetal tissue for use in research, there would be no enticements, benefits, or financial incentives provided to the pregnant woman or attending physician to incentivize the occurrence of an abortion or the donation or acquisition of human fetal tissue. HHS proposes to add this paragraph for the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Paragraph (c) would help implement 42 U.S.C. 289g–2 and specify what is required by that provision in the context of research involving pregnant women, fetuses, or human fetal tissue.

Paragraph (d) would require that no person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the acquisition of the fetal tissue or with any abortion that may be the source of the human fetal tissue used or to be used in the research. HHS proposes to add paragraph (d) for some of the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Permitting a person to provide valuable consideration for costs associated with the abortion that is the source of the human fetal tissue could impact the decision whether to donate human fetal tissue which should be independent of the decision whether to have an abortion. Moreover, permitting a person to provide valuable consideration for such costs could enable the person, by claiming they are merely paying for the costs of the abortion and not the human fetal tissue, to circumvent the prohibition on providing valuable consideration for human fetal tissue. If a person could provide valuable consideration for the abortion, enforcement actions arising out of payments for human fetal tissue would frequently face evidentiary questions about whether the payment was for the costs associated with the abortion, rather than the human fetal tissue.

Paragraph (e) would require that no person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the donation or acquisition of human fetal tissue. HHS proposes to add paragraph (e) for some of the same reasons that it proposes to add paragraph (k)(1)(B) to § 46.204. Furthermore, paragraph (e) would (1) eliminate any uncertainty about whether 42 U.S.C. 289g–2's prohibition on providing valuable consideration for the acquisition, receipt, or transfer of human fetal tissue applies to human fetal tissue research, and (2) specify what is required to comply with that provision in the human fetal tissue research context.

Paragraph (f) would define ''valuable consideration'' for purposes of paragraphs (d) and (e) as all payments other than payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. Paragraph (f) is in accord with 42 U.S.C. 289g–2(e)(3), which provides that ''valuable consideration'' does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue. Paragraph (f) would also provide certainty to those involved in human fetal tissue research, by making clear that the enumerated costs are the only ones that do not constitute ''valuable consideration'' for purposes of § 46.206.

Paragraph (g) would emphasize that human fetal tissue may be used in research only if an informed consent that meets the applicable requirements of § 46.204(k) has been obtained with respect to the tissue donation. HHS proposes that the requirement would apply with respect to donations of fetal tissue by women where the initial donation occurs after the effective date of the final rule.

Paragraph (h) would provide that human fetal tissue from elective abortions can only be used in research conducted or funded by HHS if the human fetal tissue is acquired or otherwise obtained from Federal or State Governments, Federal or State Government-owned entities, universities, colleges, accredited degree-granting institutions of higher education, or university hospitals or other academic medical centers. In this context that implicates serious moral and ethical considerations, HHS is committed to ensuring that research conducted using human fetal tissue has been obtained through appropriate procedures, including that the informed consent associated with the donation of fetal tissue is truly voluntary and not performed on an ad hoc basis or by those who are not sufficiently qualified. Thus, this proposed requirement would establish additional safeguards to ensure that the procurement of human fetal tissue is conducted by organizations or institutions that are familiar with, and accustomed to complying with, informed consent requirements and that are regularly subject to oversight by HHS—and is not obtained by organizations or individuals that are not qualified to implement such requirements, that are not otherwise subject to regulation and oversight by HHS, and that accordingly may not respond to requests for access to records. HHS also believes that paragraph (h) strengthens program integrity by making sure that the entities obtaining human fetal tissue for research are substantially more likely to comply with these requirements, especially in a manner that complies with the concerns expressed by Congress when it placed limits on the use of human fetal tissue in the Public Health Service Act.

Paragraph (i) requires that, once human fetal tissue is no longer to be used in research, it shall be treated respectfully and disposed of reasonably and in compliance with any additional laws or regulations imposed by applicable state law. By its statutory enactments, Congress has expressed that members of the public should proceed carefully when their actions involve human fetal tissue. HHS believes that paragraph (i) would further implement this concern at minimal burden. Many states and accredited academic institutions have already adopted statutes or policies with similar requirements.[47] HHS asks for comment on this proposed regulatory requirement and the contours of such proposed requirement.

D. Access to Records, § 75.364

HHS's grants regulations, at § 75.364(a), provide that, among others, the HHS awarding agency, HHS

[47] *See, e.g.,* AR Code § 20–17–801; GA ST § 16–12–141.1 (2017); IN ST § 16–34–3–4 (2016); SD ST § 34–25–32.4; University of Minnesota Policy Statement Regarding Acquisition, Use, and Disposition of Donated Human Fetal Tissue for Transplantation Research, *available at https://policy.umn.edu/research/fetalresearch.*

Inspector General, and the Comptroller General of the United States, or any of their authorized representatives, ''must have the right of access to any documents, papers, or other records'' of the non-Federal entity (that is, the recipient of HHS funds) which are ''pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts''—including ''timely and reasonable access to personnel for the purpose of interview and discussion related to such documents.'' 45 CFR 75.364; *see also* 2 CFR 200.337 (OMB uniform administrative requirements). HHS proposes to add a paragraph (a)(1), which would specifically require that non-Federal entities that engage in human fetal tissue research pursuant to a Federal award provide the HHS awarding agency, the Inspector General, the Comptroller General of the United States, and the pass-through entity or any of their authorized representatives, with a right of access to (1) all informed consent forms obtained by the non-Federal entity for human fetal tissue research, which may be redacted with respect to the name and signature of the woman (for privacy purposes); (2) all documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration; (3) all documents, papers, or other records as are necessary to establish that federal funds were not used to acquire or otherwise obtain the human fetal tissue from elective abortions; and (4) personnel familiar with the foregoing documents, for purposes of interview and discussion related to such documents.

Paragraph (a)(1) would impose little, if any, additional burdens or costs. 45 CFR 75.364(a) already requires that the HHS awarding agency, inspectors general, the Comptroller General, and any of their authorized representatives have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. Paragraph (a)(1) would simply provide clarity to recipients involved in human fetal tissue research by specifying certain categories of the documents, papers, and records (and personnel) for which a right of access must be provided. Because of the unique context and serious regulatory, ethical, and moral considerations involved in human fetal tissue research, HHS believes it would be beneficial to specifically remind this subset of recipients in advance of the documents, papers, and records (and personnel) for which HHS has a right of access. Moreover, a 2016 House of Representatives committee report found that certain institutional review boards lacked records regarding their oversight of fetal tissue research and transplantation, and the committee was unable to obtain access to records that could determine whether fetal tissue was obtained for valuable consideration.[48] Because of the uncertainty over whether required documents are being maintained, HHS proposes to reiterate that recipients must maintain required documents and provide the HHS awarding agency, among others, with access to such documents and personnel upon request. Paragraph (a)(1) would therefore also strengthen program integrity.

By its statutory enactments, Congress has expressed that members of the public should proceed carefully when their actions involve human fetal tissue and that valuable consideration should not be provided in order to acquire human fetal tissue. HHS proposes, below, that federal funds not be used to acquire human fetal tissue from elective abortions; HHS believes that it is particularly important to be good stewards of federal funds in this context. Given the aforementioned concerns, HHS believes that recipients should be able to document that valuable consideration was not provided to acquire human fetal tissue and that federal funds were not used to acquire human fetal tissue from elective abortions.

HHS also proposes to add a paragraph (d), which would provide that, for purposes of § 75.364, ''human fetal tissue'' shall have the definition ascribed to it in 49 U.S.C. 289g–1. Paragraph (e) would clarify for recipients what is meant by ''human fetal tissue,'' and would define that term in a way that conforms to the definition provided by Congress. As with the proposed definition of ''human fetal tissue'' for purposes of Subpart B of 45 CFR part 46, HHS believes that this proposed definition is consistent with the definition adopted in the NIH notice for purpose of implementing the enhanced review requirements. Similarly, HHS contemplates adopting the statutory definition with the express clarifications that (1) human fetal tissue includes human fetal primary tissue, cells from such tissue, and primary cell cultures; derivative products (including protein or nucleic acid extracts) from such tissues/cells; and any human extra-embryonic cells and tissues, such as umbilical cord tissue, cord blood, placenta, amniotic fluid, and chorionic villi; and (2) human fetal tissue does not include established human fetal cell lines (including immortalized cell lines, induced pluripotent stem cell lines from human fetal tissue, and differentiated cell lines; human fetal cells present in maternal blood or maternal sources; and secondary use of data from human fetal tissue. HHS seeks comment on whether it would be appropriate to incorporate some or all of the specificity of the definition (and/or the exclusions from the definition) contained in the NIH notice; if so, which aspects of that definition (and/or the exclusions) should be incorporated into the definition for the purpose of this proposed rule; and if the contemplated express clarifications noted immediately above strike the right balance.

E. Expenses Associated With Acquiring Certain Human Fetal Tissue for Research, § 75.478

In its grants regulation in 45 CFR part 75, HHS addresses certain select items of costs and identifies certain costs that are or are not allowable under HHS's funding awards.[49] HHS proposes to add § 75.478. Section 75.478 would provide that expenses associated with the acquisition of human fetal tissue from elective abortions for use in research are not allowable expenses under Federal awards from an HHS awarding agency. As a result of the comprehensive review that HHS undertook and in light of the serious regulatory, moral, and ethical considerations involved, HHS has concluded that such costs should not be allowable—that is, they are not expenses that should be borne by the taxpayer through the federal research award. HHS would continue to fund research involving such human fetal tissue, consistent with the June 5, 2019 policy,[50] but it proposes that funds from HHS research awards could not be used for the acquisition of human fetal tissue from elective abortions. HHS encourages the recipients of HHS awards for research involving human fetal tissue from elective abortions to obtain human fetal tissue by donation or no-cost material transfer agreement.

[48] *See, e.g.,* Final Report of the Select Investigative Panel of the Energy & Commerce Committee (Dec. 30, 2016), at xxi, xxvii, xxviii, xxix, xxxi, xxxviii, 16.

[49] *See, e.g.,* 45 CFR 75.420–75.475 (general provisions for selected items of cost), 75.476–75.477 (HHS selected items of cost).

[50] *See* Statement from the Department of Health and Human Services, June 5, 2019, available at *https://www.hhs.gov/about/news/2019/06/05/statement-from-the-department-of-health-and-human-services.html.*

IV. Request for Comment

HHS seeks comment on all aspects of this proposed rule and the model informed consent form provisions, including the likely impacts of the proposed rule, as compared to the status quo. HHS also seeks comment on its regulatory impact analysis.

V. Regulatory Impact Analysis

HHS has examined the impacts of this proposed rule as required under Executive Order 12866 on Regulatory Planning and Review, 58 FR 51,735 (Oct. 4, 1993); Executive Order 13563 on Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011); Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs, 82 FR 9339 (Feb. 3, 2017); the Regulatory Flexibility Act (Pub. L. 96–354 (Sept. 19, 1980) (codified as amended at 5 U.S.C. 601–612)) and Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461 (Aug. 16, 2002); section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–04, 109 Stat. 48 (Mar. 22, 1995)); Executive Order 13132 on Federalism, 64 FR 43255 (Aug. 4, 1999), Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121, 110 Stat. 847 (Mar. 29, 1996) (codified as amended at 5 U.S.C. 801–808)) (commonly known as the Congressional Review Act); section 654 of the Treasury and General Government Appropriations Act of 1999 (the Assessment of Federal Regulation and Policies on Families); and the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Executive Orders 12866 and 13563 Determination

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity). Executive Order 13563 is supplemental to Executive Order 12866 and reaffirms the principles, structures, and definitions governing regulatory review established there. For significant regulatory actions, Executive Order 12866 requires ''an assessment, including the underlying analysis,'' of benefits and costs ''anticipated from the regulatory action.'' Executive Order 12866, §§ 6(a)(3)(C), 3(f)(1).

The Office of Management and Budget (OMB) has determined this proposed rule is a ''significant regulatory action'' under Executive Order 12866, § 3(f)(4), in as much as it raises novel legal or policy issues that arise out of legal mandates, the President's priorities, or the principles set forth in an Executive Order, but that it is not economically significant in that it will not have an annual effect on the economy of greater than $100 million in one year. Thus, the Office of Management and Budget has reviewed it. Under Executive Order 13563, in proposing this rule, HHS has attempted to promote coordination, simplification, and harmonization; has sought to identify means to achieve regulatory goals that are designed to promote innovation; and has ensured the objectivity of any scientific and technological information and processes used to support this proposed rule.

Summary of and Need for Proposed Rule

HHS recognizes that conducting and funding research involving human fetal tissue from abortions presents serious regulatory, moral, and ethical considerations. The principle of informed consent is central to the practice of medicine, as well as to human subjects research. Federal and state laws and policies recognize the importance of informed consent, not only for research involving human subjects, but also for the donation of human tissue and cells for research purposes. This informed consent is especially important when the tissue being donated is human fetal tissue and the source of such tissue is elective abortions. Congress has similarly recognized the moral and ethical issues implicated by the acquisition of human fetal tissue and the use of human fetal tissue in research: It amended the Public Health Service Act to, among other things, make it unlawful ''for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration''—which ''does not include reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue''—if the transfer affects interstate commerce.

As a result of a comprehensive review of HHS research involving human fetal tissue from elective abortion and in light of the serious regulatory, moral and ethical considerations involved, HHS determined that it would be appropriate to undertake changes to its regulations to adopt or strengthen safeguards and program integrity requirements applicable to extramural research involving human fetal tissue. These safeguards and program integrity requirements relate to the informed consent process and the statutory bar on the provision of valuable consideration in connection with the transfer of human fetal tissue. HHS believes that additional informed consent statements and procedures are needed to ensure that (1) the informed consent to the donation of human fetal tissue from abortion is in fact voluntary and informed, and not motivated by any enticements, benefits, or financial considerations, and (2) there is separation between the decision and consent for abortion and the decision on the donation of fetal tissue, such that the abortion decision is not influenced by considerations relating to the research, including the potential contribution to biomedical research that could cure disease, advance understanding of diseases, and the like. Similarly, HHS desires to strengthen recipients' understanding of, and compliance with, the informed consent requirements and the statutory bar on the provision and receipt of valuable consideration for human fetal tissue by ensuring access to records relating to such issues for oversight purposes.

Accordingly, the proposed rule would:

- Require, prior to conducting research on human fetal tissue, that informed consent, including certain statements, be obtained from the pregnant woman;
- Prohibit providing enticements, benefits, or financial incentives to the pregnant woman or attending physician to incentivize the occurrence of an abortion or human fetal tissue donation;
- Prohibit providing valuable consideration for costs associated with obtaining human fetal tissue or the abortion (if any) that is the source of the human fetal tissue;
- Mandate that research involving human fetal tissue from elective abortions can only use human fetal tissue that is acquired or otherwise obtained from a Government, Government-owned entities, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center;
- Require that human fetal tissue be treated respectfully and disposed of reasonably when no longer to be used in research;
- Require HHS recipients that engage in human fetal tissue research to provide HHS, inspectors general, and the Comptroller General with a right of access to all informed consent forms obtained for human fetal tissue research, and documents, papers, or other records as are necessary to establish that the

human fetal tissue was not obtained or transferred for valuable consideration and that federal funds were not used to acquire or otherwise obtain the human fetal tissue; and

• Provide that expenses associated with the acquisition of human fetal tissue for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

Alternatives Considered

HHS carefully considered several alternatives, but rejected the potential alternatives for a number of reasons:

• Alternative 1: Not taking any action. HHS concluded that this alternative was unacceptable because of the serious regulatory, moral and ethical considerations involved with respect to research involving human fetal tissue from elective abortions.

• Alternative 2: Making no changes to 45 CFR part 46, subpart B or to part Part 75, but issuing guidance on (1) best practices for (and the elements that should be included in) informed consent for the donation of human fetal tissue for research, (2) the documentation that should be maintained with respect to compliance with the statutory bar on valuable consideration for the transfer of human fetal tissue, and (3) encouraging the practice of obtaining human fetal tissue by donation or non-cost material transfer agreement. HHS concluded that this alternative would be inadequate because the guidance mechanism (1) did not seem commensurate with the nature and seriousness of the issue and (2) may not be sufficient to permit HHS to conduct appropriate oversight and ensure compliance with/enforce the identified informed consent standards and the bar on valuable consideration.

• Alternative 3: Make more limited changes to 45 CFR part 46, subpart B and Part 75, such as by (1) requiring that, with respect to research involving human fetal tissue from elective abortions, HHS-funded projects obtain informed consent for the donation of human fetal tissue from elective abortion, without specifying any required content of the informed consent document; or (2) clarifying recordkeeping and access requirements. HHS concluded that this alternative would be inadequate because, among other reasons, it would not ensure that the informed consent process included measures and statements to ensure that the informed consent was truly voluntary and truly informed and that no consideration or inducements had been provided for the human fetal tissue.

Expected Benefits and Costs of the Proposed Rule

HHS expects several benefits from this proposed rule. The proposed rule would provide better assurance of compliance with federal statutory requirements with respect to the acquisition and use of human fetal tissue in research. It would better align federal and state law with respect to informed consent for the use of fetal tissue in research, and ensure the uniformity across HHS/NIH grants with respect to the elements of informed consent for the donation of human fetal tissue for research. It would strengthen the informed consent process. It would also strengthen HHS's ability to conduct oversight of, and monitor compliance on, these issues (informed consent, bar on valuable consideration). While maintaining, consistent with the Public Health Service Act, the ability of NIH to fund research involving human fetal tissue from abortion, this proposed rule would also ensure that—in light of the serious moral and ethical issues involved—the costs associated with such human fetal tissue would not be borne by the federal taxpayer.

HHS believes that the costs associated with the proposed rule will be de minimis. In the main, the costs would consist of the administrative costs to the relevant recipients to (1) become familiar with the requirements of the final rule; (2) update their informed consent documents; and (3) update their grant policies and procedures (or compliance manuals) on grant record retention to reflect certain information retention requirements, practices concerning treatment and disposal of human fetal tissue, the bar on valuable consideration, and the unallowability of costs associated with the acquisition of human fetal tissue from abortion.

Familiarization Costs. NIH is the only HHS component that funds grants, cooperative agreements, or R&D contracts for research involving human fetal tissue. Between FY 2015 and FY 2019, NIH funded between approximately 120 and 178 research projects involving the use of human fetal tissue from abortions each year, including between 15 and 55 new research projects per year; with NIH-funded projects usually having a five year project period, most such annually funded research projects represented renewals, revisions, extensions, or continuations. The entities that hold the NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children's hospitals, biomedical research institutions and several corporations. Many of these entities hold multiple NIH grants, cooperative agreements, or R&D contracts for research involving the use of human fetal tissue. In FY 2019, there were a total of 71 unique institutions with active NIH awards for research involving human fetal tissue. Thus, to ensure that costs are not underestimated, for purposes of estimating the costs associated with this rulemaking, HHS will use 80 as the number of organizations that would be affected by this proposed rule. Given the size and sophistication of these entities, the task of familiarization would likely fall to the equivalent of a lawyer in the entities' law departments. According to the U.S. Bureau of Labor Statistics,[51] lawyers have a mean hourly rate of $69.86. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or $139.72. The changes proposed in the proposed rule are straightforward and easy to understand. Accordingly, HHS estimates that it would take a recipient approximately an hour to become familiar with the requirements if the proposed rule is finalized as proposed. HHS, thus, concludes that the total cost for recipient familiarization with such a final rule would total $11,177.60 ($139.72 × 80).

Informed Consent and Informed Consent Forms. As noted above, since not later than 2016, NIH has conveyed to researchers working with human fetal tissue that receive NIH grants for such research that (1) NIH-funded research involving human fetal tissue must be conducted in compliance with all applicable federal, state, and local laws and regulations;[52] (2) most states require informed consent for the use of fetal tissue in research; and (3) NIH expects informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue. *See* NOT–OD–16–033; NIH Grants Policy Statement, Sec. 4.1.14. Recently, NIH informed grantees, contractors, and applicants that it expects such informed consent forms to contain certain statements that are consistent with the statements proposed in this proposed rule. *See* NOT–OD–19–128. In addition, the AMA has indicated, through its 2016 Code of Ethics Opinion, that physicians who are involved in research that uses human fetal tissue should, in all instances,

[51] U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at https://www.bls.gov/oes/current/oes_nat.htm.*

[52] *See* 45 CFR 46.206(a).

obtain the woman's voluntary, informed consent. Although there is currently no express requirement for such informed consent, based on the foregoing, it is HHS's understanding that informed consent is generally obtained from the donor for NIH-funded research involving human fetal tissue. HHS assumes that recipients have an informed consent form that they use or require their contractors to use in obtaining the informed consent to the donation of human fetal tissue. Accordingly, the only costs HHS expects that recipients would incur associated with the proposed informed consent requirements would be the costs to update such forms. Such a task would again likely fall to the equivalent of a lawyer in the entities' law departments. According to the U.S. Bureau of Labor Statistics,[53] lawyers have a mean hourly rate of $69.86. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or $139.72. The informed consent requirements in the proposed rule are straightforward and easy to understand—and HHS has provided sample informed consent form provisions. Accordingly, HHS estimates that it would take a recipient approximately an hour to update its informed consent for the donation of human fetal tissue from elective abortion for research. HHS, thus, concludes that the costs likely to be incurred to update informed consent forms as a result of the proposed informed consent requirements (proposed §§ 46.204(k) and 46.206(g)) would total $11,177.60 ($139.72 × 80).

Although HHS believes that most, if not all, recipients of NIH awards for research involving human fetal tissue have processes in place to obtain informed consent for the donation of human fetal tissue for research, HHS recognizes that some may not conduct a process to obtain informed consent for the donation that is separate and independent from the process to obtain informed consent for the abortion. As set forth in greater detail in the Paperwork Reduction Act section of this regulatory impact analysis, and using NIH intramural data as a proxy, HHS estimates that, on an annual basis, each research project would need to conduct the informed consent process for the donation of human fetal tissue an average of 8 times, in order to obtain the amount of human fetal tissue needed for each research project, for a total of 1,059.2 informed consent processes per year. Assuming the informed consent process requires 10–15 minutes of a registered nurse's time, this results in a total of between 176.89 and 264.8 burden hours per year for the separate and independent informed consent process, or between $13,174.77 and $19,722.30 in total annual costs. This suggests a total annual burden of between 2.21 and 3.31 hours per unique recipient, and cost on an annual basis (undiscounted) for each unique recipient of between $164.68 and $246.53 for a separate and independent informed consent process for the donation of human fetal tissue for research.[54]

Prohibitions on Valuable Consideration. The proposed substantive prohibitions on valuable consideration in proposed § 46.206(c)–(f) merely reiterate current statutory requirements with respect to the provision or receipt of valuable consideration associated with the transfer of human fetal tissue. Accordingly, HHS does not believe that recipients would incur any additional or incremental costs as a result of these proposed requirements.

Disposal of Human Fetal Tissue. It is HHS's understanding that the proposed requirement for the respectful treatment and disposal of human fetal tissue when such tissue is no longer needed for research (proposed § 46.206(i)) is consistent with good clinical practice on the part of researchers. Accordingly, HHS believes that recipients would incur de minimis costs, if any, as a result of this proposed requirement.

Updating of Policies and Procedures (or Manuals). HHS would classify, as grant administration requirements, the proposed requirements on the sourcing of human fetal tissue for research; on access to grant-related information pertaining to informed consent, valuable consideration, and use of grant funds; and on the unallowability of costs associated with the acquisition of human fetal tissue (proposed §§ 46.206(h), 75.364(a), and 75.478). It is HHS's understanding that requirements such as these proposed requirements are generally reflected in the grant administration or compliance policies and procedures (or manuals) that are maintained by recipients of the size and sophistication of those that tend to receive NIH grants for research involving human fetal tissue—and that recipient personnel tend to consult such documents in connection with their activities. Accordingly, HHS believes that the only costs that recipients would incur as a result of these proposed requirements would likely be associated with the updating of such policies and procedures (or manuals). Given the size and sophistication of these entities, the task of familiarization would likely fall to the equivalent of a lawyer in the entities' law departments or a compliance officer in their compliance offices. According to the U.S. Bureau of Labor Statistics, lawyers have a mean hourly rate of $69.86,[55] and compliance officers have a mean hourly rate of $35.03.[56] HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or $139.72 for lawyers, and $70.06 for compliance officers. HHS believes that the updating of such documents would likely take a total of two hours—and assumes that half of the work would be completed by compliance officers and half would be completed by lawyers. Accordingly, HHS estimates that the total cost incurred by recipients as a result of the proposed requirements would be $16,782.40 (($139.72 + $70.06) × 80).

Records and Access to Records and Personnel. HHS proposes to amend its current provision requiring awardees to provide access to records relating to a recipient's award to specify that recipients of awards for research involving human fetal tissue would need to provide access on the part of HHS, the Inspector General, GAO, and others, to specific grant-related information. All of the information that is specifically referenced in proposed § 75.364(a)(1) is already subsumed within the existing § 75.364(a). Accordingly, HHS does not believe that the proposed records access requirements would add any incremental burden.

Acquisition of Human Fetal Tissue. HHS proposes to limit the sources from which HHS recipients for research involving human fetal tissue can obtain human fetal tissue from abortion and to

[53] U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at https://www.bls.gov/oes/current/oes_nat.htm.*

[54] As noted below, in that section, HHS believes that most, if not all, recipients obtain informed consents for the donation of human fetal tissue for research and that many recipients utilize or require the utilization of a separate and independent informed consent process. Accordingly, these estimates represent HHS's estimate of the total cost of a separate and independent informed consent process on an annual basis, not the likely incremental costs resulting from this proposed rule. However, HHS will use these costs for simplicity of analysis in this proposed rule.

[55] U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at https://www.bls.gov/oes/current/oes_nat.htm.*

[56] U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at https://www.bls.gov/oes/current/oes131041.htm.*

preclude the inclusion of any expenses associated with the acquisition of human fetal tissue from elective abortion in allowable costs that could be charged against HHS award funds. The proposed limitation on the sources of human fetal tissue from abortion should not have any impact on the costs associated with the acquisition of such tissue because the statutory bar on the provision of valuable consideration in connection with the transfer of human fetal tissue provides a statutory limit on the ability of tissue procurement organizations and other organizations to seek to take advantage of such a regulatory limitation to exact higher consideration. To the extent that recipients currently incur permissible costs associated with the acquisition of human fetal tissue from elective abortions, HHS acknowledges that the proposal to exclude human fetal tissue from elective abortion from allowable costs under HHS research grants, cooperative agreements, and R&D contracts would effect a transfer of costs from HHS (through its awards) to the recipients of such research awards. Prior to NIH's July 2019 notice, recipients had not been required to separately identify or account for such expenditures of award funds, so HHS and NIH do not have complete data on the expenses incurred by awardees with respect to the acquisition of human fetal tissue from elective abortions. Accordingly, HHS uses the costs incurred by intramural NIH researchers to acquire human fetal tissue from elective abortions as a proxy. During the HHS review and audit, it reviewed NIH documentation with respect to intramural research involving human fetal tissue and the expenditures made to acquire such tissue in fiscal year (FY) 2018; NIH also provided information concerning intramural projects involving human fetal tissue, and the expenditures made with respect to them, in FY 2015. In FY 2015, intramural researchers incurred a total of $26,915 in the acquisition of such tissue across 14 research projects, for an average expenditure of $1,922.50 per project. And in FY 2018, intramural researchers incurred a total of approximately $55,195 to acquire human fetal tissue across approximately 12 research projects, for an average expenditure of $4,599.58 per project. Across the two fiscal years, the average annual expenditure for fetal tissue per project was, thus, $3,261.04. Assuming that award recipients needed to acquire human fetal tissue for each project each year—an assumption that would tend to overestimate costs [57]—this would suggest transfer costs of $3,261.04 per project per year, for a total annual cost of $431,761.70 and an average annual cost per unique recipient of $5,397.02 (132.4 projects × $3,261.04 cost per project per year/80 unique recipients).[58]

Except for the potential costs of the separate informed consent process and the acquisition of human fetal tissue from elective abortions, these costs would be one-time costs that would be experienced in the first year of implementation. Accordingly, if all recipients that receive HHS funds for research involved human fetal tissue were to implement the proposed requirements,[59] HHS estimates that these proposed requirements if finalized as proposed would impose first year costs (including both one-time costs and annual cost of the informed consent process and the acquisition of fetal tissue) totaling between $484,074.07 and $490,621.60, with cost per unique recipient of between $6,050.92 and $6,132.77. Thereafter, there would be total annual costs (undiscounted) of $444,936.47 to $451,484 and $5,561.70 to $5,643.55 per unique recipient (again, undiscounted).[60]

Executive Order 13771

The White House issued Executive Order 13771 on Reducing Regulation and Controlling Regulatory Costs on January 30, 2017. Section 2(a) of Executive Order 13771 requires an agency, unless prohibited by law, to identify at least two existing regulations to be repealed when the agency publicly proposes for notice and comment or otherwise promulgates a new regulation. In furtherance of this requirement, section 2(c) of Executive Order 13771 requires that the new incremental costs associated with 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 rule, while significant under Executive Order 12866, will impose de minimis costs and, therefore, is not anticipated to be a regulatory or deregulatory action under Executive Order 13771. HHS's human subjects protection regulations permit HHS-funded or conducted research involving human fetal tissue to be conducted only in accord with any applicable Federal, State, or local laws and regulations regarding such activities. Current federal law and regulations require informed consent for human fetal tissue transplantation research and research with human fetal tissue with associated information that can identify a human being. In addition, most states require informed consent for the use of fetal tissue in research—and NIH has indicated that it expects informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue. As a result, HHS expects that HHS recipients conducting such research would incur only de minimis costs to become familiar with the regulation, to update their informed consent forms to include the specific statements proposed in this proposed rule, to obtain the necessary informed consents, to properly dispose of human fetal tissue, and to update their grants policies and procedures (or compliance manuals). Federal law already prohibits the transfer of human fetal tissue for valuable consideration, and federal regulation gives HHS the right of access to any documents, papers, or other records of Department recipients which are pertinent to the

[57] It is likely that researchers do not need to obtain human fetal tissue for their HHS-funded research projects annually. In addition, it is likely that some researchers and projects obtained such tissue through no-cost material transfer agreements. However, since HHS lacks knowledge as to how often funded research projects would need to obtain such tissue or how much would need to be expended to acquire such tissue—and the frequency and expense could vary from project to project—for purposes of the analysis of the regulatory impact of this proposed rule, HHS will assume that each project has to acquire human fetal tissue from abortion on an annual basis.

[58] If only new research projects need to acquire fetal tissue from elective abortions, this would suggest total transfer costs of $92,613.54 per year, and an average annual cost per unique recipient of $1,157.67 (28.4 projects × $3,261.04 cost per project per year/80 unique recipients).

HHS notes that in FYs 2015 and 2018, the largest expenditure by an intramural research project for fetal tissue was $21,400 and $25,785, respectively, for an average of $23,592.50. Even if this number is used as the proxy for the annual expense that the recipient of an award for research involving human fetal tissue might incur to acquire such tissue—and it is assumed that every research project would incur such expenditures each year—this only results in a total annual expenditure of $3,123,647 ($23,592.50 × 132.4 projects), and an average annual cost per unique recipient of $39,045.59 (132.4 projects × $23,592.50/80 unique recipients).

[59] If recipients have already acquired all of the human fetal tissue needed for the funded research—which could be the case especially for those organizations that have received grant renewals, revisions, extensions, or continuations—they may conclude that they do not need to undertake any action associated with some of the proposed requirements. This would reduce the costs that such recipients would incur to implement any final rule resulting from this proposed rule.

[60] If the average of the highest annual intramural expenditures for fetal tissue is used to calculate the annual expenditure to acquire fetal tissue, the total first year costs (including both one-time and annual costs of fetal tissue acquisition) would range from $3,175,959.37 to $3,182,506.90, with total first year costs per unique recipient ranging between $39,699.49 and $39,781.65 Thereafter, total annual costs (undiscounted) would total $3,136,821.77 to $3,143,369.30, with annual costs (undiscounted) of $39,210.27 to $39,292.12 per unique recipient.

award. Public comments will inform the ultimate designation of this rule.

Regulatory Flexibility Act

HHS has examined the economic implications of this proposed rule as required by the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612). The RFA requires an agency to describe the impact of a proposed rulemaking on small entities by providing an initial regulatory flexibility analysis unless the agency expects that the proposed rule will not have a significant impact on a substantial number of small entities, provides a factual basis for this determination, and proposes to certify the statement. 5 U.S.C. 603(a), 605(b). If an agency must provide an initial regulatory flexibility analysis, this analysis must address the consideration of regulatory options that would lessen the economic effect of the rule on small entities. For purposes of the RFA, small entities include proprietary firms meeting the size standards of the Small Business Administration (SBA);[61] nonprofit organizations that are not dominant in their fields; and small governmental jurisdictions with populations of less than 50,000. 5 U.S.C. 601(3)–(6). HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities.

Executive Order 13272 on Proper Consideration of Small Entities in Agency Rulemaking reinforces the requirements of the RFA and requires HHS to notify the Chief Counsel for Advocacy of the Small Business Administration if the final rule may have a significant economic impact on a substantial number of small entities under the RFA. Executive Order 13272, 67 FR 53461 (Aug. 16, 2002).

As discussed, the proposed rule would

- Require, prior to conducting research on human fetal tissue, that informed consent be obtained from the pregnant woman;
- Prohibit providing enticements, benefits, or financial incentives to the pregnant woman or attending physician to incentivize the occurrence of an abortion or human fetal tissue donation;
- Prohibit providing valuable consideration for costs associated with obtaining human fetal tissue or the abortion (if any) that is the source of the human fetal tissue;
- Mandate that research involving human fetal tissue from elective abortions can only use such human fetal tissue that is acquired or otherwise obtained from a Government, a Government-owned entity, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center;
- Require that human fetal tissue be treated respectfully and disposed of reasonably when no longer to be used in research;
- Require HHS recipients that engage in human fetal tissue research to provide HHS, inspectors general, and the Comptroller General with a right of access to all informed consent forms obtained for human fetal tissue research, and documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration and that federal funds were not used to acquire or otherwise obtain the human fetal tissue; and
- Provide that expenses associated with the acquisition of human fetal tissue from elective abortion for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

NIH is the only HHS component the funds grants, cooperative agreements, or R&D contracts for research involving human fetal tissue. Between FY 2015 and FY 2019, NIH funded between approximately 120 and 178 research projects involving the use of human fetal tissue from abortions each year, including between 15 and 55 new research projects per year; with NIH-funded projects usually having a five year project period, most such annually funded research projects represented renewals, revisions, extensions, or continuations. The entities that hold the NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children's hospitals, biomedical research institutions and several corporations. Many of these entities hold multiple NIH grants, cooperative agreements, or R&D contracts for research involving the use of human fetal tissue; in FY 2019, there were a total of 71 unique institutions with active NIH awards for research involving human fetal tissue.[62]

Even if all of the entities that receive such NIH awards were considered small entities by virtue of their size or nonprofit status,[63] the proposed rule would not have a serious impact on a significant number of small entities. The proposed rule would not impose significant burdens not already imposed by federal or state law. As discussed above, if the proposed rule is finalized as proposed, each unique NIH awardee would likely experience, at most, first year costs (including both one-time costs, the cost of the separate informed consent process for the donation of human fetal tissue, and the cost of acquiring fetal tissue) totaling between $6,050.92 and $6,132.77, associated with the incremental burden of the requirements proposed in this proposed rule and, thereafter, $5,561.70 to $5,643.55 per year in expenses for the separate informed consent process and for unreimbursed expenses to acquire fetal tissue for the research.[64] As noted above, the entities that hold the NIH awards for such research projects include major colleges and universities, medical schools, academic medical centers, major hospitals and children's hospitals, biomedical research institutions and several corporations. These entities generally correspond to the following North American Industry Classification (NAIC) codes and small entity size guidelines:[65]

[61] In the health care sector, from which the Department draws many of its biomedical research recipients, SBA considers businesses to be small by virtue of having less than between $8.0 million and $41.5 million in average annual revenues, depending on the particular type of business. See U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Industry Classification System Codes, effective August 19, 2019 (sector 62), available at *https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.* Inasmuch as colleges, universities and professional schools (*e.g.,* medical schools) and other educational institutions may also receive Department funding to conduct biomedical research, the other sector from which the Department may draw recipients is the educational services sector, where the relevant small business sizes range from $12.0 million to $30.0 million in annual revenues. *Id.* (sector 61).

[62] In the regulatory impact analyses, HHS is using 80 as the number of unique organizations that would be affected by the proposed rule, to ensure that costs are not underestimated.

[63] Some of the entities receiving NIH awards for research involving the use of human fetal tissue are public colleges or universities that may be considered components of state governments and, thus, not small entities for purposes of RFA. Similarly, some of the entities are major private colleges or universities, medical schools, academic medical centers, or hospitals that may be nonprofit organizations that are considered dominant in their fields and, thus, also not small entities for purposes of RFA.

[64] If the average of the highest annual intramural expenditures for fetal tissue is used to calculate the annual expenditure to acquire fetal tissue, the first year costs (including both one-time and annual costs of fetal tissue acquisition) per unique recipient would range between $39,699.49 and $39,781.65. Thereafter, annual costs (undiscounted) would total $39,210.27 and $39,292.12 per unique awardee, associated with the costs of the separate informed consent process and of acquiring human fetal tissue.

[65] *See https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf.*

Industry	NAIC code	Small entity size guideline	3% impact on revenue
Colleges, Universities and Professional Schools	611310	$30 million in annual revenue	$900,000
HMO Medical Centers	621491	$35 million in annual revenue	1,050,000
General Medical and Surgical Hospitals	622110	$41.5 million in annual revenue	1,245,000
Specialty (except Psychiatric and Substance Abuse) Hospitals	622310	$41.5 million in annual revenue	1,245,000
Research and Development in the Physical, Engineering and Life Sciences (except Nanotechnology and Biotechnology).	541715	1,000 employees	

As noted above, HHS considers a rule to have a significant impact on a substantial number of small entities if it has at least a three percent impact on revenue on at least five percent of small entities. The estimated potential impact on recipients of HHS/NIH awards for research involving human fetal tissue is significantly lower than three percent of the annual revenues of small entities in the relevant industries. Thus, HHS anticipates that this rulemaking, if finalized, would have minimal economic impact—and would not have a significant impact on a substantial number of small entities. HHS anticipates that the information disclosures that would be required by the rule would, to the extent they would result in a change from current practice, allow affected individuals to make better informed decisions and allow affected entities to better deploy resources in line with established requirements for HHS recipients. As a result, HHS has determined, and the Secretary certifies, that this proposed rule would not have a significant impact on a substantial number of small entities.

HHS seeks comment on this analysis of the impact of the proposed rule on small entities, and the assumptions that underlie this analysis.

Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532) requires that covered agencies prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. Currently, that threshold is approximately $154 million. If a budgetary impact statement is required, section 205 of the Unfunded Mandates Act also requires covered agencies to identify and consider a reasonable number of regulatory alternatives before promulgating a rule. HHS has determined that this proposed rule will not result in expenditures by State, local, and tribal governments, or by the private sector, of $154 million or more in any one year. Accordingly, HHS has not prepared a budgetary impact statement or specifically addressed the regulatory alternatives considered.

Executive Order 13132—Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has federalism implications. Executive Order 13132, 64 FR 43255 (Aug. 10, 1999). HHS does not believe that this proposed rule would (1) impose substantial direct requirements costs on State or local governments; (2) preempt State law; or (3) otherwise have Federalism implications. Thus, the Department has determined that this proposed rule does not impose such costs or have any Federalism implications.

Executive Order 12866 directs that significant regulatory actions avoid undue interference with State, local, or tribal governments, in the exercise of their governmental functions. Executive Order 12866 at 6(a)(3)(B). Executive Order 13175 further directs that agencies respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments. Executive Order 13175 at 2(a). HHS does not believe that the proposed rule would implicate the requirements of Executive Orders 12866 and 13175 with respect to tribal sovereignty.

The proposed rule would add specificity to federal and state law requirements with respect to informed consent for the donation of human fetal tissue for HHS-funded or conducted research and to federal law requirements on the maintenance of documentation with respect to compliance with federal law on informed consent and the bar on the receipt of valuable consideration for human fetal tissue. Some HHS grants for research involving human fetal tissue may be held by state colleges or universities. However, HHS anticipates that the proposed rule would have only minimal impacts on such state colleges and universities. Therefore, HHS has determined that this proposed rule would not have sufficient Federalism implications to warrant the preparation of a Federalism summary impact statement under Executive Order 13132, and that the rule would not implicate the requirements of Executive Orders 12866 and 13175 with respect to tribes.

Congressional Review Act

Title E of the Small Business Regulatory Fairness Enforcement Act of 1996, also known as the Congressional Review Act, defines a ''major rule'' as ''any rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget 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.'' 5 U.S.C. 804(2). Based on the analysis of this proposed rule under Executive Order 12866, OMB has determined that this proposed rule would not likely to result in an annual effect of $100,000,000 or more, and would not otherwise be a major rule for purposes of the Congressional Review Act.

Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal departments and agencies to determine whether a proposed policy or regulation could affect family well-being.[66] If the

[66] Public Law 105–277, Div. A, § 654, 112 Stat. 2681–480, 2681–528 (Oct. 21, 1998), codified at 5 U.S.C. 601 note.

Before implementing regulations that may affect family well-being, an agency is required to assess the actions as to whether the action

Continued

determination is affirmative, then the department or agency must prepare an impact assessment to address criteria specified in the law.[67] HHS has determined that these proposed regulations would not have an impact on family well-being, as defined in the Act.

Paperwork Reduction Act of 1995

Under the Paperwork Reduction Act of 1995 (PRA), as amended (44 U.S.C. 3501–3520), agencies are required to provide a 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. In order to fairly evaluation whether an information collection should be approved by OMB, section 3506(c)(2)(A) of the PRA requires that agencies solicit comment on (1) whether the information collection is necessary and useful to carry out the proper functions of the agency; (2) the accuracy of the agency's estimate of burden of the proposed collection of information; (3) the quality, utility, and clarity of the information to be collected (and ways to enhance the same); and (4) recommendations to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information and technology.

In accordance with these requirements, HHS is soliciting public comments on the following proposed requirements that may implicate the PRA. These proposed collection of information requirements relate to the proposal to require informed consent for the donation of human fetal tissue for research (45 CFR 46.204(k), 46.206(g)) and the proposal to expressly require access to certain records (45 CFR 75.364(a)(1).

Informed Consent for the Donation of Human Fetal Tissue. HHS proposes to require, among other things, that (1) informed consent for the donation of human fetal tissue for research purposes be obtained from the woman; (2) the informed consents contain certain specific statements and be signed by both the woman and the person obtaining the informed consent; and (3) the informed consent for donation be obtained after the abortion decision has been made and informed consent has been provided for the abortion and person obtaining the informed consent be someone other than the person who obtains the informed consent for the abortion procedure. Current federal human subjects protection regulations at 45 CFR 46.206 requires that HHS-funded research involving human fetal tissue be conducted only in accord with any applicable federal, state, or local laws and regulations. As noted above in more detail, (1) most states require informed consent for the use of fetal tissue in research; (2) since early 2016, NIH has expressed the expectation that ''informed consent to have been obtained from the donor for any NIH-funded research using human fetal tissue;''[68] and (3) an AMA Ethics Opinion, issued in June 2016, indicates that ''physicians who are involved in research that uses human fetal tissues should . . . [i]n all instances, obtain the woman's voluntary, informed consent in keeping with ethics guidance. . . .''[69] Accordingly, HHS believes that all entities receiving NIH funding for research involving the use of human fetal tissue have an informed consent form for the donation of human fetal tissue and that such informed consent is being obtained in most, if not all, instances.

HHS recognizes that it proposes to require certain specific statements in the informed consents that may not currently be contained in such informed consent forms. Above, HHS estimated that it would take each recipient approximately one hour of attorney time to update its informed consent form for the donation of human fetal tissue from elective abortion.[70] Thus, HHS estimated 80 burden hours at 200% of the wage rate for an attorney, or a total of $11,177.60.

HHS estimates that an informed consent process for the donation of human fetal tissue that is independent of, and separate from, the process of obtaining informed consent for the abortion procedure might take between 10 and 15 minutes per informed consent. HHS expects that a nurse would be assigned to obtain the informed consents. Mean hourly wages for nurses range from $23.32 for licensed practical nurses to $53.77 for nurse practitioners. HHS believes that it is likely that such tasks would be assigned to registered nurses. According to the Bureau of Labor Statistics,[71] registered nurses have a mean hourly rate of $37.24. HHS assumes that the total dollar value of labor, which includes wages, benefits, and overhead, is equal to 200% of the wage rate, or $74.48. HHS does not have information on the number of times informed consent would need to be sought, in order to obtain the donation of human fetal tissue necessary on an annual basis for extramural research projects. Accordingly, HHS uses the likely number of informed consents that would have been necessary with respect to the human fetal tissue acquired by intramural NIH researchers for intramural research projects, using the number of human fetuses from which tissue was obtained as a further proxy for the number of informed consents. During the HHS review and audit, it reviewed NIH documentation with respect to the acquisition of human fetal tissue for intramural research projects in FY 2018; NIH also provided information concerning on-going intramural research projects involving human fetal tissue. In FY 2018, intramural researchers engaged in approximately 12 intramural research projects involving human fetal tissue, and acquired human fetal tissue from approximately 45 fetuses, for an average of 3.75 per project. Accordingly, HHS proposes to estimate that, on an annual basis, each research project involving human fetal tissue would need to obtain an average of 4 informed consents for donation of human fetal tissue, for a total of 529.6 informed

(1) strengthens or erodes the stability or safety of the family and, particularly, the marital commitment;

(2) strengthens or erodes the authority and rights of parents in the education, nurture, and supervision of their children;

(3) helps the family perform its functions, or substitutes governmental activity for the function;

(4) increases or decreases disposable income or poverty of families and children;

(5) action's proposed benefits justify the financial impact on the family;

(6) may be carried out by State or local government or by the family; and

(7) establishes an implicit or explicit policy concerning the relationship between the behavior and personal responsibility of youth, and the norms of society.

5 U.S.C. 601 (note).

[67] If a regulation may affect family well-being, the head of the agency is required to submit a written certification to the director of OMB and to Congress that the regulation has been assessed and to provide an adequate rationale for implementation of a regulation that may negatively affect family well-being. *Id.*

[68] *See* NIH Policy on Informed Consent for Human Fetal Tissue Research, NOT–OD–16–033 (Feb. 11, 2016), *available at https://grants.nih/gov/grants/guide/notice-files/not-od-16-033.html;* October 2018 NIH Grants Policy Statement, Section 4.1.14, *available at https://grants.nih/gov/grants/policy/nihgps/html5/section_4/4.1.14_human_fetal_tissue_research.htm.*

[69] AMA Code of Medical Ethics Opinion 7.3.5, *available at https://www.ama.assn.org/delivering-care/ethics/research-using-human-fetal-tissue.*

[70] In that regard, HHS proposes to provide sample informed consent form provisions for voluntary use by recipients in an appendix to this preamble. To the extent that recipients used the sample informed consent form provisions, it would tend to reduce burden on recipients.

[71] U.S. Bureau of Labor Statistics, May 2019 National Occupational Employment and Wage Estimates United States, *available at https://www.bls.gov/oes/current/oes291141.htm.*

consents (4 × 132.4, the average number of extramural research projects involving human fetal tissue). HHS recognizes that not every woman who is asked to donate human fetal tissue would agree; accordingly, HHS will estimate that the informed consent process would need to be conducted an average of 8 times per project in order to obtain the necessary human fetal tissue. On an annual basis, this results in a total of between 176.89 and 264.8 burden hours for a separate and independent informed consent process for the donation of human fetal tissue, for a total of between $13,174.77 and $19,722.30. This suggests a total annual burden of between 2.21 and 3.31 hours per unique recipient, and cost on an annual basis (undiscounted) for each unique recipient of between $164.68 and $246.53 for a separate and independent informed consent process for the donation of human fetal tissue for research.

This would represent the collection of information burden associated with the proposed informed consent requirements if no recipients of NIH funding for research involving human fetal tissue were otherwise obtaining such informed consents. However, as discussed in greater detail above, because of the state law requirements, the previous NIH policy statements, and the AMA Ethics Opinion, as well as the size and sophistication of such NIH recipients, HHS believes that most, if not all, recipients obtain informed consents. Furthermore, the AMA Ethics Opinion emphasized that physicians engaged in research that uses human fetal tissue should ensure that ''[t]he woman's decisions to terminate the pregnancy is made prior to and independent of any discussion of using the fetal tissue for research purposes,'' which suggests that the process to discuss, and obtain informed consent for, donation of human fetal tissue for research purposes should be separate from and independent of the informed consent for the abortion, and NIH's Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research. NOT–OD–19–128, indicated that NIH expected that the informed consent for donation of human fetal tissue would be obtained by someone other than the person who obtained the informed consent for the abortion and would occur after the informed consent for abortion. Based on the foregoing, HHS estimates that 80% to 100% of NIH's recipients obtain informed consent for the donation of human fetal tissue and that 50% of such recipients already require a separate and independent informed consent process for the donation of human fetal tissue, utilizing different personnel from, and occurring after, the informed consent to the abortion. These estimates would suggest that (1) 40 recipients would not experience any additional burden from the proposed informed consent provisions because they are already using a separate informed consent process for donation of human fetal tissue; (2) up to 20% (or 16 recipients) might experience the full per-recipient burden identified above as a result of the proposed requirements because they are not conducting any informed consent process; and (3) at least 30% (or 24 recipients) would experience some burden because they would need to divide their current informed consent process into two processes. For example, the informed consent for donation of human fetal tissue, when combined with the informed consent for abortion, may take a shorter period of time as compared to two separate and independent processes because of the need to repeat certain information in the second process. However, there could be some cost savings if the health care provider conducting the informed consent for the donation of human fetal tissue was paid at a low hourly rate than the health care provider conducting the informed consent for the abortion.

Access to certain records. HHS proposes expressly to require that recipients provide access to informed consent forms for research involving human fetal tissue and such records as are necessary to establish that such tissue was not obtained or transferred for valuable consideration and that federal funds were not used to acquire or otherwise obtain human fetal tissue. HHS believes that this merely makes express recipients' current recordkeeping and access obligations. HHS's grants regulations currently require that recipients provide access to the recipient's records pertinent to the federal award. 45 CFR 75.364; *see also* 2 CFR 200.337 (OMB uniform administrative requirements). NIH has made its expectations on maintenance and access to records regarding NIH-funded research involving human fetal tissue clear: For example, in NIH Policy on Informed Consent for Human Fetal Tissue Research,[72] NIH stated that, '[w]hen obtaining primary human fetal tissue for research purposes, NIH expects grantees and contractors to maintain appropriate documentation . . . that informed consent was obtained at the time of tissue collection''; such ''policy will be included in the terms and conditions of grant and cooperative agreement awards as well as contracts issued for research involving human fetal tissue.'' Further, in NIH–OD–19–128,[73] NIH indicated that all grants and cooperative agreements awarded with, or adding, human fetal tissue on or after September 25, 2019 would include certain terms and conditions, including that the recipient has documentation from the donating organization of compliance with the requirements of the informed consent process and documentation that the human fetal tissue was not obtained or acquired for valuable consideration. Accordingly, the proposed records access provision merely provides specificity to the general requirement in 45 CFR 75.364(a), which parallels 2 CFR 200.337(a), but does not impose any new information collection requirements.

HHS solicits public comment on the potential burden associated with the proposed requirements that would impose collection of information requirements, as outlined in this section, including HHS's assumptions and analysis, as well as on each of the required issues under section 3506(c)(2)(A) of the PRA with respect to each of these proposed requirements. HHS asks for public comment on the proposed information collection, including what additional benefits may be cited as a result of this proposed rule. Comments regarding the collection of information proposed in this proposed rule must refer to the proposed rule by name and docket number as indicated under **ADDRESSES** by the date specified under **DATES**.

These information collection requirements will be submitted to OMB for review and approval.

Appendix to the Preamble—Model Informed Consent Form Provisions

HHS provides these model informed consent form provisions for comment. This is only model language to illustrate the proposed informed consent provisions in this proposed rule. HHS contemplates providing updated guidance upon publication of the final rule. These model provisions would help regulated entities more easily comply with the informed consent provisions of this proposed rule, assuming the rule is finalized as proposed. However, use of such model

[72] NIH–OD–16–033 (Feb. 11, 2016), *available at https://grants.nih.gov/grants/guide/notice-files/not-od-16-033.html.*

[73] Changes to NIH Requirements Regarding Proposed Human Fetal Tissue Research, NOT–OD–9–128 (July 26, 2019), *available at https://grants.nih/gov/grants/guide/notice-files/NOT-OD-19-128.html.*

provisions would not be required for compliance with this proposed rule. In addition, the language could be amended to more accurately reflect the understandings of the fetal tissue donor and the particular situations. These or similar provisions may be incorporated into a regulated entity's informed consent form for donation of fetal tissue. These concepts only address concepts and requirements set forth in this proposed rule, and alone are not sufficient to result in legally sufficient informed consent for the donation of fetal tissue under State law and do not include some formalities and substantive provisions that are required or typically included in legally sufficient informed consents. Reliance on these model provisions is not sufficient for compliance with state law and does not replace consultation with a lawyer. Furthermore, a regulated entity may want to include other provisions that are related to this proposed rule, but that HHS has not proposed through this proposed rule.

Model Informed Consent for Human Fetal Tissue Donation Provisions [74]

It is important to us that your preferences and beliefs are respected.

If you are willing to donate fetal tissue, the following statements apply:

- I already have completed my consent form for the abortion.
- My decision about whether to donate fetal tissue will not affect how or when my abortion is done. Regardless of what I decide, the doctor will complete my abortion in the usual way.
- The fetal tissue that I donate may be kept for many years and may be used for various research purposes.
- The doctor performing the abortion will not benefit in any way from my decision.
- I will not receive any payment, benefit, or other incentives for donating tissue.
- I will not receive any medical benefit from any research conducted with the donated fetal tissue.
- The research using the donated fetal tissue may have commercial potential, but I will not receive any financial or other benefit from any commercial development from the research.
- I am [insert the age of majority in the jurisdiction where the informed consent is being signed] or older.
- My preferences about donating fetal tissue for research will not affect my care today or in the future at [insert name of facility].

I have had an opportunity to discuss this with my provider and my questions have been answered.

Please mark the statement that best matches your preference:

__I consent to donating fetal tissue for research.

__I do not want to donate fetal tissue to be used for research.

Date and Time: _____

Patient Name: _____

Patient Signature: _____

* * * * *

Attestation of Provider

I attest that

- All options were presented to the patient.
- I have documented the patient's preferences.
- All relevant laws and regulations will be followed in completing the abortion.
- The patient's decision to donate fetal tissue will not affect the manner, methods and/or procedures used to perform the abortion, nor will it affect the timing of the abortion. The abortion will be performed in the same way, regardless of the patient's decision on fetal tissue donation.
- I am not the individual who obtained the informed consent for the patient's abortion.
- No payments, in cash or in kind, were offered or provided to the patient for the donation of human fetal tissue. Neither [insert name of facility] nor I have provided, or obtained, any valuable consideration for the human fetal tissue.

Date and Time: _____

Provider Name, Title, and ID No.: _____

Provider Signature: _____

* * * * *

Witness:

Date and Time: _____

Name of Witness: _____

Signature of Witness: _____

List of Subjects

45 CFR Part 46

Human research subjects, Reporting and record-keeping requirements, Research.

45 CFR Part 75

Accounting, Administrative practice and procedure, Cost principles, Grant programs, Grant programs—health, Grants administration, Hospitals, Nonprofit organizations reporting and recordkeeping requirements, and State and local governments.

For the reasons set forth in the preamble, the Department of Health and Human Services proposes to amend 45 CFR parts 46 and 75 as follows:

PART 46—PROTECTION OF HUMAN SUBJECTS

■ 1. The authority citation for part 46 is revised to read as follows:

Authority: 5 U.S.C. 301; 31 U.S.C. 503(b)(2)(2); 41 U.S.C. Ch. 13; 42; U.S.C. 216(b); 42 U.S.C. 289(a); 42 U.S.C. 289g–1; 42 U.S.C. 289g–2.

■ 2. Amend § 46.202 by adding paragraph (i) to read as follows:

§ 46.202 Definitions.

* * * * *

(i) Human fetal tissue shall have the definition ascribed to the term in 42 U.S.C. 289g–1(g).

■ 3. Amend § 46.204 by adding paragraph (k) to read as follows:

§ 46.204 Research involving pregnant women or fetuses.

* * * * *

(k) Notwithstanding any provisions to the contrary in this Part, HHS-funded research involving human fetal tissue obtained by donation from a pregnant woman occurring after [the effective date of the final rule] may not occur without the written informed consent of the pregnant woman from whom the human fetal tissue was obtained.

(1) For purposes of this paragraph (k), informed consent requires that:

(i) The pregnant woman's consent be documented on a written informed consent form that is signed by the pregnant woman and written in plain language that is clear and easily understandable (''Informed Consent Form'');

(ii) The Informed Consent Form include a statement that there have been and will be no enticements, benefits, or financial incentives exchanged for the donation or acquisition of human fetal tissue or the abortion (if any) from which such tissue was obtained;

(iii) The Informed Consent Form permit the pregnant woman to choose to donate fetal tissue for research or to decline to donate fetal tissue for research; and

(iv) The Informed Consent Form be signed by both the pregnant woman and the individual obtaining the informed consent for the donation, with the latter attesting to the truth of the statements in the form.

(2) With respect to human fetal tissue obtained from elective abortions, informed consent also requires that:

(i) The pregnant woman's informed consent be obtained after the decision to have an abortion has been conclusively made and informed consent for the abortion has been obtained;

[74] Words or phrases contained in brackets are intended as instructions to users of these model provisions and are not intended to be included in the informed consent form provisions.

(ii) The pregnant woman's informed consent be obtained by an individual other than the individual who obtained the informed consent for the pregnant woman's abortion;

(iii) The pregnant woman be at or over the age of majority in the jurisdiction in which the pregnant woman's donation is made; and

(iv) The Informed Consent Form include a statement that the decision to have an abortion and the method of abortion have not been affected by the decision whether to donate human fetal tissue.

■ 4. Amend § 46.206 by adding paragraphs (c) through (i) to read as follows:

§ 46.206 Research involving, after delivery, the placenta, the dead fetus or fetal material.

* * * * *

(c) At all stages in the process to acquire or otherwise obtain human fetal tissue for use in research, there shall be no enticements, benefits, or financial incentives provided to the pregnant woman or attending physician to incentivize the occurrence of an abortion or the donation or acquisition of human fetal tissue.

(d) No person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the abortion that is the source of the human fetal tissue used or to be used in the research.

(e) No person who solicits or knowingly acquires, receives, or accepts a donation of human fetal tissue for use in research shall provide valuable consideration for the costs associated with the donation or acquisition of human fetal tissue.

(f) For purposes of paragraphs (d) and (e) of this section, the term ''valuable consideration'' includes all payments other than reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue.

(g) Human fetal tissue obtained by donation from a woman occurring after [the effective date of the final rule] may be used in research only if an informed consent that meets the applicable requirements of § 46.204(k) has been obtained with respect to the tissue.

(h) Research involving human fetal tissue can use human fetal tissue from elective abortions only if such tissue is acquired or otherwise obtained from a Federal or State Government, a Federal or State Government-owned entity, university, college, accredited degree-granting institution of higher education, university hospital, or academic medical center.

(i) Once human fetal tissue is no longer to be used in research, it shall be treated respectfully and disposed of reasonably and in compliance with any additional laws or regulations imposed by applicable state law.

PART 75—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR HHS AWARDS

■ 5. The authority citation for 45 CFR part 75 continues to read as follows:

Authority: 5 U.S.C. 301.

■ 6. Amend § 75.364 by adding paragraph (a)(1), adding and reserving paragraph (a)(2) and adding paragraph (d) to read as follows:

§ 75.364 Access to records.

(a) * * *

(1) For non-Federal entities that engage in human fetal tissue research pursuant to a Federal award, the HHS awarding entity, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to:

(i) Copies of the informed consent forms signed by each pregnant woman who is the source of human fetal tissue used by the non-Federal entity in research, which may be redacted with respect to the name and signature of the woman;

(ii) all documents, papers, or other records as are necessary to establish that the human fetal tissue was not obtained or transferred for valuable consideration, as that term is defined in 45 CFR 46.206(f);

(iii) all documents, papers, or other records as are necessary to establish that federal funds were not used to acquire or otherwise obtain the human fetal tissue from elective abortions; and

(iv) personnel familiar with such documents, for purposes of interview and discussion concerning such documents, at reasonable times and locations.

(2) [Reserved]

* * * * *

(d) For purposes of this section, ''human fetal tissue'' shall have the definition ascribed to the term in 42 U.S.C. 289g–1(g).

■ 7. Add § 75.478 to subpart E to read as follows:

§ 75.478 Expenses associated with acquiring human fetal tissue for research.

Expenses associated with the acquisition of human fetal tissue from elective abortions for use in research are not allowable expenses under Federal awards from an HHS awarding agency.

Dated: December 29, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–29107 Filed 1–11–21; 4:15 pm]

BILLING CODE 4151–26–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Part 5b

[Docket Number NIH–2016–0002]

RIN 0925–AA62

Privacy Act; Implementation

AGENCY: Department of Health and Human Services.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Department of Health and Human Services (HHS or Department) proposes to exempt confidential source identifying information in a system of records maintained by the National Institutes of Health (NIH) from certain requirements of the Privacy Act. The affected system of records is 09–25–0165, ''National Institutes of Health (NIH) Office of Loan Repayment and Scholarship (OLRS) Record System, HHS/NIH/OD'' (to be renamed ''NIH Loan Repayment Records''). Elsewhere in today's **Federal Register**, HHS/NIH has published an updated system of records notice (SORN) for system 09–25–0165 for public notice and comment.

DATES: Submit either electronic or written comments regarding this document by March 15, 2021.

ADDRESSES: You may submit comments, identified by Docket Number NIH–2015–0002, via any of the following methods:

Electronic Submission

Submit electronic comments in the following way:

• *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions provided for submitting comments.

Written Submission

Submit written submissions in the following ways:

• *Fax:* 301–402–0169.

• *Mail:* Daniel Hernandez, Acting NIH Regulations Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, MD 20852.

In order to ensure more timely processing of comments, HHS/NIH is no

longer accepting notice of proposed rulemaking (NPRM) comments submitted to the agency by email. HHS/NIH encourages you to continue to submit electronic comments by using the Federal eRulemaking Portal, as described previously, in the **ADDRESSES** portion of this document under *Electronic Submissions.*

Instructions: All submissions received must include the agency name and Docket No. for this rulemaking. All comments received may be posted without change to *https://www.regulations.gov,* including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to

https://www.regulations.gov and follow the instructions provided for conducting a search, using the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: General questions about the proposed exemptions may be submitted to Daniel Hernandez, Acting NIH Regulations Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Boulevard, Suite 601, MSC 7669, Rockville, MD 20852, telephone 301– 435–3343, fax 301–402–0169, email *dhernandez@od.nih.gov.*

SUPPLEMENTARY INFORMATION:

I. Background on the NIH Loan Repayment Programs and System of Records 09–25–0165

The NIH Loan Repayment Programs (LRPs) are administered by the Division of Loan Repayment within NIH's Office of Extramural Research (HHS/NIH/OER/DLR, hereafter referred to as DLR). DLR provides repayment of student loans for approved applicants to encourage outstanding health professionals to pursue careers in biomedical, behavioral, social, and clinical research. Research health professionals who owe qualified educational debt and who meet eligibility criteria may apply for student loan repayment. Loan repayments utilize a peer review process to determine which applicants to approve. The peer review process is committee-based, with a peer review group comprised of individual reviewers, referees, or other recommenders (hereafter collectively referred to as reviewers). Reviewers are primarily non-government experts qualified by training and experience in scientific or technical fields, or as authorities knowledgeable in disciplines and fields related to the areas under review. Reviewers give DLR expert recommendations and materials (such as ratings, summaries, and communications) about applicants' suitability, eligibility, or qualifications for student loan repayments under express promises that the reviewers will not be identified as the sources of the information. DLR uses the information solely for the purpose of determining applicants' suitability, eligibility, or qualifications for federal loan repayment. System of records 09–25–0165 covers records about health professionals who apply for student loan repayments and about other categories of individuals who are related to the applications. Records about those record subjects include materials and recommendations provided to DLR by reviewers which identify, or could enable identification of, those confidential sources.

II. Proposed Exemptions and Affected Records

HHS/NIH is proposing to exempt materials about LRP applicants in system of records 09–25–0165 from certain provisions of the Privacy Act (5 U.S.C. 552a). The exemption applies only to the extent that a disclosure would reveal the identity of the reviewer or referee who furnished information to the Government under an express promise that his or her identity would be held in confidence. We propose to exempt the system of records from (c)(3), pertaining to the accounting of disclosures, and (d)(1) through (d)(4), pertaining to access, amendment, and notification provisions, based on subsection (k)(5) of the Act (5 U.S.C. 552a(k)(5)). Because records in system of records 09–25–0165 contain information not only about applicants, but also about the reviewers, the proposed exemptions are necessary to enable NIH to prevent applicants from having access to information about the identity of individuals who provided NIH with an expert review or referee report under an express promise of confidentiality. Notwithstanding the exemptions, NIH will consider any requests for notification, access, and amendment that are addressed to the System Manager, as provided in the SORN for system of records 09–25–0165, and to any request for an accounting of disclosures.

Under the Privacy Act of 1974, as amended (5 U.S.C. 552a), individuals have access and amendment rights with respect to records about them in a federal agency system of records, and the right to seek an accounting of certain disclosures made of the records about them, but the Act permits certain types of systems of records (identified in subsections (j) and (k) of the Act) to be exempted from those requirements of the Act. Subsection (k)(5) permits the head of an agency to promulgate rules to exempt from the requirements in 5 U.S.C. 552a(c)(3) and (d)(1) through (4) investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for access to federal civilian employment, military service, federal contracts, or access to classified information, to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the government under an express promise that the identity of the source would be held in confidence. Referee reports and reviews in system of records 09–25–0165 qualify for exemption under 5 U.S.C. 552a(k)(5), when provided to DLR under an express promise of confidentiality, because it is investigatory material that DLR compiles solely for the purpose of determining applicants' suitability, eligibility, or qualifications for federal loan repayment awards, which are implemented by contracts.

III. Exemption Rationales

The proposed exemptions are necessary to maintain the integrity of the DLR peer review and award processes, which depend on receiving accurate, objective, and unbiased recommendations and evaluations from reviewers about loan repayment applications. Protecting reviewer identities as the sources of the information they provide protects them from harassment, intimidation, and other attempts to improperly influence award outcomes, and ensures that they are not reluctant to provide sensitive information or frank assessments. Case law has held that exemptions promulgated under subsection (k)(5) may protect source-identifying material even where the identity of the source is known to the subject individual(s).

The specific rationales that support the exemptions, as to each affected Privacy Act provision, are as follows:

- *Subsection (c)(3).* An exemption from the requirement to provide an accounting of disclosures to record subjects is needed to protect the identity of any reviewer source who is expressly promised confidentiality. Providing an accounting of disclosures to an individual who is related to the application under assessment or evaluation could identify particular reviewers as sources of recommendations or evaluative input received, or to be received, on the application. Inappropriately revealing their identities in association with the nature and scope of their assessments or

evaluations could lead them to alter or destroy their assessments or evaluations or subject them to harassment, intimidation, or other improper influence, which would impede or compromise the fairness and objectivity of the loan repayment application review process.

• *Subsection (d)(1).* An exemption from the access requirement is needed both during and after an award application review proceeding to avoid inappropriately revealing the identity of any source who was expressly promised confidentiality. Protecting these records from access by record subjects is necessary for the integrity of the review process. It ensures such sources provide candid assessments or evaluations to the government without fear that their identities as linked to a specific work product will be revealed inappropriately. Allowing an individual applicant who is the subject of an assessment or evaluation, or another record subject who has a relationship to the application, to access material that would reveal a reviewer could interfere with or compromise the objectivity and fairness of award application review proceedings, constitute an unwarranted invasion of the personal privacy of the reviewer, and violate the express promise of confidentiality made to the reviewer.

• *Subsection (d)(2) through (4).* An exemption from the amendment provisions is necessary while one or more related application review proceedings are pending, but only if and to the extent that disclosure of information in the amendment request process would reveal inappropriately the identity of any reviewer source who was expressly promised confidentiality. An exemption will be limited to allowing the agency, when processing an amendment request by an applicant or other subject individual, to avoid disclosing the existence of the record sought to be amended and its contents, if doing so would reveal the identity of any reviewer who was expressly promised confidentiality. Revealing the identity of a reviewer to an individual applicant or other subject individual would interfere with the agency's application review process and constitute an unwarranted invasion of the personal privacy of the reviewer and would violate the express promise of confidentiality made to the reviewer.

Accordingly, pursuant to 5 U.S.C. 552a(k)(5), NIH proposes to exempt records about particular LRP applicants in system of records 09–25–0165 NIH Division of Loan Repayment Record System from the access, amendment, and accounting of disclosures provisions of the Privacy Act (5 U.S.C. 552a(c)(3) and (d)(1) through (4)), to the extent, and based on the specific rationales stated above. Notwithstanding the exemptions, NIH will consider any request for access or amendment that is addressed to the System Manger as provided in the SORN for system of records 09–25–0165, and to any request for an accounting of disclosures.

Analysis of Impacts

I. Review Under Executive Orders 12866, 13563, and 13771

The agency has reviewed this proposed rule under Executive Orders 12866 and 13563, which direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to maximize the net benefits. The agency believes that this proposed rule is not a significant regulatory action under Executive Order 12866, and therefore does not constitute an E.O. 13771 regulatory action, because it will not (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs, or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. This rule removes certain Privacy Act rights from the subjects of these records in accordance with criteria established in subsection (k)(5) of the Privacy Act (5 U.S.C. 552a(k)(5)). This decision is based on a showing that agency compliance with all of the Privacy Act requirements with respect to those records would harm the effectiveness or integrity of the agency function or process for which the records are maintained (in this case, NIH research and development loan award processes).

II. Review Under the Regulatory Flexibility Act (5 U.S.C. 601–612)

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant regulatory impacts of a rule on small entities. Because the proposed rule imposes no duties or obligations on small entities, we have determined, and the Director certifies, that the proposed rule will not have a significant economic impact on a substantial number of small entities.

III. Review Under the Unfunded Mandates Reform Act of 1995 (Section 202, Pub. L. 104–4)

Section 202(a) of the Unfunded Mandates Reform Act of 1995 requires that agencies prepare a written statement, which includes an assessment of anticipated costs and benefits, before proposing ''any rule that includes any Federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year.'' The current threshold after adjustment for inflation is $144 million, using the most current (2015) Implicit Price Deflator for the Gross Domestic Product. The agency does not expect that this proposed rule would result in any 1-year expenditure by state, local, and tribal governments that would meet or exceed this amount.

IV. Review Under the Paperwork Reduction Act of 1995 (44 U.S.C. 35–1 *et seq.*)

This proposed rule does not contain any information collection requirements subject to the Paperwork Reduction Act.

V. Review Under Executive Order 13132, Federalism

This proposed rule will not have any 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. Therefore, the requirements of Executive Order 13132 are inapplicable.

List of Subjects in 45 CFR Part 5b

Privacy.

For the reasons set out in the preamble, the Department amends part 5b of title 45 of the Code of Federal Regulations, as follows:

PART 5b—PRIVACY ACT REGULATIONS

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

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

■ 2. Amend § 5b.11 by adding paragraph (b)(2)(iv)(D) as follows:

§ 5b.11 Exempt systems.

* * * * *

(b) * * *

(2) * * *

(iv)

(D) NIH Division of Loan Repayment Record System, 09–25–0165.

Dated: November 20, 2020.

Lawrence A. Tabak,

Principal Deputy Director, National Institutes of Health.

Approved: December 22, 2020.

Alex M. Azar II,

Secretary, Department of Health and Human Services.

[FR Doc. 2020–28884 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[WC Docket No. 12–375; DA 20–1446; FRS 17293]

Petition for Reconsideration of Action in Proceeding

Correction

In proposed rule document 2020–27982 appearing on page 83000 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83000, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27982 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 218

[Docket No. 201207–0329]

RIN 0648–BJ90

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

Correction

In proposed rule document 2020–27300 appearing on pages 83001 through 83026 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83001, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27300 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

Notices

Federal Register

Vol. 86, No. 8

Wednesday, January 13, 2021

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

Forest Service

Ravalli Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Ravalli Resource Advisory Committee (RAC) will hold a virtual meeting. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations tothe Forest Service concerning projects and funding consistent with the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/bitterroot/workingtogether/advisorycommittees*.

DATES: The meeting will be held on Tuesday, February 16, 2021, at 1:00 p.m., Mountain Time and continued on Thursday, February 18, 2021, at 1:00 p.m., Mountain Time. All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held with virtual attendance only. For virtual meeting information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at the Bitterroot National Forest Supervisor's Office. Contact 406–363–7100 to facilitate that inspection.

FOR FURTHER INFORMATION CONTACT: Eric Winthers, Designated Federal Officer (DFO), by phone at 406–821–4244 or via email at *eric.winthers@usda.gov;* or Joni Lubke at 406–363–7100 or email at *joni.lubke@usda.gov.*

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Hear presentations on Title II project proposals.

2. Discuss and make decisions on which Title II project(s) to recommend for funding.

The meetings are open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement at either meeting should request in writing 7 business days before to be scheduled on that meeting's agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Joni Lubke, RAC Coordinator, Bitterroot National Forest Supervisor's Office, 24 1801 N 1st, Hamilton, Montana 59840; or by email to *joni.lubke@usda.gov.*

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in thesection titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case-by-case basis.

Dated: January 8, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–00522 Filed 1–12–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

El Dorado County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The El Dorado County Resource Advisory Committee (RAC) will hold a series virtual meetings. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Act. RAC information can be found at the following website: *https://www.fs.usda.gov/main/eldorado/workingtogether/advisorycommittees*.

DATES: The meetings will be held at 4:00 p.m. PST on

- Wednesday, February 3, 2021
- Wednesday, February 17, 2021

All RAC meetings are subject to cancellation. For status of meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

ADDRESSES: The meeting will be held with virtual attendance only. For virtual meeting information, please contact the person listed under **FOR FURTHER INFORMATION CONTACT.**

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION.** All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at: Eldorado National Forest Supervisor's Office, 100 Forni Road, Placerville, CA. Please call ahead to facilitate entry into the building.

FOR FURTHER INFORMATION CONTACT: Kristi Schroeder, Public Affairs Specialist by phone at (530) 305–6864 or via email at *kristi.schroeder@usda.gov*.

Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339

between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The purpose of the meetings is to:

1. Review FACA regulations, update committee governing documents, review past practices and determine new process for project proposals, and solicit project proposals.

The meetings are open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing 7 days before either meeting to be scheduled on that meeting's agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Kristi Schroeder, Eldorado National Forest, 100 Forni Road, Placerville, CA 95667; by email to *kristi.schroeder@usda.gov,* or via facsimile to (530) 621–5297.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices, or other reasonable accommodation. For access to the facility or proceedings, please contact the person listed in the section titled **FOR FURTHER INFORMATION CONTACT.** All reasonable accommodation requests are managed on a case-by-case basis.

Dated: January 8, 2021.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2021–00506 Filed 1–12–21; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[S–184–2020]

Approval of Subzone Status Robert Bosch Tool Corporation West Memphis, Arkansas

On October 22, 2020, the Executive Secretary of the Foreign-Trade Zones (FTZ) Board docketed an application submitted by the City of West Memphis, Arkansas Public Facilities Board, grantee of FTZ 273, requesting subzone status subject to the existing activation limit of FTZ 273, on behalf of Robert Bosch Tool Corporation in West Memphis, Arkansas.

The application was processed in accordance with the FTZ Act and Regulations, including notice in the **Federal Register** inviting public comment (85 FR 68038, October 27, 2020). The FTZ staff examiner reviewed the application and determined that it meets the criteria for approval.

Pursuant to the authority delegated to the FTZ Board Executive Secretary (15 CFR Sec. 400.36(f)), the application to establish Subzone 273A was approved on January 7, 2021, subject to the FTZ Act and the Board's regulations, including Section 400.13, and further subject to FTZ 273's 341-acre activation limit.

Dated: January 7, 2021.

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2021–00532 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–849]

Refillable Stainless Steel Kegs From Mexico: Rescission of Antidumping Duty Administrative Review; 2019–2020

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) is rescinding the administrative review of the antidumping duty order on refillable stainless steel kegs (kegs) from Mexico covering the period of review (POR) October 9, 2019, through September 30, 2020, based on the timely withdrawal of the request for review.

DATES: Applicable January 13, 2021.

FOR FURTHER INFORMATION CONTACT: Christopher Williams, AD/CVD Operations, Office I, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–5166.

SUPPLEMENTARY INFORMATION:

Background

On October 1, 2020, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order on kegs from Mexico for the period October 9, 2019 through September 30, 2020.[1] On October 26, 2020, American Keg Company (the petitioner) timely requested an administrative review of the antidumping duty order with respect to four exporters/producers.[2] Commerce received no other requests for an administrative review of the antidumping duty order.

On December 8, 2020, pursuant to section 751(a) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.221(c)(1)(i), we published in the **Federal Register** a notice of initiation of an administrative review of the antidumping duty order on kegs from Mexico with respect to the four companies listed in the petitioner's request for review.[3] On December 14, 2020, Commerce released U.S. Customs and Border Protection (CBP) import data to eligible parties and invited comments concerning selection of respondents for individual examination.[4] On December 18, 2020, the petitioner timely withdrew its administrative review request for all four companies for which a review was requested: Cerveceria Cuauhtemoc Moctezuma S.A. de C.V., Europartners Mexico S.A. de C.V., Grupo de Intercambio Comercial S.A. de C.V., Thielmann Mexico S.A. de C.V.[5]

Rescission of Administrative Review

Pursuant to 19 CFR 351.213(d)(1), Commerce will rescind an administrative review, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review. The petitioner withdrew their request for review within 90 days of the publication date of the *Initiation Notice.* No other parties requested an administrative review of the antidumping duty order. Therefore, in accordance with 19 CFR 351.213(d)(1), we are rescinding the administrative review of the antidumping order on kegs from Mexico for the period October 9, 2019, through September 30, 2020, in its entirety.

Assessment

Commerce will instruct CBP to assess antidumping duties on all appropriate entries of kegs from Mexico during the POR at rates equal to the cash deposit

[1] *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 61926 (October 1, 2020); *see also Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review,* 85 FR 69586 (November 3, 2020).

[2] *See* Petitioner's Letter, ''Refillable Stainless Steel Kegs from Mexico: Request for Administrative Reviews,'' dated October 26, 2020.

[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 85 FR 78990 (December 8, 2020) (*Initiation Notice*).

[4] *See* Commerce's Letter, dated December 14, 2020.

[5] *See* Petitioner's Letter, ''Refillable Stainless Steel Kegs from Mexico: Withdrawal of Request for Administrative Review,'' dated December 18, 2020.

rate of estimated antidumping duties required at the time of entry, or withdrawal from warehouse, for consumption, in accordance with 19 CFR 351.212(c)(1)(i). Commerce intends to issue appropriate assessment instructions to CBP 15 days after publication of this notice in the **Federal Register**.

Notification to Importers

This notice 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 doubled 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 the return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

This notice is issued and published in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.213(d)(4).

Dated: January 7, 2021.

James Maeder,

Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations.

[FR Doc. 2021–00462 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–890]

Wooden Bedroom Furniture From the People's Republic of China: Rescission of 2019 Antidumping Duty New Shipper Review

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (Commerce) finds that the sale made by Kunshan Jujia Decoration Design Co., Ltd. (Jujia) is a non-*bona fide* sale. Therefore, we are rescinding this new shipper review (NSR).

DATES: Applicable January 11, 2021.

FOR FURTHER INFORMATION CONTACT: Elizabeth Bremer, AD/CVD Operations, Office IV, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–4987.

SUPPLEMENTARY INFORMATION:

Background

Commerce published its *Preliminary Results* in this NSR on August 20, 2020.[1] Subsequently, Jujia filed a case brief on September 21, 2020[2] and the American Furniture Manufacturers Committee for Legal Trade and Vaughan-Basset Furniture Company (the petitioners) filed a rebuttal brief on September 24, 2020.[3]

Scope of the Order

The product covered by this order is wooden bedroom furniture, subject to certain exceptions. Imports of subject merchandise are classified under the following Harmonized Tariff Schedule of the United States (HTSUS) subheadings: 9403.50.9042, 9403.50.9045, 9403.50.9080, 9403.90.7005, 9403.90.7080, 9403.50.9041, 9403.60.8081, 9403.20.0018, 9403.90.8041, 7009.92.1000 and 7009.92.5000. Although the HTSUS subheadings are provided for convenience and custom purposes, the written product description in the order remains dispositive. For a complete description of the scope of the order, *see* the Issues and Decision Memorandum.[4]

Analysis of Comments Received

The issue discussed in the case and rebuttal briefs is addressed in the Issues and Decision Memorandum.[5] The Issues and Decision Memorandum is a public document and is on file via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service 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/.* The signed Issues and Decision Memorandum and the electronic version of the Issues and Decision Memorandum are identical in context. The one issue raised in the case brief is listed in the Appendix to this notice.

Rescission of the Antidumping New Shipper Review

For the reasons explained in the Issues and Decision Memorandum, Commerce continues to find that the sale made by Jujia is not a *bona fide* sale for purposes of the AD law. Commerce reached this conclusion based on the totality of the evidence, including, among other things, the sales price and quantity. Because Jujia made no *bona fide* sales during the period of review (POR), we are rescinding the NSR.

Assessment Rates

As Commerce is rescinding this NSR, Jujia's status with respect to the antidumping duty order on wooden bedroom furniture from the People's Republic of China (China) remains unchanged. Jujia remains part of the China-wide entity and, accordingly, entries of its subject merchandise into the United States during the POR will be assessed at the China-wide rate.

Cash Deposit Requirements

Because we are rescinding this NSR, we are not determining a company-specific cash deposit rate for Jujia. Jujia continues to be part of the China-wide entity and is, therefore, subject to the China-wide entity cash deposit rate of 216.01 percent.[6]

Administrative Protective Order

This notice also serves as a reminder to parties subject to an Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305, which continues to govern business proprietary information in this segment of the

[1] *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Rescission of 2019 Antidumping Duty New Shipper Review,* 85 FR 51413 (August 20, 2020) (*Preliminary Results*); *see also* Memorandum, ''2019 Antidumping Duty New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China: Preliminary *Bona Fide* Sales Analysis for Kunshan Jujia Decoration Design Co., Ltd.,'' dated August 14, 2020.

[2] *See* Jujia's Case Brief, ''Wooden Bedroom Furniture from the People's Republic of China: Jujia's Case Brief,'' dated September 21, 2020.

[3] *See* Petitioner's Letter, ''Wooden Bedroom Furniture from the People's Republic of China: Petitioners' Rebuttal Brief,'' dated September 24, 2020.

[4] *See* Memorandum ''Issues and Decision Memorandum for the Final Results of the 2019 Antidumping Duty New Shipper Review of Wooden Bedroom Furniture from the People's Republic of China,'' issued concurrently with and hereby adopted by this notice (Issues and Decision Memorandum).

[5] *Id.*

[6] *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2018,* 85 FR 7731 (February 11, 2020).

proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these results in accordance with sections 751(a)(2)(B) and 777(i)(1) of the Act.

Dated: January 7, 2021.

Joseph A. Laroski Jr.,

Deputy Assistant Secretary for Policy and Negotiations.

Appendix

List of Sections in the Issues and Decision Memorandum

I. Summary
II. Background
III. Scope of the Order
IV. Discussion of the Issues
Comment: Whether Jujia's Sale is *Bona Fide*
V. Recommendation

[FR Doc. 2021–00531 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Advisory Committee on Supply Chain Competitiveness: Notice of Public Meetings

AGENCY: International Trade Administration, U.S. Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: This notice sets forth the schedule and proposed topics of discussion for the upcoming public meeting of the Advisory Committee on Supply Chain Competitiveness (Committee).

DATES: The meeting will be held on January 28, 2021, from 10:00 a.m. to 12:00 p.m. and 1:00 p.m. to 4:00 p.m., Eastern Daylight Time (EDT).

ADDRESSES: The meetings will be held via Webex.

FOR FURTHER INFORMATION CONTACT: Richard Boll, Office of Supply Chain, Professional & Business Services (OSCPBS), International Trade Administration. Email: *richard.boll@trade.gov.*

SUPPLEMENTARY INFORMATION:

Background: The Committee 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.). It provides advice to the Secretary of Commerce on the necessary elements of a comprehensive policy approach to supply chain competitiveness and on regulatory policies and programs and investment priorities that affect the competitiveness of U.S. supply chains. For more information about the Committee visit: *https://www.trade.gov/acscc.*

Matters To Be Considered: Committee members are expected to continue to discuss the major competitiveness-related topics raised at the previous Committee meetings, including trade and competitiveness; freight movement and policy; trade innovation; regulatory issues; finance and infrastructure; and workforce development. The Committee's subcommittees will report on the status of their work regarding these topics. The agenda may change to accommodate other Committee business. The Office of Supply Chain, Professional & Business Services will post the final detailed agenda on its website, *https://www.trade.gov/acscc,* at least one week prior to the meeting.

The meetings will be open to the public and press on a first-come, first-served basis. Space is limited. Please contact Richard Boll, at *richard.boll@trade.gov,* for participation information if you wish to participate.

Interested parties may submit written comments to the Committee at any time before and after the meeting. Parties wishing to submit written comments for consideration by the Committee in advance of this meeting should email them to *richard.boll@trade.gov.*

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 January 20, 2021. Comments received after January 20, 2021, will be distributed to the Committee, but may not be considered at the meeting. The minutes of the meeting will be posted on the Committee website within 60 days of the meeting.

Maria Goodman,

Acting Director, Office of Supply Chain & Professional and Business Services.

[FR Doc. 2021–00496 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

Minority Business Development Agency

President's Advisory Commission on Asian Americans and Pacific Islanders

AGENCY: Minority Business Development Agency, Department of Commerce.

ACTION: Notice of open meeting.

SUMMARY: The President's Advisory Commission on Asian Americans and Pacific Islanders (AAPI Commission) will convene the fourth open meeting to present the 2020 Commission Report and to discuss issues related to the upcoming survey of the AAPI small business community. This meeting is open to the public and interested persons may join the video and audio conference by using the call-in number or weblink by registering online (see **ADDRESSES**).

DATES: The meeting will be held via video and audio conference on Wednesday, January 13, 2021 from 4:00 p.m. to 6:00 p.m., Eastern Time (ET).

ADDRESSES: The public meeting will be broadcast virtually from the meeting at the U.S. Department of Commerce, 1401 Constitution Ave. NW, Washington, DC 20230. The meeting is open to the public via video and audio conference technology. Registration for access to the meeting will be prominently posted on the PAC–AAPI homepage at: *https://www.commerce.gov/whiaapi/pac-aapi/public-meetings-and-events.* Please note: The PAC–AAPI Commission website will maintain the most current information on the meeting agenda, registration, and location.

FOR FURTHER INFORMATION CONTACT: For information regarding the conference, please contact Ms. Tina Wei Smith, Executive Director, Office of the White House Initiative on Asian Americans and Pacific Islanders; telephone (202) 482–1375; email: *whiaapi@doc.gov.*

SUPPLEMENTARY INFORMATION:

Background. The President, through Executive Order 13872 (May 13, 2019), re-established the President's Advisory Commission on Asian Americans and Pacific Islanders to advise the President, through the Secretary of Commerce and the Secretary of Transportation. The AAPI Advisory Commission provides advice to the President on executive branch efforts to broaden access of AAPI communities, families and businesses to economic resources and opportunities that empower AAPIs to improve the quality of their lives, raise the standard of living of their communities and families, and more fully participate in the U.S. economy.

Public Participation. In accordance with Section 10(a)(2) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), this notice is the public announcement of the Commission's intent to hold a video and audio conference on January 13, 2021. This meeting is open to the public and interested persons may attend the

conference virtually by using the call-in number and pass code set forth above (see **ADDRESSES**). Prospective agenda items for the meeting the presentation of the Commission's 2020 report to the President, update on the survey of AAPI businesses, administrative tasks and such other Commission business as may arise during the meeting.

The Commission welcomes interested persons to submit written comments to the Office of the White House Initiative on Asian Americans and Pacific Islanders. Please submit statements or questions via email address, *whiaapi@doc.gov* (please use the subject line ''January 2021 PAC–AAPI Open Meeting Public Comment''), or by letter to Tina Wei Smith, c/o White House Initiative of Asian Americans and Pacific Islanders (MBDA), Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230. If you wish the Commission to consider your statement or question during the meeting, we must receive your written statement or question no later than 5 p.m. (EDT) three business days prior to the meeting. We will provide all statements or questions received after the deadline to the members; however, they may not consider them during the meeting.

Copies of the Commission open meeting minutes will be made available to the public.

Josephine Arnold,

Chief Counsel, Minority Business Development Agency.

[FR Doc. 2021–00479 Filed 1–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA761]

Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of public online meeting.

SUMMARY: The Pacific Fishery Management Council's (Pacific Council) Ad Hoc Ecosystem Workshop (EWG) and Ecosystem Advisory Subpanel (EAS) will hold online meetings, which are open to the public.

DATES: The EWG will hold an online meeting on Monday, February 22, 2021, from 1:30 p.m. to 4:30 p.m. Pacific Time, or until business is concluded. The EWG and EAS will hold a joint meeting on Tuesday, February 23, 2021, from 1:30 p.m. to 4:30 p.m. Pacific Time, or until business is concluded.

ADDRESSES: This meeting will be held online. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). You may send an email to Mr. Kris Kleinschmidt (*kris.kleinschmidt@noaa.gov*) or contact him at (503) 820–2412 for technical assistance.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220–1384.

FOR FURTHER INFORMATION CONTACT: Kit Dahl, Staff Officer, Pacific Council; telephone: (503) 820–2422.

SUPPLEMENTARY INFORMATION: The purpose of the EWG meeting is to plan and prepare for advisory body work supporting the Pacific Council's March 2–11, 2021, meeting. This includes reviewing and discussing available meeting materials and planning work for the ecosystem management topics and other topics of interest that may arise during the Pacific Council meeting. In their joint meeting, the EAS and EWG will receive a briefing on the California Current Integrated Ecosystem Assessment Report and other topics as appropriate. A detailed agenda for these meetings will be made available on the Pacific Council website in advance of the meeting.

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 business days prior to the meeting date.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00558 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA796]

Pacific Fishery Management Council; Public Meetings

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of public meetings.

SUMMARY: The Pacific Fishery Management Council (Pacific Council) and its advisory entities will hold online public meetings.

DATES: The Pacific Council and its advisory entities will meet online March 2–5 and 8–11, 2021, noting there will be no meetings Saturday, March 6 and Sunday, March 7, 2021. The Pacific Council meeting will begin on Thursday, March 4, 2021 at 8 a.m. Pacific Standard Time (PST), reconvening at 8 a.m. Friday, March 5 and Monday, March 8, each day through Thursday, March 11, 2021. All meetings are open to the public, except a Closed Session will be held from 8 a.m. to 9 a.m., Thursday, March 4, to address litigation and personnel matters. The Pacific Council will meet as late as necessary each day to complete its scheduled business.

ADDRESSES: Meetings of the Pacific Council and its advisory entities will be webinar only.

Council address: Pacific Fishery Management Council, 7700 NE Ambassador Place, Suite 101, Portland, OR 97220. Instructions for attending the meeting via live stream broadcast are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Mr. Chuck Tracy, Executive Director; telephone: (503) 820–2280 or (866) 806–7204 toll-free; or access the Pacific Council website, *www.pcouncil.org* for the proposed agenda and meeting briefing materials.

SUPPLEMENTARY INFORMATION: The March 4–5 and 8–11, 2021 meeting of the Pacific Council will be streamed live on the internet. The broadcasts begin initially at 9 a.m. PST Thursday, March 4, 2021 and continue at 8 a.m. Friday,

March 5, and Monday, March 8 daily through Thursday, March 11. No meetings are scheduled for Saturday, March 6 through Sunday, March 7, 2021. Broadcasts end when business for the day is complete. Only the audio portion and presentations displayed on the screen at the Pacific Council meeting will be broadcast. The audio portion for the public is listen-only except that an opportunity for oral public comment will be provided prior to Council Action on each agenda item. You can attend the webinar online using a computer, tablet, or smart phone, using the webinar application. Specific meeting information, including directions on how to join the meeting and system requirements will be provided in the meeting announcement on the Pacific Council's website (see *www.pcouncil.org*). It is recommended that you use a computer headset to listen to the meeting, but you may use your telephone for the audio-only portion of the meeting.

The following items are on the Pacific Council agenda, but not necessarily in this order. Agenda items noted as ''Final Action'' refer to actions requiring the Council to transmit a proposed fishery management plan, proposed plan amendment, or proposed regulations to the U.S. Secretary of Commerce, under Sections 304 or 305 of the Magnuson-Stevens Fishery Conservation and Management Act. Additional detail on agenda items, Council action, and advisory entity meeting times, are described in Agenda Item A.4, Proposed Council Meeting Agenda, and will be in the advance March 2021 briefing materials and posted on the Pacific Council website at *www.pcouncil.org* no later than Friday, February 12, 2021.

A. Call to Order
  1. Opening Remarks
  2. Roll Call
  3. Executive Director's Report
  4. Approve Agenda
B. Open Comment Period
  1. Comments on Non-Agenda Items
C. Administrative Matters
  1. Report of the Office of National Marine Sanctuaries (ONMS)
  2. Marine Planning Update
  3. Legislative Matters
  4. Approval of Council Meeting Record
  5. Membership Appointments and Council Operating Procedures
  6. Future Council Meeting Agenda and Workload Planning
D. Habitat Issues
  1. Current Habitat Issues
E. Salmon Management
  1. National Marine Fisheries Service Report
  2. Reintroduction of Salmon Above Grand Coulee Dam
  3. Review of 2020 Fisheries and Summary of 2021 Stock Forecasts
  4. Identify Management Objectives and Preliminary Definition of 2021 Management Alternatives
  5. Recommendations for 2021 Management Alternative Analysis
  6. Further Direction for 2021 Management Alternatives
  7. Further Direction for 2021 Management Alternatives
  8. Adopt 2021 Management Alternatives for Public Review
  9. Appoint Salmon Hearing Officers
F. Halibut Management
  1. Annual International Pacific Halibut Commission (IPHC) Meeting Report
  2. Incidental Catch Recommendations: Options for Salmon Troll and Final Action on Recommendations for Fixed Gear Sablefish Fisheries
G. Groundfish Management
  1. National Marine Fisheries Service Report
  2. Workload and New Management Measure Priorities
  3. Pacific Whiting Utilization in the Mothership Sector
  4. Inseason Adjustments—Final Action
  5. Electronic Monitoring Program Update
H. Highly Migratory Species Management
  1. National Marine Fisheries Service Report
  2. Review of Essential Fish Habitat—Phase 2
  3. Recommend International Management Activities
  4. Deep-Set Buoy Gear Permit Clarifications
  5. Biennial Harvest Specifications and Management Measures
I. Ecosystem Management
  1. California Current Ecosystem and Integrated Ecosystem Assessment (IEA) Report and Science Review Topics
  2. Climate and Communities Initiative Workshop Report
  3. Fishery Ecosystem Plan (FEP) Five-Year Review—Final Action

Advisory Body Agendas

Advisory body agendas will include discussions of relevant issues that are on the Pacific Council agenda for this meeting and may also include issues that may be relevant to future Council meetings. Proposed advisory body agendas for this meeting will be available on the Pacific Council website *www.pcouncil.org* no later than Friday, February 12, 2021.

Schedule of Ancillary Meetings

Day 1—Tuesday, March 2, 2021

Coastal Pelagic Species Advisory Subpanel—8 a.m.
Coastal Pelagic Species Management Team—8 a.m.
Ecosystem Advisory Subpanel—8 a.m.
Ad Hoc Ecosystem Workgroup—8 a.m.
Habitat Committee—8 a.m.
Scientific and Statistical Committee—8 a.m.

Day 2—Wednesday, March 3, 2021

Coastal Pelagic Species Advisory Subpanel—8 a.m.
Coastal Pelagic Species Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Ecosystem Advisory Subpanel—8 a.m.
Ad Hoc Ecosystem Workgroup—8 a.m.
Enforcement Consultants—8 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Scientific and Statistical Committee—8 a.m.
Legislative Committee—10 a.m.

Day 3—Thursday, March 4, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Necessary

Day 4—Friday, March 5, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Necessary

* No Meetings Scheduled for Saturday, March 6 through Sunday, March 7, 2021

Day 5—Monday, March 8, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.

Groundfish Management Team—8 a.m.
Highly Migratory Species Advisory Subpanel—8 a.m.
Highly Migratory Species Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Necessary

Day 6—Tuesday, March 9, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Groundfish Advisory Subpanel—8 a.m.
Groundfish Management Team—8 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants—As Necessary

Day 7—Wednesday, March 10, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Salmon Advisory Subpanel—8 a.m.
Salmon Technical Team—8 a.m.
Enforcement Consultants As Necessary

Day 8—Thursday, March 11, 2021

California State Delegation—7 a.m.
Oregon State Delegation—7 a.m.
Washington State Delegation—7 a.m.
Enforcement Consultants—As Necessary

Although non-emergency issues not contained in this agenda may come before the Pacific Council for discussion, those issues may not be the subject of formal Council action during these meetings. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice 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 Pacific Council's 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 at (503) 820–2412 at least 10 business days prior to the meeting date.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00561 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Pacific Islands Permit Family of Forms

The Department of Commerce will submit the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995, on or after the date of publication of this notice. We invite the general public and other Federal agencies to comment on proposed and continuing information collections, which help us assess the impact of our information collection requirements and minimize the public's reporting burden. Public comments were previously requested via the **Federal Register** on September 14, 2020, during a 60-day comment period. This notice allows for an additional 30 days for public comments.

Agency: NOAA National Marine Fisheries Service.

Title: Pacific Islands Permit Family of Forms.

OMB Control Number: 0648–0490.

Form Number(s): None.

Type of Request: Regular submission (revision of a currently approved collection).

Number of Respondents: 246.

Average Hours per Response:

- 15 minutes for Hawaii longline limited entry renewal online, 30 minutes for Hawaii longline limited entry renewal by emailed document submission.
- 1 hour for Hawaii longline limited entry permit transfer document.
- 30 minutes for Western Pacific (WP) general longline, WP receiving vessel, PRIA troll and handline, WP bottomfish, pelagic squid jig, crustacean, and WP precious coral applications.
- 45 minutes for American Samoa longline limited entry vessel registration.
- 75 minutes for American Samoa longline limited entry permit transfer, renewal, or additional permit applications.
- 2 hours for permit appeal or longline prohibited area exemption.

Total Annual Burden Hours: 135.

Needs and Uses: All vessel owners or permit holders fishing with specified gear in the federally managed fisheries covered by this information collection in the U.S. Exclusive Economic Zone around Hawaii, American Samoa, Guam, Northern Mariana Islands, and Pacific Remote Island Areas must have the permits and register their vessels to the permits. Each vessel that lands catch in these islands must be registered to a permit. NMFS, the Western Pacific Fishery Management Council, and Federal enforcement agencies use the information to monitor and manage the fisheries.

Affected Public: Individuals or households; Business or other for-profit organizations.

Frequency: As required.

Respondent's Obligation: Voluntary for open access permits; Required to Obtain or Retain Benefits for limited entry permits.

Legal Authority: 50 CFR 665.

This information collection request may be viewed at *https://www.reginfo.gov/public/do/PRAMain.* Follow the instructions to view the Department of Commerce collections currently under review by OMB.

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 *https://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 and entering the title of the collection or OMB Control Number 0648–0490.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00555 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA798]

Fisheries of the Gulf of Mexico and Atlantic; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 68 Assessment Webinar II for Gulf of Mexico and Atlantic scamp grouper.

SUMMARY: The SEDAR 68 assessment process of Gulf of Mexico and Atlantic scamp will consist of a series of data

and assessment webinars, and a Review Workshop. See **SUPPLEMENTARY INFORMATION**.

DATES: The SEDAR 68 Assessment Webinar II will be held February 12, 2021, from 11 a.m. to 2 p.m., Eastern Time.

ADDRESSES: The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop, (2) a series of assessment webinars, and (3) A Review Workshop. The product of the Data Workshop is a report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The assessment webinars produce a report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The product of the Review Workshop is an Assessment Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion during the Assessment Webinar are as follows:

1. Using datasets and initial assessment analysis recommended from the data webinars, panelists will employ assessment models to evaluate stock status, estimate population benchmarks and management criteria, and project future conditions.

2. Participants will recommend the most appropriate methods and configurations for determining stock status and estimating population parameters.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice 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

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00562 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Individual Fishing Quotas for Pacific Halibut and Sablefish in the Alaska Fisheries

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 15, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0272 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Gabrielle Aberle, 907–586–7228.

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting renewal of a currently approved information collection that contains requirements for the Pacific Halibut and Sablefish Individual Fishing Quota Program (IFQ Program).

The International Pacific Halibut Commission (IPHC) and NMFS Alaska Region manage fishing for Pacific halibut (*Hippoglossus stenolepis*) through regulations established under the authority of the *Northern Pacific Halibut Act of 1982, 16 U.S.C. 773c* (Halibut Act). The IPHC promulgates regulations governing the halibut fishery under the *Convention between the United States and Canada for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea* (Convention). Regulations pursuant to the Convention are set forth at *50 CFR 300 subpart E.*

The North Pacific Fishery Management Council, under the authority of the Halibut Act (with respect to Pacific halibut) and the *Magnuson-Stevens Fishery Conservation and Management Act* (16 U.S.C. 1801 *et seq.;* Magnuson-Stevens Act) (with respect to sablefish), manages the IFQ Program. NMFS Alaska Region administers the IFQ Program. Regulations implementing the IFQ Program are set forth at *50 CFR part 679.*

The IFQ Program provides a limited access system for Pacific halibut in Convention waters in and off Alaska and sablefish fisheries in waters of the Exclusive Economic Zone off Alaska. The IFQ Program provides coastal Alaska communities a source of revenue, while maintaining the social and economic character of the fixed-gear sablefish and halibut fisheries. The IFQ Program provides economic stability for these fisheries while reducing many of the conservation and management problems commonly associated with open-access fisheries. The IFQ Program includes several provisions, such as ownership caps and vessel use caps that protect small producers, part-time participants, and entry-level participants that otherwise could be adversely affected by excessive consolidation.

Participation in the IFQ Program is limited to persons that hold quota share (QS), although there are several very limited provisions for ''leasing'' of annual IFQ. QS is a transferable permit that was initially issued to persons who owned or leased vessels that made legal commercial fixed-gear landings of Pacific halibut or sablefish in the waters off Alaska from 1988 through 1990. Currently, QS may only be obtained through transfer.

Annually, NMFS issues eligible QS holders an IFQ fishing permit that authorizes participation in the IFQ fisheries. Those to whom IFQ permits are issued may harvest their annual allocation at any time during the eight plus-month IFQ halibut and sablefish seasons.

More information on the IFQ Program is provided on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/alaska/sustainable-fisheries/pacific-halibut-and-sablefish-individual-fishing-quota-ifq-program.*

Some of the collection instruments in this information collection are used by participants in the Western Alaska Community Development Quota (CDQ) Program. The purpose of the CDQ Program is to provide eligible western Alaska villages with the opportunity to participate and invest in fisheries in the Bering Sea and Aleutian Islands Management Area (BSAI); to support economic development in western Alaska; to alleviate poverty and provide economic and social benefits for residents of western Alaska; and to achieve sustainable and diversified local economies in western Alaska. In fitting with these goals, NMFS allocates a portion of the annual catch limits for a variety of commercially valuable marine species in the BSAI to the CDQ Program. Pacific halibut is one of these species. More information on the CDQ Program is provided on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/alaska/sustainable-fisheries/community-development-quota-cdq-program.* Information collection requirements for the CDQ Program are approved under OMB Control Number 0648–0269.

This information collection is required to manage commercial halibut and sablefish fishing under the Magnuson-Stevens Act, the Halibut Act, and under 50 CFR parts 300 and 679.

This information collection contains the forms used by participants in the IFQ Program to apply for, renew, or replace permits; transfer or lease IFQ and QS; determine compliance with IFQ program requirements; and designate a beneficiary for a QS holder. Two of the permit applications are also used by participants in the CDQ Program. This information collection also contains annual reports and other collections submitted by telephone or other methods and that do not have forms.

The type of information collected includes information on the applicants, transferors, transferees, permits, IFQ or QS types and owners, beneficiaries, vessels, business operations, medical declarations, landings, gear types, products, and harvests and harvest areas.

This information is used to identify and authorize participants in the halibut and sablefish fisheries, to track and transfer quota share, to limit transfers to authorized participants, and to monitor quota share balances and harvest in these fisheries.

II. Method of Collection

The information is collected primarily by mail, delivery, fax, email, or telephone. Registered buyers may use eFISH to renew or amend their registered buyer permit. *eFISH* is the NMFS Alaska Region online Fisheries Information System. The forms and applications are available as fillable pdfs on the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/permit/alaska-ifq-halibut-sablefish-and-cdq-halibut-program-fishery-applications-and-reporting.*

III. Data

OMB Control Number: 0648–0272.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions.

Estimated Number of Respondents: 2,559.

Estimated Time per Response: Application for IFQ/CDQ Hired Master Permit, 1 hour; Application for IFQ/CDQ Registered Buyer Permit, 30 minutes; Application for Replacement of Certificates or Permits, 30 minutes; Application for Eligibility to Receive QS/IFQ by Transfer, 2 hours; QS Holder: Identification of Ownership Interest, 2 hours; Application for Transfer of QS, 2 hours; Application for Transfer of QS/IFQ by Self Sweep Up, 2 hours; Application for Medical Transfer of IFQ, 1.5 hours; Application for Temporary Transfer of Halibut/Sablefish IFQ, 2 hours; Annual Report for CDQ IFQ Transfers, 40 hours; QS/IFQ Beneficiary Designation Form, 30 minutes; Appeals, 4 hours; IFQ Administrative Waiver, 6 minutes; Prior Notice of Landing, 15 minutes; IFQ Departure Report, 15 minutes; Transshipment Authorization, 12 minutes; Dockside sales, 6 minutes; Application for a Non-profit Corporation to be Designated as a Recreational Quota Entity, 200 hours; Application for Transfer of Quota Share To or From a Recreational Quota Entity, 2 hours; Recreational Quota Entity Annual Report, 40 hours.

Estimated Total Annual Burden Hours: 4,588 hours.

Estimated Total Annual Cost to Public: $21,471.

Respondent's Obligation: Required to Obtain or Retain Benefits; Mandatory.

Legal Authority: Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.;* Northern Pacific Halibut Act of 1982, 16 U.S.C. 773c.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request

to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00553 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Alaska Chinook Salmon Economic Data Reports (EDR)

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 15, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0633 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Scott Miller, 907–586–7416, *scott.miller@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

The National Marine Fisheries Service (NMFS), Alaska Regional Office, is requesting renewal of the currently approved information collection for the Chinook Salmon Economic Data Report Program.

National Marine Fisheries Service (NMFS) manages the Bering Sea pollock fishery under the American Fisheries Act (AFA) (16 U.S.C. 1851). AFA fishing vessels harvest pollock in the Bering Sea pollock fishery using pelagic (midwater) trawl gear, which consists of large nets towed through the water by the vessel. At times, Chinook salmon and pollock occur in the same locations in the Bering Sea; consequently, Chinook salmon are incidentally caught in the nets as pollock is harvested. This incidental catch is called bycatch and is also called prohibited species catch (PSC).

The Chinook Salmon Economic Data Report (Chinook Salmon EDR) Program provides NMFS and the North Pacific Fishery Management Council (Council) with data to evaluate the effectiveness of Chinook salmon bycatch management measures for the Bering Sea pollock fishery that were implemented under Amendment 91 to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (75 FR 53026, August 30, 2010). The Chinook Salmon EDR Program provides information to the analysts and the Council and is intended to evaluate the effectiveness of the Chinook Salmon Incentive Plan Agreement (IPA) (see OMB Control No. 0648–0401). The Chinook Salmon EDR Program is intended to evaluate where, when, and how pollock fishing and salmon bycatch occur and to provide data to study and verify conclusions drawn by industry in the IPA annual reports.

The Chinook Salmon EDR Program is managed primarily by the Alaska Fisheries Science Center, with support from NMFS Alaska Region, and is administered in collaboration with Pacific States Marine Fisheries Commission (Pacific States). The EDR is a mandatory reporting requirement under 50 CFR 679.65 for all entities participating in the AFA BSAI pollock trawl fishery, including vessel masters and businesses that own or lease one or more AFA-permitted vessels active in fishing or processing BSAI pollock, Western Alaska Community Development Quota (CDQ) groups receiving allocations of BSAI pollock, and representatives of sector entities receiving allocations of Chinook salmon PSC from NMFS.

The Chinook Salmon EDR Program consists of three separate forms:

- Chinook PSC Allocation In-season Compensated Transfer Report—Collects transfer and monetary compensation information for Chinook salmon PSC allocations.
- Vessel Fuel Survey—Collects fuel consumption and average fuel costs.
- Vessel Master Survey—Collects vessel master impressions of fishing experiences during the year and of Chinook salmon PSC avoidance efforts.

The Chinook Salmon EDR Program also includes a means for NMFS to verify the data submitted in the Compensated Transfer Report. These collections are unchanged since the previous renewal in 2018.

II. Method of Collection

The Compensated Transfer Report, Vessel Fuel Survey, and Vessel Master Survey are completed and submitted using the economic data reporting web application on the Pacific States Marine Fisheries Commission website at *https://www.psmfc.org//chinookedr/.* In 2019, NMFS discontinued automated auditing of EDR Program reporting. Audits will now only be conducted in cases of suspected gross noncompliance. Future audits will be conducted by a designated auditor and an audit report will be provided to NMFS electronically.

III. Data

OMB Control Number: 0648–0633.

Form Number(s): None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Business or other for-profit organizations.

Estimated Number of Respondents: 117.

Estimated Time per Response: Compensated Transfer Report: 40 hours; Vessel Fuel Survey: 4 hours; Vessel Master Survey: 4 hours; CTR Verification Audit: 4 hours.

Estimated Total Annual Burden Hours: 728 hours.

Estimated Total Annual Cost to Public: $0.

Respondent's Obligation: Mandatory.

Legal Authority: American Fisheries Act (16 U.S.C. 1851); Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a)

Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00552 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA730]

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 (MAFMC's) Tilefish Advisory Panel will hold a public meeting.

DATES: The meeting will be held on Wednesday, February 17, 2021, from 9 a.m. to 12 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The meeting will be held via webinar, which can be accessed at: *http://mafmc.adobeconnect.com/tf2021ap/.* Meeting audio can also be accessed via telephone by dialing 1–800–832–0736 and entering room number 5068609.

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *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 for the Advisory Panel to develop a fishery performance report (FPR) for both golden and blueline tilefish. The intent of the FPR is to facilitate a venue for structured input from the Advisory Panel for the tilefish specifications processes. The FPR will be used by the MAFMC's Scientific and Statistical Committee and the Tilefish Monitoring Committee when reviewing golden tilefish specifications and setting blueline tilefish specifications.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office, (302) 526–5251, at least 5 days prior to the meeting date.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00557 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Agency Information Collection Activities; Submission to the Office of Management and Budget (OMB) for Review and Approval; Comment Request; Protocol for Access to Tissue Specimen Samples From the National Marine Mammal Tissue Bank

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before March 15, 2021.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *Adrienne.thomas@noaa.gov.* Please reference OMB Control Number 0648–0468 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Stephen Manley, Biologist, National Marine Fisheries Service, 1315 East-West Highway, #13604, Silver Spring, MD 20910, (301)-427–8476, *stephen.manley@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

In 1989, the National Marine Mammal Tissue Bank (NMMTB) was established by the National Marine Fisheries Service (NMFS) Office of Protected Resources (OPR) in collaboration with the National Institute of Standards and Technology (NIST), Minerals Management Service (MMS), and the U.S. Geological Survey/Biological Resources Division (USGS/BRD). The NMMTB provides protocols, techniques, and physical facilities for the long-term storage of tissues from marine mammals. Scientists can request tissues from this repository for retrospective analyses to determine environmental trends of contaminants and other substances of interest. Under 16 U.S.C. 1421f section 407(d)(1) of the Marine Mammal Protection Act, the NMFS must establish criteria for access to marine mammal tissues in the NMMTB and make those available for public comment and review. This was accomplished through the proposed rule RIN 0648–AQ51, published on 11/12/2002, and codified in 50 CFR 216.47.

The NMMTB collects, processes, and stores tissues from specific indicator species (*e.g.,* Atlantic bottlenose dolphins, Atlantic white sided dolphins, pilot whales, harbor porpoises), animals from mass strandings, animals that have been

obtained incidental to commercial fisheries, animals taken for subsistence purposes, biopsies, and animals from unusual mortality events through two projects, the Marine Mammal Health and Stranding Response Program (MMHSRP) and the Alaska Marine Mammal Tissue Archival Project (AMMTAP).

The purposes of this collection of information are: (1) To enable NOAA to allow the scientific community the opportunity to request tissue specimen samples from the NMMTB and, (2) to enable the Marine Mammal Health and Stranding Response Program (MMHSRP) of NOAA to assemble information on all specimens submitted to the National Institute of Standards and Technology's Biorepository (NIST Biorepository), which includes the NMMTB.

This request is for revision and extension of a current information collection. Most revisions were grammatical. However, two changes were made to data fields in order to streamline data collection. Specifically, instead of relying on a ''please specify'' text field, more checkbox options have been added to the ''collection type'' field, and the ''method used to age'' field on the National Marine Mammal Tissue Bank Form. No changes have been made to the National Marine Mammal Tissue Bank Tissue Request Form.

II. Method of Collection

Respondents must complete a specimen banking information sheet for every sample submitted to the Bank. Methods of submitting reports include internet, mail and facsimile transmission of paper forms. Those requesting samples send the information, and their research findings, mainly via email.

III. Data

OMB Control Number: 0648–0468.

Form Number(s): None.

Type of Review: Regular submission (Revision and extension of a current information collection).

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government; Federal government.

Estimated Number of Respondents: 100 specimen submission forms (from ~20 different organizations); 5 requests for tissue samples.

Estimated Time Per Response: Request for tissue sample, 2 hours. Specimen submission form, 45 minutes.

Estimated Total Annual Burden Hours: 85.

Estimated Total Annual Cost to Public: $152.

Respondent's Obligation: Mandatory.

Legal Authority: Under 16 U.S.C. 1421f section 407(d)(1) of the Marine Mammal Protection Act, the NMFS must establish criteria for access to marine mammal tissues in the NMMTB and make those available for public comment and review.

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. 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 may 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.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Chief Information Officer, Commerce Department.

[FR Doc. 2021–00554 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA747]

Endangered and Threatened Species; Initiation of a 5-Year Review for the Beringia and Okhotsk Distinct Population Segments of the Bearded Seal

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

ACTION: Notice of initiation of 5-year review; request for information.

SUMMARY: NMFS announces its intent to conduct a 5-year review of the threatened Beringia and Okhotsk distinct population segments (DPSs) of the Pacific bearded seal subspecies *Erignathus barbatus nauticus.* NMFS is required by the Endangered Species Act (ESA) to conduct 5-year reviews to ensure that listing classifications of species are accurate. The 5-year review must be based on the best scientific and commercial data available at the time of the review. We request submission of any such information on these bearded seal DPSs, particularly information on their status, threats, and recovery, that has become available since their listing on December 28, 2012.

DATES: To allow us adequate time to conduct this review, we must receive your information no later than March 26, 2021. However, we will continue to accept new information about any listed species at any time.

ADDRESSES: Submit your information, identified by docket number NOAA–NMFS–2020–0030, by either of the following methods:

- *Federal e-Rulemaking Portal:* Go to *www.regulations.gov.* In the Search box, enter the above docket number for this notice. Then, click on the Search icon. On the resulting web page, click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written information to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: Records Office. Mail comments to P.O. Box 21668, Juneau, AK 99802–1668.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the comment period ends. All comments received are a part of the public record and NMFS will post the comments 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 is publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Tammy Olson, NMFS Alaska Region, 907–271–2373, *tammy.olson@noaa.gov.*

SUPPLEMENTARY INFORMATION: Section 4(c)(2)(A) of the ESA requires that we conduct a review of listed species at least once every 5 years. The regulations in 50 CFR 424.21 require that we publish a notice in the **Federal Register** announcing species currently under active review. On the basis of such reviews, under section 4(c)(2)(B) we determine whether a listed species should be delisted, or reclassified from endangered to threatened or from threatened to endangered (16 U.S.C. 1533(c)(2)(B)). As described by the regulations in 50 CFR 424.11(e), the Secretary shall delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available: (1) The species is extinct; (2) the species does not meet the definition of an endangered species or a threatened species; or (3) the listed entity does not meet the statutory definition of a species. Any change in Federal classification would require a separate rulemaking process.

The Beringia and Okhotsk DPSs of the bearded seal were listed as threatened under the ESA on December 28, 2012 (77 FR 76740). Background information on these bearded seal DPSs is available on the NMFS website at: *http://www.fisheries.noaa.gov/species/bearded-seal.*

Determining if a Species Is Threatened or Endangered

Section 4(a)(1) of the ESA requires that we determine whether a species is endangered or threatened based on one or more of the five following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. Section 4(b) also requires that our determination be made on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation to protect such species.

Public Solicitation of New Relevant Information

To ensure that the 5-year review is complete and based on the best scientific and commercial data available, we are soliciting new information from the public, governmental agencies, Tribes, the scientific community, industry, environmental entities, and any other interested parties concerning the status of the listed bearded seal DPSs. Categories of requested information include: (1) Species biology including, but not limited to, population trends, distribution, abundance, demographics, and genetics; (2) habitat conditions including, but not limited to, amount, distribution, and important features for conservation; (3) status and trends of threats; (4) conservation measures that have been implemented that benefit the species, including monitoring data demonstrating effectiveness of such measures; (5) need for additional conservation measures; and (6) other new information, data, or corrections including, but not limited to, taxonomic or nomenclatural changes and improved analytical methods for evaluating extinction risk.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: January 7, 2021.

Angela Somma,

Chief, Endangered Species Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2021–00500 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA792]

Fisheries of the U.S. Caribbean; Southeast Data, Assessment, and Review (SEDAR); Public Meeting

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

ACTION: Notice of SEDAR 80 Life History Topical Working Group Data Scoping webinar for U.S. Caribbean Queen Triggerfish.

SUMMARY: The SEDAR 80 stock assessment of U.S. Caribbean queen triggerfish will consist of a series of data webinars. See **SUPPLEMENTARY INFORMATION.**

DATES: The SEDAR 80 Life History Topical Working Group Data Scoping webinar will be held on February 10, 2021, from 2 p.m. to 4 p.m., Eastern.

ADDRESSES: *Meeting address:* The meeting will be held via webinar. The webinar is open to members of the public. Those interested in participating should contact Julie A. Neer at SEDAR (see **FOR FURTHER INFORMATION CONTACT**) to request an invitation providing webinar access information. Please request webinar invitations at least 24 hours in advance of each webinar.

SEDAR address: 4055 Faber Place Drive, Suite 201, North Charleston, SC 29405.

FOR FURTHER INFORMATION CONTACT: Julie A. Neer, SEDAR Coordinator; (843) 571–4366; email: *Julie.neer@safmc.net.*

SUPPLEMENTARY INFORMATION: The Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils, in conjunction with NOAA Fisheries and the Atlantic and Gulf States Marine Fisheries Commissions have implemented the Southeast Data, Assessment and Review (SEDAR) process, a multi-step method for determining the status of fish stocks in the Southeast Region. SEDAR is a multi-step process including: (1) Data Workshop; (2) Assessment Process utilizing webinars; and (3) Review Workshop. The product of the Data Workshop is a data report that compiles and evaluates potential datasets and recommends which datasets are appropriate for assessment analyses. The product of the Assessment Process is a stock assessment report that describes the fisheries, evaluates the status of the stock, estimates biological benchmarks, projects future population conditions, and recommends research and monitoring needs. The assessment is independently peer reviewed at the Review Workshop. The product of the Review Workshop is a Summary documenting panel opinions regarding the strengths and weaknesses of the stock assessment and input data. Participants for SEDAR Workshops are appointed by the Gulf of Mexico, South Atlantic, and Caribbean Fishery Management Councils and NOAA Fisheries Southeast Regional Office, HMS Management Division, and Southeast Fisheries Science Center. Participants include data collectors and database managers; stock assessment scientists, biologists, and researchers; constituency representatives including fishermen, environmentalists, and NGO's; International experts; and staff of Councils, Commissions, and state and federal agencies.

The items of discussion in the Data Scoping webinar are as follows:

- Participants will discuss what life history data may be available for use in the assessment of U.S. Caribbean Queen Triggerfish.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues

arising after publication of this notice 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

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to the Council office (see **ADDRESSES**) at least 5 business days prior to each workshop.

Note: The times and sequence specified in this agenda are subject to change.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00560 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XA762]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public meeting of its Herring Advisory Panel via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Tuesday, February 23, 2021 at 9:30 a.m. Webinar registration URL information: *https://attendee.gotowebinar.com/register/5521626860224837390.*

ADDRESSES: *Council address:* New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Thomas A. Nies, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Advisory Panel will meet to review and discuss 2021 work priorities for the Atlantic Herring Fishery Management Plan including: (1) A framework action that is considering spawning closures on Georges Bank; (2) development of a formal rebuilding plan for Atlantic herring; (3) review and potentially adjust accountability measures (AMs) in the herring plan; and (4) coordinate with the Mid-Atlantic Fishery Management Council (MAFMC) and Atlantic States Marine Fisheries Commission (ASMFC) on various herring management issues (*i.e.,* river herring and shad (RH/S)). Other business will be discussed, as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Thomas A. Nies, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

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

Dated: January 8, 2021.

Rey Israel Marquez,

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

[FR Doc. 2021–00559 Filed 1–12–21; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Department of the Air Force

[Docket ID: USAF–2020–HQ–0012]

Proposed Collection; Comment Request

AGENCY: Department of the Air Force, Department of Defense (DoD).

ACTION: Information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* the 711 Human Performance Wing/United States Air Force School of Aerospace Medicine announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on: Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by March 15, 2021.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

Instructions: All submissions received must include the agency name, docket number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

Any associated form(s) for this collection may be located within this same electronic docket and downloaded for review/testing. Follow the instructions at *http://www.regulations.gov* for submitting comments. Please submit comments on any given form identified by docket number, form number, and title.

FOR FURTHER INFORMATION CONTACT: To request more information on this proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to the United States Air Force School of Aerospace Medicine/FESP, ATTN: Rachael N. Martinez, 2510 North, 5th St., Building 840, Fairborn, OH 45324; 773.251.2451 or email at *rachael.martinez.1@us.af.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Air Force Embedded Care

Access Interview Guide; OMB Control Number 0701–XXXX.

Needs and Uses: The information collection requirement is necessary to receive verbal feedback from U.S. Air Force embedded mental healthcare providers (who are contractors) on their experiences providing mental healthcare services to airmen within the unit. These interviews are part of a programmatic improvement study to examine the experiences of embedded mental healthcare providers as well as the airmen that they serve in order to improve delivery of care. The results of this short-term study will be used to shape line and medical leadership strategies geared toward improving embedded mental healthcare capabilities for airmen in tip-of-the-spear communities, as well as readiness and availability of airmen in these environments.

Affected Public: Individuals or households.

Annual Burden Hours: 15.

Number of Respondents: 30.

Responses per Respondent: 1.

Annual Responses: 30.

Average Burden per Response: 30 minutes.

Frequency: Annually.

Respondents are U.S. Air Force embedded mental healthcare providers (*e.g.,* psychologists, social workers) who are embedded within units to provide on-the-spot consultation to airmen. Embedded mental healthcare providers are comprised of U.S. Air Force military members, civilians, and contractors. This Information Collection Notice is to speak with contractors, specifically, in an embedded mental healthcare role about the barriers and strategies encountered in their role.

Dated: January 7, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–00376 Filed 1–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2020–HQ–0016]

Submission for OMB Review; Comment Request

AGENCY: Department of the Army, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by February 12, 2021.

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: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Installation Management Command Survivor Outreach Service System (SOS IMCOM); OMB Control Number 0702–XXXX.

Type of Request: New collection.

Number of Respondents: 72,307.

Responses per Respondent: 2.49.

Annual Responses: 180,044.

Average Burden per Response: 18 minutes.

Annual Burden Hours: 54,013.

Needs and Uses: Survivor Outreach Services is an Army-wide program that provides dedicated and comprehensive support services to all Family members of Soldiers who die while on Active Duty, including Regular Army, United States Army National Guard (ARNG) and Reserves patrons. Survivor Outreach Services Support Coordinators serve as the main Survivor advocate. They facilitate support groups, provide life skills education, assist Survivors in managing applicable life-long benefit transition milestones, connect Survivors with counseling resources, and represent the command in contacts with community organizations. Survivor Outreach Services Financial Counselors help Survivors by assisting with budget counseling, debt management, education, and higher education needs. SOS staff members are required to make periodic communication with Survivors—at a minimum of one contact annually—to conduct well-being checks and milestone management reviews or determine the level of support Survivors desire. Information gathered in these meetings is input into the SOS application collection instrument by SOS staff members. No customers have access to the collection instrument. SOS staff members collect the information from the Survivors and document the information as a direct contact within the SOS application case notes. The successful end result of the information collection as a whole is an organized and up-to-date database of essential information on Survivors that allows SOS to better provide the support they deserve.

Affected Public: Business or other for-profit; individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: January 8, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–00516 Filed 1–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

[Docket Number DARS–2020–0042; OMB Control Number 0704–0341]

Information Collection Requirement; Defense Federal Acquisition Regulation Supplement; Part 239, Acquisition of Information Technology

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Notice.

SUMMARY: The Defense Acquisition Regulations System has submitted to OMB for clearance, the following proposed revision and extension of a collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by February 12, 2021.

FOR FURTHER INFORMATION CONTACT: Ms. Heather Kitchens, 571–372–6104.

SUPPLEMENTARY INFORMATION:

Title and OMB Number: Defense Federal Acquisition Regulation Supplement (DFARS) Part 239, Acquisition of Information Technology, and the associated clause at DFARS 252.239–7000; OMB Control Number 0704–0341.

Affected Public: Businesses or other for-profit and not-for-profit institutions.

Respondent's Obligation: Required to obtain or retain benefits.

Type of Request: Revision and extension of a currently approved collection.

Reporting Frequency: On occasion.

Number of Respondents: 820.

Responses per Respondent: Approximately 7.

Annual Responses: 5,932.

Average Burden per Response: Approximately 0.5 hour.

Annual Burden Hours: 3,025.

Needs and Uses: This requirement provides for the collection of information from contractors regarding security of information technology and proposals from common carriers to perform special construction under contracts for telecommunications services. Contracting officers and other DoD personnel use the information to ensure that information technology is protected and to establish reasonable prices for special construction by common carriers.

The clause at DFARS 252.239–7000, Protection Against Compromising Emanations, requires that the contractor provide, upon request of the contracting officer, documentation that information technology used or provided under the contract meets appropriate information assurance requirements. DFARS 239.7408 requires the contracting officer to obtain a detailed special construction proposal from a common carrier that submits a proposal or quotation that has special construction requirements related to the performance of basic telecommunications services.

Comments and recommendations on the proposed information collection should be sent to Ms. Susan Minson, DoD Desk Officer, at *Oira_submission@omb.eop.gov.* Please identify the proposed information collection by DoD Desk Officer and the Docket ID number and title of the information collection.

You may also submit comments, identified by docket number and title, by the following method: *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.

DoD Clearance Officer: Ms. Angela James. Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Jennifer D. Johnson,

Regulatory Control Officer, Defense Acquisition Regulations System.

[FR Doc. 2021–00627 Filed 1–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

[Docket ID: DoD–2020–OS–0086]

Submission for OMB Review; Comment Request

AGENCY: Defense Counterintelligence and Security Agency, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by February 12, 2021.

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: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: National Industrial Security System (NISS) OMB Control Number 0704–0571.

Type of Request: Revision.

Number of Respondents: 11,671.

Responses per Respondent: 1.

Annual Responses: 11,671.

Average Burden per Response: 60 minutes.

Annual Burden Hours: 11,671.

Needs and Uses: The information collection requirement is necessary for DCSA to oversee the National Industrial Security Program (NISP) pursuant to Executive Order 12829. The National Industrial Security System (NISS) is the primary collection instrument for DCSA oversight of the NISP and maintaining data associated with cleared facilities and their oversight. The NISS is the repository of records related to the maintenance of information pertaining to contractor facility security clearances (FCL) and contractor capabilities to protect classified information in its possession. The information is utilized to determine if a company and its key management personnel are eligible for issuance of a facility clearance in accordance with NISPOM requirements. In addition, information is utilized to inform Government Contracting Activities (GCAs) of contractor's ability to maintain facility clearance status and/or storage capability as well as to analyze vulnerabilities identified within security programs and ensure proper mitigation actions are taken to preclude unauthorized disclosure of classified information.

Affected Public: Business or other for-profit; Federal Government; not-for-profit institutions.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

MB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: January 8, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–00521 Filed 1–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2020–OS–0085]

Submission for OMB Review; Comment Request

AGENCY: Defense Threat Reduction Agency (DTRA), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by February 12, 2021.

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: Angela James, 571–372–7574, or *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Nuclear Test Personnel Review Forms; DTRA Form 150, DTRA Form 150A, DTRA Form 150B, DTRA Form 150D; OMB Control Number 0704–0447.

Type of Request: Revision.

Number of Respondents: 278.

Responses per Respondent: 1.

Annual Responses: 278.

Average Burden per Response: 24.4 minutes.

Annual Burden Hours: 113.

Needs and Uses: The information collection requirement is necessary to provide recognition, verify participation, and/or collect irradiation scenario information from nuclear test participants to perform radiation dose assessments. This information is used to award the Atomic Veterans Service Certificate (AVSC) to eligible veterans and to process claims submitted by veterans seeking radiogenic disease compensation from the Department of Veterans Affairs (VA) and/or the Department of Justice (DOJ). This information may also be used in approved veteran epidemiology studies that study the health impact of nuclear tests on U.S. veterans. Respondents include Veterans and civilian test participants, and their representatives, who apply for the AVSC or file radiogenic disease compensation claims with the VA or DOJ and require information from the Department of Defense.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

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

Instructions: All submissions received must include the agency name, Docket ID number, and title for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the internet at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information.

DOD Clearance Officer: Ms. Angela James.

Requests for copies of the information collection proposal should be sent to Ms. James at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: January 8, 2021.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2021–00520 Filed 1–12–21; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Equity Assistance Centers

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education is issuing a notice inviting applications for fiscal year (FY) 2021 for the Equity Assistance Centers, Assistance Listing Number 84.004D. This notice relates to the approved information collection under OMB control number 1894–0006.

DATES:

Applications Available: January 13, 2021.

Deadline for Transmittal of Applications: March 29, 2021.

Deadline for Intergovernmental Review: May 28, 2021.

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: Ed Vitelli, U.S. Department of Education, 400 Maryland Avenue SW, room 3E106, Washington, DC 20202. Telephone: (202) 453–6203. Email: *Edward.Vitelli@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: The Equity Assistance Centers (EAC) program is authorized under title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c–2000c–2, 2000c–5, and the implementing regulations in 34 CFR part 270. This program awards grants through cooperative agreements to operate regional EACs that provide technical assistance (including training) at the request of school boards and other responsible governmental agencies in the preparation, adoption, and implementation of plans for the desegregation of public schools—which in this context means plans for equity (including desegregation based on race, national origin, sex, and religion)—and in the development of effective methods of coping with special educational problems occasioned by desegregation. Desegregation assistance, per 34 CFR 270.4, may include, among other activities: (1) Dissemination of information regarding effective methods of coping with special educational problems occasioned by desegregation; (2) assistance and advice in coping with these problems; and (3) training designed to improve the ability of teachers, supervisors, counselors, parents, community members, community organizations, and other elementary or secondary school personnel to deal effectively with special educational problems occasioned by desegregation. A project must provide technical assistance in all four of the desegregation assistance areas: race, sex, national origin, and religion desegregation. Additionally, EACs provide critical support to help ensure that all students have access to

positive and safe learning environments that meet their needs and are free of bullying, violence, and disruptive actions.

Desegregation assistance services provided by EACs may also help to alleviate the adverse educational effects of the extraordinary circumstances caused by the novel coronavirus of 2019 (COVID–19). These circumstances have highlighted inequity with respect to a local educational agency's (LEA) ability to leverage remote learning to support all students. Inadequate support for continuity of learning is disproportionately affecting students who already faced special educational problems occasioned by desegregation pre-pandemic (*e.g.,* English learners). EACs may, where requested, assist clients in responding to special educational problems occasioned by desegregation related to remote learning, including, for example, online bullying or exposure to harassment.

Where requested to assist in the development of desegregation plans, EACs can help eligible entities develop strategies for incorporating equitable access to educational opportunities to best meet individual student needs into voluntary desegregation plans consistent with applicable Federal, State, and local laws. Such strategies could include use of public magnet schools; remote learning; work-based learning opportunities (*e.g.,* apprenticeships); dual or concurrent enrollment programs, early college high schools, or other programs that enable secondary school students to begin earning credit toward a postsecondary degree or credential; access to services or programs for students aspiring to postsecondary education; credit recovery, accelerated learning, or tutoring in instances to help create a pipeline for participation of students who have not had access to these programs based on race, national origin, sex, or religion.

Priority: This notice contains one competitive preference priority. This priority is from the Department's Administrative Priorities for Discretionary Grant Programs, published in the **Federal Register** on March 9, 2020 (85 FR 13640) (the Administrative Priorities).

Competitive Preference Priority: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, this priority is a competitive preference priority. Under 34 CFR 75.105(c)(2)(i), we award an additional three points to an application that meets this priority.

This priority is:

New Potential Grantees.

(a) Under this priority, an applicant must demonstrate that:

(i) The applicant has not had an active discretionary grant under the program from which it seeks funds, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, in the seven years before the deadline date for submission of applications under the program; and

(ii) The applicant has not had an active discretionary grant from the Department, including through membership in a group application submitted in accordance with 34 CFR 75.127–75.129, in the one year before the deadline date for submission of applications under the program.

(b) For the purpose of this priority, a grant or contract is active until the end of the grant's or contract's project or funding period, including any extensions of those periods that extend the grantee's or contractor's authority to obligate funds.

Note: For new potential grantees unfamiliar with grantmaking at the Department, please consult our funding basics resource at *www2.ed.gov/documents/funding-101/funding-101-basics.pdf* or a more detailed resource at *www2.ed.gov/documents/funding-101/funding-101.pdf.*

Definitions: For the convenience of the applicant, we are highlighting the following definitions, for this competition. They include definitions from the regulations for the EAC program in 34 CFR part 270.7, and the definitions of ''demonstrates a rationale'' and ''logic model,'' which are from 34 CFR 77.1.

Demonstrates a rationale means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Desegregation assistance means the provision of technical assistance (including training) in the areas of race, sex, national origin, and religion desegregation of public elementary and secondary schools.

Desegregation assistance areas mean the areas of race, sex, national origin, and religion desegregation.

English learner has the same meaning as defined in section 8101(20) of the Elementary and Secondary Education Act, as amended.

Equity Assistance Center means a regional desegregation technical assistance and training center funded under this part.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

National origin desegregation means the assignment of students to public schools and within those schools without regard to their national origin, including providing students such as those who are English learners with a full opportunity for participation in all educational programs regardless of their national origin.

Public school means any elementary or secondary educational institution operated by a State, subdivision of a State, or governmental agency within a State, or operated wholly or predominantly from or through the use of governmental funds or property, or funds or property derived from governmental sources.

Public school personnel means school board members and persons who are employed by or who work in the schools of a responsible governmental agency, as that term is defined in this section.

Race desegregation means the assignment of students to public schools and within those schools without regard to their race, including providing students with a full opportunity for participation in all educational programs regardless of their race. ''Race desegregation'' does not mean the assignment of students to public schools to correct conditions of racial separation that are not the result of State or local law or official action.

Religion desegregation means the assignment of students to public schools and within those schools without regard to their religion, including providing students with a full opportunity for participation in all educational programs regardless of their religion.

Responsible governmental agency means any school board, State, municipality, LEA, or other governmental unit legally responsible for operating a public school or schools.

School board means any agency or agencies that administer a system of one or more public schools and any other agency that is responsible for the assignment of students to or within that system.

Sex desegregation means the assignment of students to public schools and within those schools without regard to their sex (including transgender status; gender identity; sex stereotypes, such as treating a person differently because he or she does not conform to sex-role expectations because he or she

is attracted to or is in a relationship with a person of the same sex; and pregnancy and related conditions), including providing students with a full opportunity for participation in all educational programs regardless of their sex.

Special educational problems occasioned by desegregation means those issues that arise in classrooms, schools, and communities in the course of desegregation efforts based on race, national origin, sex, or religion. The phrase does not refer to the provision of special education and related services for students with disabilities as defined under the Individuals with Disabilities Education Act (20 U.S.C. 1400 *et seq.*).

Program Authority: 42 U.S.C. 2000c–2000c–2, 2000c–5.

Note: 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.

Applicable Regulations: (a) The Education Department General Administrative Regulations (EDGAR) in 34 CFR parts 75, 77, 79, 81, 82, 84, 86, 97, 98, and 99. (b) The OMB 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. (d) The regulations for the EAC program in 34 CFR part 270. (e) The Administrative Priorities.

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 only.

II. Award Information

Type of Award: Cooperative agreement.

Estimated Available Funds: The Administration has requested $6,475,000 for new awards for this program. The actual level of funding, if any, depends on final congressional action. However, we are inviting applications to allow enough time to complete the grant process before the end of the current fiscal year, if Congress appropriates funds for this program.

Estimated Range of Awards: $1,400,000–$1,700,000.

Estimated Average Size of Awards: $1,618,750.

Maximum Award: We will not make an award exceeding $1,700,000 for a single budget period of 12 months. Under 34 CFR 75.104(b), the Secretary may reject without consideration or evaluation any application that proposes a project funding level that exceeds the stated maximum award amount.

Estimated Number of Awards: 4.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* A public agency (other than a State educational agency or a school board) or a private, non-profit organization.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* This program does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses an unrestricted indirect cost rate. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Geographical Regions:* Four EACs will be funded under this grant program in four geographical regions, in accordance with 34 CFR 270.5. One award will be made in each region to the highest-ranking proposal for that region. If an applicant wishes to apply to serve more than one region, such an applicant must submit an application for each region it wishes to serve.

Note: The Department intends to create four separate funding slates, one for each geographic region. As a result, the Department will fund applications in rank order for each of the four funding slates rather than the overall rank order of all applications received.

The geographic regions served by the EACs are:

Region I: Connecticut, Delaware, Kentucky, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Islands, West Virginia.

Region II: Alabama, Arkansas, District of Columbia, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia.

Region III: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, South Dakota, Wisconsin.

Region IV: Alaska, American Samoa, Arizona, California, Colorado, Commonwealth of the Northern Mariana Islands, Guam, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming.

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. *Submission of Proprietary Information:* Given the types of projects that may be proposed in applications for the EAC program, your application may include business information that you consider proprietary. In 34 CFR 5.11 we define ''business information'' and describe the process we use in determining whether any of that information is proprietary and, thus, protected from disclosure under Exemption 4 of the Freedom of Information Act (5 U.S.C. 552, as amended).

Because we plan to make successful applications available to the public, you may wish to request confidentiality of business information.

Consistent with Executive Order 12600, please designate in your application any information that you believe is exempt from disclosure under Exemption 4. In the appropriate Appendix section of your application, under ''Other Attachments Form,'' please list the page number or numbers on which we can find this information. For additional information please see 34 CFR 5.11(c).

3. *Intergovernmental Review:* This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79.

4. *Funding Restrictions:* We reference regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

5. *Recommended Page Limit:* The application narrative 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″ × 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, references, and captions, as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger or no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract, the resumes, the bibliography, or the letters of support. However, the recommended page limit does apply to all of the application narrative.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 75.210. The maximum score for addressing all of these criteria is 100 points. The maximum score for addressing each criterion is indicated in parentheses. The Secretary uses the following criteria to evaluate applications for EAC grants:

(a) *Quality of Project Services.* (Up to 35 points) The Secretary considers the quality of the services to be provided by the proposed project. In determining the quality of the services to be provided by the proposed project, the Secretary considers:

(1) 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. (Up to 5 points)

Note: For this competition, ''eligible project participants'' refers to those eligible to receive services from an Equity Assistance Center.

(2) In addition, the Secretary considers:

(i) The extent to which the training or professional development services to be provided by the proposed project are of sufficient quality, intensity, and duration to lead to improvements in practice among the recipients of those services. (Up to 15 points)

(ii) The extent to which the results of the proposed project are to be disseminated in ways that will enable others to use the information or strategies. (Up to 10 points)

(iii) The extent to which the budget is adequate to support the proposed project. (Up to 5 points)

(b) *Quality of the Project Design.* (Up to 40 points) The Secretary considers the quality of the design of the proposed project. In determining the quality of the design of the proposed project, the Secretary considers:

(1) The extent to which the proposed project demonstrates a rationale (as defined in this notice). (Up to 10 points)

(2) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives. (Up to 20 points)

(3) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes. (Up to 10 points)

(c) *Quality of Project Personnel.* (Up to 25 points) The Secretary considers the quality of the personnel who will carry out the proposed project. In determining the quality of project personnel, the Secretary considers:

(1) 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. (Up to 10 points)

(2) The qualifications, including relevant training and experience, of key project personnel. (Up to 15 points)

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 also 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 (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

3. *Risk Assessment and Special Conditions:* Consistent with 2 CFR 200.205, before awarding grants under this program the Department conducts a review of the risks posed by applicants. Under 2 CFR 3474.10, the Secretary may impose special 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.

4. *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 200.206(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.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

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:* The Department has established the following Government Performance and Results Act of 1993 performance measures for the EAC program, adapted from a set of common measures developed to help assess performance across the Department's technical assistance programs:

Measure 1: The percentage of clients reporting an increase in awareness or knowledge resulting from technical assistance provided.

Measure 2: The percentage of clients who report changed policies or practices related to providing students with a full opportunity for participation in all educational programs regardless of their sex, race, religion, and national origin.

Measure 3: The percentage of clients reporting an increase in capacity resulting from technical assistance provided.

Measure 4: The percentage of clients who report outcomes, as documented in memoranda of understanding with EACs, were met as a result of the technical assistance provided.

All grantees will be expected to submit, as part of their annual and final performance reports, quantitative data documenting their progress with regard to these performance measures.

Project Measures: The Department has established the following project measures for the EAC program:

Measure 1: The percentage of technical assistance requests received from organizations that were accepted during the performance period.

Measure 2: The percentage of clients willing to request additional technical assistance or refer another organization to an EAC for technical assistance during the performance period.

All grantees will be expected to submit, as part of their annual and final performance reports, quantitative data documenting their progress with regard to these project measures. An applicant may propose additional project measures specific to that applicant's proposed project. If an applicant chooses to propose such project measures, the application must provide the following information as directed under 34 CFR 75.110(b): How each proposed project measure would accurately measure the performance of the project and how the proposed project measure would be consistent with the performance measures established for this program.

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: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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.

Frank T. Brogan,

Assistant Secretary for Elementary and Secondary Education.

[FR Doc. 2021–00540 Filed 1–11–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0168]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Comprehensive Transition Program (CTP) for Disbursing Title IV Aid to Students With Intellectual Disabilities Expenditure Report

AGENCY: Federal Student Aid (FSA), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, ED is proposing an extension without change of a currently approved collection.

DATES: Interested persons are invited to submit comments on or before February 12, 2021.

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 information collection request by selecting ''Department of Education'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox. Comments may also be sent to *ICDocketmgr@ed.gov.*

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Beth Grebeldinger, (202) 377–4018.

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: Comprehensive Transition Program (CTP) for Disbursing Title IV Aid to Students with Intellectual Disabilities Expenditure Report

OMB Control Number: 1845–0113.

Type of Review: Extension without change of a currently approved collection.

Respondents/Affected Public: State, Local, and Tribal Governments; Private Sector *Total Estimated Number of Annual Responses:* 104.

Total Estimated Number of Annual Burden Hours: 208.

Abstract: The Higher Education Opportunity Act, Public Law 110–315, added provisions to the Higher Education Act of 1965, as amended, in section 750 and 766 that enable eligible students with intellectual disabilities to receive Federal Pell Grant, Federal Supplemental Educational Opportunity Grant, and Federal Work Study funds if they are enrolled in an approved program. The Comprehensive Transition Program (CTP) for Disbursing Title IV Aid to Students with Intellectual Disabilities expenditure report is the tool for reporting the use of these specific funds. The data is used by the Department to monitor program effectiveness and accountability of fund expenditures. The data is used in conjunction with institutional program reviews to assess the administrative capability and compliance of the applicants.

Dated: January 8, 2021.

Kate Mullan,

PRA Coordinator, Strategic Collections and Clearance Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2021–00566 Filed 1–12–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2020–SCC–0154]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Quarterly Budget and Expenditure Reporting Under CARES Act Sections 18004(a)(1) Institutional Portion, 18004(a)(2), and 18004(a)(3)

Correction

In notice document 2020–28000, appearing on page 83068 in the issue of Monday, December 21, 2020, make the following correction:

On page 83068, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28000 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF EDUCATION

Applications for New Awards; Educational Opportunity Centers Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: The Department of Education (Department) is issuing a notice inviting applications for new awards for fiscal year (FY) 2021 for the Educational Opportunity Centers (EOC) Program, Assistance Listing Number 84.066A. This notice relates to the approved information collection under OMB control number 1840–0820.

DATES:

Applications Available: January 13, 2021.

Deadline for Transmittal of Applications: March 1, 2021.

Deadline for Intergovernmental Review: April 28, 2021.

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: Rachael Wiley Ed.D, U.S. Department of Education, 400 Maryland Avenue SW, Room 271–24, Washington, DC 20202–4260. Telephone: (202) 453–6078. Email: *Rachael.Wiley@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: The purposes of the EOC Program are to: Provide information regarding financial and academic assistance available for qualified individuals who want to enter or continue to pursue a program of postsecondary education; provide assistance to those individuals in applying for admission to institutions that offer programs of postsecondary education, including assistance in preparing necessary applications for use by admissions and financial aid officers; and improve the financial and economic literacy of program participants.

Priorities: This notice contains three competitive preference priorities. Competitive Preference Priorities 1 and 2 are from the Secretary's Notice of Final Supplemental Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on March 2, 2018 (83 FR 9096) (Supplemental Priorities). Competitive Preference Priority 3 is from the Secretary's Notice of Administrative Priorities and Definitions for Discretionary Grant Programs, published in the **Federal Register** on March 9, 2020 (85 FR 13640) (Administrative Priorities).

Note: Applicants must include, in the one-page abstract submitted with the application, a statement indicating which, if any, of the competitive preference priorities are addressed. If the applicant has addressed the competitive preference priorities, this information must also be listed on the EOC Program Profile Form.

Competitive Preference Priorities: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, these priorities are competitive preference priorities. Under 34 CFR 75.105(c)(2)(i), we award an application up to two additional points for each priority, for a total of up to six additional points, depending on how well the application meets each of these priorities.

These priorities are:

Competitive Preference Priority 1: Ensuring that Service Members, Veterans, and Their Families Have Access to High-Quality Educational Options (up to 2 points).

Projects that are designed to address the academic needs of military- or veteran-connected students (as defined in this notice).

Competitive Priority 2: Fostering Flexible and Affordable Paths to Obtaining Knowledge and Skills (up to 2 points).

Projects that are designed to create or expand opportunities for individuals to obtain recognized postsecondary credentials through the demonstration of prior knowledge and skills, such as competency-based learning. Such credentials may include an industry-recognized certificate or certification, a certificate of completion of an apprenticeship, a license recognized by the State involved or Federal Government, or an associate or baccalaureate degree.

Competitive Priority 3: Applications that Demonstrate a Rationale (up to 2 points).

Under this priority, an applicant proposes a project that demonstrates a rationale (as defined in 34 CFR 77.1).

Definitions: The definitions below are from 34 CFR 77.1 and the Supplemental Priorities.

Demonstrates a rationale means a key project component included in the project's logic model is informed by research or evaluation findings that suggest the project component is likely to improve relevant outcomes.

Logic model (also referred to as a theory of action) means a framework that identifies key project components of the proposed project (*i.e.,* the active ''ingredients'' that are hypothesized to be critical to achieving the relevant outcomes) and describes the theoretical and operational relationships among the key project components and relevant outcomes.

Note: In developing logic models, applicants may want to use resources such as the Regional Educational Laboratory Program's (REL Pacific) Education Logic Model Application, available at *https://ies.ed.gov/ncee/edlabs/regions/pacific/elm.asp,* to help design their logic models. Other sources include: *https://ies.ed.gov/ncee/edlabs/regions/pacific/pdf/REL_2014025.pdf, https://ies.ed.gov/ncee/edlabs/regions/pacific/pdf/REL_2014007.pdf,* and *https://ies.ed.gov/ncee/edlabs/regions/northeast/pdf/REL_2015057.pdf.*

Military- or veteran-connected student means a student who is a member of the uniformed services, a veteran of the uniformed services, or the spouse of a service member or veteran.

Note: For the purpose of this definition, ''student'' may include a prospective student.

Project component means an activity, strategy, intervention, process, product, practice, or policy included in a project. Evidence may pertain to an individual project component or to a combination of project components (*e.g.,* training teachers on instructional practices for English learners and follow-on coaching for these teachers).

Relevant outcome means the student outcome(s) or other outcome(s) the key project component is designed to improve, consistent with the specific goals of the program.

Program Authority: 20 U.S.C. 1070a–11 and 20 U.S.C. 1070–16.

Note: 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.

Application Requirements: For FY 2021 and any subsequent year in which we make awards from the list of unfunded applications from this competition, applicants must meet the following application requirements from 34 CFR 644.11.

An applicant must submit, as part of its application, assurances that—

(a) At least two-thirds of the individuals it serves under its proposed EOC project will be low-income individuals who are potential first-generation college students;

(b) The project will collaborate with other Federal TRIO projects, GEAR UP projects, or programs serving similar

populations that are serving the same target schools or target area in order to minimize the duplication of services and promote collaborations so that more students can be served;

(c) The project will be located in a setting or settings accessible to the individuals proposed to be served by the project; and

(d) If the applicant is an institution of higher education, it will not use the project as a part of its recruitment program.

Applicable Regulations: (a) The Education Department General Administrative Regulations in 34 CFR parts 75 (except for §§ 75.215 through 75.221), 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. (d) The regulations for this program in 34 CFR part 644. (e) The Supplemental Priorities. (f) The Administrative Priorities.

Note: The regulations in 34 CFR 86 apply to institutions of higher education (IHEs) only.

II. Award Information

Type of Award: Discretionary grants.

Estimated Available Funds: $55,994,306.

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.

Estimated Range of Awards: $232,050–$1,280,000.

Estimated Average Size of Awards: $273,793.

Maximum Award: The maximum award varies based on whether the applicant is currently receiving an EOC Program grant, as well as the number of participants served.

- For an applicant that is not currently receiving an EOC Program grant, the maximum award amount is $232,050. Applicants must have a per-participant cost of no more than $273 and propose to serve a minimum of 850 participants.
- For an applicant that is currently receiving an EOC Program grant—

1. The applicant may request a maximum award amount that is an amount equal to 100 percent of the applicant's base award amount for FY 2020 to serve a minimum number of participants equal to the applicant's approved FY 2020 participant number; or

2. If the applicant proposes to reduce the number of participants to be served below the amount served in FY 2020, the proposed number of participants must be at least 850 *and* the per-participant cost must not exceed the applicant's cost per participant for FY 2020 or $273, whichever is greater. For example, if an applicant's per participant cost for FY 2020 is $344 and the applicant is proposing to serve 850 participants under the FY 2021 competition, the applicant would be eligible to request a $292,400 grant ($344 × 850 = $292,400).

Note: Applicants currently receiving an EOC Program grant in FY 2020 are strongly encouraged to continue to serve the same number of participants under the proposed project.

Estimated Number of Awards: 140.

Note: The Department is not bound by any estimates in this notice.

Project Period: Up to 60 months.

III. Eligibility Information

1. *Eligible Applicants:* IHEs; public and private agencies and organizations, including community-based organizations with experience in serving disadvantaged youth; secondary schools; and combinations of such institutions, agencies, and organizations.

Note: If you are a nonprofit organization, under 34 CFR 75.51, you may demonstrate your nonprofit status by providing: (1) Proof that the Internal Revenue Service currently recognizes the applicant as an organization to which contributions are tax deductible under section 501(c)(3) of the Internal Revenue Code; (2) a statement from a State taxing body or the State attorney general certifying that the organization is a nonprofit organization operating within the State and that no part of its net earnings may lawfully benefit any private shareholder or individual; (3) a certified copy of the applicant's certificate of incorporation or similar document if it clearly establishes the nonprofit status of the applicant; or (4) any item described above if that item applies to a State or national parent organization, together with a statement by the State or parent organization that the applicant is a local nonprofit affiliate.

2. a. *Cost Sharing or Matching:* This competition does not require cost sharing or matching.

b. *Indirect Cost Rate Information:* This program uses a training indirect cost rate. This limits indirect cost reimbursement to an entity's actual indirect costs, as determined in its negotiated indirect cost rate agreement, or eight percent of a modified total direct cost base, whichever amount is less. For more information regarding training indirect cost rates, see 34 CFR 75.562. For more information regarding indirect costs, or to obtain a negotiated indirect cost rate, please see *www2.ed.gov/about/offices/list/ocfo/intro.html.*

c. *Administrative Cost Limitation:* This program does not include any program-specific limitation on administrative expenses. All administrative expenses must be reasonable and necessary and conform to Cost Principles described in 2 CFR part 200 subpart E of the Uniform Guidance.

3. *Subgrantees:* A grantee under this competition may not award subgrants to entities to directly carry out project activities described in its application.

4. *Other:* An applicant may submit more than one application for an EOC Program grant so long as each application describes a project that serves a different target area (34 CFR 644.10(a)). The term ''target area'' is defined as a geographic area served by a project (34 CFR 644.7(b)).

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 program 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 program.

3. *Funding Restrictions:* We specify unallowable costs in 34 CFR 644.31. We reference additional regulations outlining funding restrictions in the *Applicable Regulations* section of this notice.

Requirements concerning the content of an application, together with the forms you must submit, are in the application package for this program.

4. *Recommended Page Limit:* The application narrative 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, which includes the budget narrative, to no more than 60 pages and (2) use the following standards:

- A ''page'' is 8.5″ × 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, references, and captions as well as all text in charts, tables, figures, and graphs.
- Use a font that is either 12 point or larger, and no smaller than 10 pitch (characters per inch).
- Use one of the following fonts: Times New Roman, Courier, Courier New, or Arial.

The recommended page limit does not apply to the cover sheet; the budget section, including the narrative budget justification; the assurances and certifications; or the one-page abstract. However, the recommended page limit does apply to all of the application narrative.

We recommend that any application addressing the competitive preference priorities include no more than three additional pages for each priority addressed.

V. Application Review Information

1. *Selection Criteria:* The selection criteria for this competition are from 34 CFR 644.21. We will award up to 100 points to an application under the selection criteria and up to 6 additional points to an application under the competitive preference priorities, for a total score of up to 106 points. The maximum number of points available for each criterion is indicated in parentheses.

(a) *Need for the project* (24 points). The Secretary evaluates the need for an EOC project in the proposed target area on the basis of the extent to which the application contains clear evidence of—

(1) A high number or percentage, or both, of low-income families residing in the target area;

(2) A high number or percentage, or both, of individuals residing in the target area with education completion levels below the baccalaureate level;

(3) A high need on the part of residents of the target area for further education and training from programs of postsecondary education in order to meet changing employment trends; and

(4) Other indicators of need for an EOC project, including the presence of unaddressed educational or socio-economic problems of adult residents in the target area.

(b) *Objectives* (8 points). The Secretary evaluates the quality of the applicant's objectives and proposed targets (percentages) in the following areas on the basis of the extent to which they are both ambitious, as related to the need data provided under selection criterion (a), and attainable, given the project's plan of operation, budget, and other resources—

(1) Secondary school diploma or equivalent (2 points).

(2) Postsecondary enrollment (3 points).

(3) Financial aid applications (1.5 points).

(4) College admission applications (1.5 points).

(c) *Plan of operation* (30 points). The Secretary evaluates the quality of the applicant's plan of operation on the basis of the following—

(1) The plan to inform the residents, schools, and community organizations in the target area of the goals, objectives, and services of the project and the eligibility requirements for participation in the project (4 points);

(2) The plan to identify and select eligible participants and ensure their participation without regard to race, color, national origin, gender, or disability (4 points);

(3) The plan to assess each participant's need for services provided by the project (2 points);

(4) The plan to provide services that meet the participants' needs and achieve the objectives of the project (12 points); and

(5) The management plan to ensure the proper and efficient administration of the project including, but not limited to, the project's organizational structure, the time committed to the project by the project director and other personnel, and, where appropriate, its coordination with other projects for disadvantaged students (8 points).

(d) *Applicant and community support* (16 points). The Secretary evaluates the applicant and community support for the proposed project on the basis of the extent to which the applicant has made provision for resources to supplement the grant and enhance the project's services, including—

(1) Facilities, equipment, supplies, personnel, and other resources committed by the applicant (8 points); and

(2) Resources secured through written commitments from schools, community organizations, and others (8 points).

(e) *Quality of personnel* (9 points). (1) The Secretary evaluates the quality of the personnel the applicant plans to use in the project on the basis of the following—

(i) The qualifications required of the project director.

(ii) The qualifications required of each of the other personnel to be used in the project.

(iii) The plan to employ personnel who have succeeded in overcoming disadvantages or circumstances like those of the population of the target area.

(2) In evaluating the qualifications of a person, the Secretary considers his or her experience and training in fields related to the objectives of the project.

(f) *Budget* (5 points). The Secretary evaluates the extent to which the project budget is reasonable, cost-effective, and adequate to support the project.

(g) *Evaluation plan* (8 points). The Secretary evaluates the quality of the evaluation plan for the project on the basis of the extent to which the applicant's methods of evaluation—

(1) Are appropriate to the project's objectives;

(2) Provide for the applicant to determine, using specific and quantifiable measures, the success of the project in—

(i) Making progress toward achieving its objectives (a formative evaluation); and

(ii) Achieving its objectives at the end of the project period (a summative evaluation); and

(3) Provide for the disclosure of unanticipated project outcomes, using quantifiable measures if appropriate.

2. *Review and Selection Process:* We remind potential applicants that, 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 (34 CFR 100.4, 104.5, 106.4, 108.8, and 110.23).

For this competition, a panel of non-Federal reviewers will review each application in accordance with the selection criteria in 34 CFR 644.21. The individual scores of the reviewers will be added and the sum divided by the number of reviewers to determine the peer review score received in the review process. Additionally, in accordance with 34 CFR 644.22, the Secretary will award prior experience points to applicants that conducted an EOC Program project during budget periods 2017–18, 2018–19, and 2019–20, based on their documented experience. Prior experience points, if any, will be added to the application's averaged reader score to determine the total score for each application.

If there are insufficient funds for all applications with the same total scores,

the Secretary will choose among the tied applications so as to serve geographic areas and eligible populations that have been underserved by the EOC Program.

3. *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.

4. *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.

5. *In General:* In accordance with the Office of Management and Budget's guidance located at 2 CFR part 200, all applicable Federal laws, and relevant Executive guidance, the Department will review and consider applications for funding pursuant to this notice inviting applications in accordance with—

(a) Selecting recipients most likely to be successful in delivering results based on the program objectives through an objective process of evaluating Federal award applications (2 CFR 200.205);

(b) Prohibiting the purchase of certain telecommunication and video surveillance services or equipment in alignment with section 889 of the National Defense Authorization Act of 2019 (Pub. L. 115–232) (2 CFR 200.216);

(c) Promoting the freedom of speech and religious liberty in alignment with *Promoting Free Speech and Religious Liberty* (E.O. 13798) and *Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities* (E.O. 13864) (2 CFR 200.300, 200.303, 200.339, and 200.341);

(d) Providing a preference, to the extent permitted by law, to maximize use of goods, products, and materials produced in the United States (2 CFR 200.322); and

(e) Terminating agreements in whole or in part to the greatest extent authorized by law if an award no longer effectuates the program goals or agency priorities (2 CFR 200.340).

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.*

5. *Performance Measures:* Under the Government Performance and Results Act of 1993, the following measure will be used by the Department to evaluate the success of the EOC Program: Participants' success in completing a secondary school diploma or its equivalent, completion of applications for student financial aid, submission of applications for postsecondary admission, and postsecondary enrollment. All EOC Program grantees will be required to submit annual performance reports.

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: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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.

Christopher J. McCaghren,

Acting Assistant Secretary for Postsecondary Education.

[FR Doc. 2021–00329 Filed 1–12–21; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Arbitration Panel Decisions Under the Randolph-Sheppard Act

AGENCY: Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Notice.

SUMMARY: This notice lists arbitration panel decisions under the Randolph-Sheppard Act issued from April 1, 2020 to July 31, 2020. This notice also lists any older decisions that the Department of Education (Department) has made publicly available in accessible electronic format during that period. All decisions are available on the Department's website and by request.

FOR FURTHER INFORMATION CONTACT: James McCarthy, U.S. Department of Education, 400 Maryland Avenue SW, Room 5064D, Potomac Center Plaza, Washington, DC 20202–2800. Telephone: (202) 245–6703. Email: *james.mccarthy@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service, toll-free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: For the purpose of providing individuals who are blind with remunerative employment, enlarging their economic opportunities, and stimulating greater efforts to make themselves self-supporting, the Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.* (Act), authorizes individuals who are blind to operate vending facilities on Federal property and provides them with a priority for doing so. The vending facilities include, among other things, cafeterias, snack bars, and automatic vending machines. The Department administers the Act and designates an agency in each State—the State licensing agency (SLA)—to license individuals who are blind to operate vending facilities on Federal and other property in the State.

The Act provides for arbitration of disputes between SLAs and vendors who are blind and between SLAs and Federal agencies before three-person panels, convened by the Department, whose decisions constitute final agency action. 20 U.S.C. 107d–1. The Act also makes these decisions matters of public record and requires their publication in the **Federal Register**. 20 U.S.C. 107d–2(c).

The Department publishes lists of Randolph-Sheppard Act arbitration panel decisions in the **Federal Register** and the full text of the decisions listed are available on the Department's website (see below) or by request (see 84 FR 41941). Older, archived decisions are also added to the Department's website as they are digitized.

In the second quarter of 2020, Randolph-Sheppard arbitration panels issued the following decisions.

Case name	Docket No.	Date	State
Illinois v. The Department of Energy	R–S/16–12	4/30/2020	Illinois.
Oklahoma v. the Department of the Army, Fort Sill	R–S/18–09	6/22/2020	Oklahoma.

These decisions and other decisions that we have already posted are searchable by key terms, are accessible under Section 508 of the Rehabilitation Act, and are available in Portable Document Format (PDF) on the Department's website at *www.ed.gov/programs/rsarsp/arbitration-decisions.html* or by request to the person listed under **FOR FURTHER INFORMATION CONTACT.**

At the same site, we have posted the following older, archived decision from 2019.

Case name	Docket No.	Date	State
The Florida Department of Education, Division of Blind Services v. The Department of the Air Force, Hurlburt Field.	R–S/17–03	6/13/2019	Florida.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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 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,

Delegated the authority to perform the functions and duties of the Assistant Secretary for the Office of Special Education and Rehabilitative Services.

[FR Doc. 2021–00486 Filed 1–12–21; 8:45 am]

BILLING CODE 4000–01–P

ELECTION ASSISTANCE COMMISSION

Roundtable Discussion; Corrections

AGENCY: U.S. Election Assistance Commission.

ACTION: Notice; corrections.

SUMMARY: The U.S. Election Assistance Commission published a document in the **Federal Register** regarding the scheduled Roundtable Discussion: 2020 Elections Lessons Learned. The Roundtable Discussion scheduled for 1:30 p.m.–3:30 p.m. Eastern on Wednesday, January 27, 2021 is cancelled. The Notice appeared in the **Federal Register** of January 8, 2021, in FR Doc. 2021–0269, on page 1486 in the third column and page 1487 in the first column.

FOR FURTHER INFORMATION CONTACT: Kristen Muthig, Telephone: (202) 897–9285, Email: *kmuthig@eac.gov.*

Amanda Joiner,

Associate Counsel, U.S. Election Assistance Commission.

[FR Doc. 2021–00546 Filed 1–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF ENERGY

Fuels of the Future Advisory Board

AGENCY: Office of the Under Secretary of Energy, Department of Energy.

ACTION: Notice of intent to establish.

SUMMARY: Pursuant to the Federal Advisory Committee Act, and in accordance with Title 41, Code of Federal Regulations, and following consultation with the Committee Management Secretariat, General Services Administration, notice is hereby given that the Fuels of the Future Advisory Board (FoFAB) will be established. The FoFAB will provide advice and recommendations to the Secretary of Energy concerning the development of alternative fuels throughout the Department of Energy. Additionally, the establishment of the Board has been determined to be essential to the conduct of the Department's business and to be in the public interest in connection with the performance of duties imposed upon the Department of Energy, by law and agreement. The Board will operate in accordance with the provisions of the Federal Advisory Committee Act, and the rules and regulations in implementation of that Act.

FOR FURTHER INFORMATION CONTACT: Kurt Heckman, Director, Office of Board and Councils, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; Phone: (202) 586–1212; email: *kurt.heckman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The activities of the FoFAB will include advice and recommendations to the Secretary of Energy concerning the development of alternative fuels and related programmatic issues. Activities include, but are not limited to, developing recommendations on broad programmatic priorities for various alternative fuel research and development programs throughout the Department. Such programs may include the methane hydrate research and development program, bioenergy research and development, and the hydrogen and fuel cells research, development, and demonstration program.

FoFAB is expected to be continuing in nature. FoFAB members were selected to achieve a balanced board of community representatives and technical experts in fields relevant to the Department of Energy and the development of alternative fuels.

Signing Authority: This document of the Department of Energy was signed on January 7, 2021, by Briana McClain, Acting Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 8, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–00509 Filed 1–12–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Biomass Research and Development Technical Advisory Committee; Methane Hydrate Advisory Committee; Hydrogen and Fuel Cell Technical Advisory Committee; Termination

AGENCY: Office of the Under Secretary of Energy, Department of Energy.

ACTION: Termination of federal advisory committees.

SUMMARY: The Department of Energy is publishing this notice to announce that it is terminating the following three Federal Advisory Committees (FACAs) effective January 7, 2021: The Biomass Research and Development Technical Advisory Committee (BR&D TAC); Methane Hydrate Advisory Committee (MHAC); and Hydrogen and Fuel Cell Technical Advisory Committee (HTAC).

FOR FURTHER INFORMATION CONTACT: Kurt Heckman, Director, Office of Board and Councils, U.S. Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585; Phone: (202) 586–1212; email: *kurt.heckman@hq.doe.gov.*

SUPPLEMENTARY INFORMATION: The BR&D TAC, MHAC, and HTAC FACAs are being terminated under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix) and 41 CFR 102–3.55, and the Government in the Sunshine Act of 1976 (5 U.S.C. 552b), effective January 7, 2021.

Signing Authority: This document of the Department of Energy was signed on January 7, 2021, by Briana McClain, Acting Committee Management Officer, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on January 8, 2021.

Treena V. Garrett,

Federal Register Liaison Officer, U.S. Department of Energy.

[FR Doc. 2021–00508 Filed 1–12–21; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Docket Numbers: RP21–371–000.
Applicants: Cheniere Corpus Christi Pipeline, LP.
Description: § 4(d) Rate Filing: CCPL Housekeeping Filing—FTS ROFR Clarification to be effective 2/1/2021.
Filed Date: 1/5/21.
Accession Number: 20210105–5034.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: RP21–372–000.
Applicants: Tennessee Gas Pipeline Company, L.L.C.
Description: Compliance filing Amended and Restated Cash Management Agreement 2020.
Filed Date: 1/6/21.
Accession Number: 20210106–5020.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: RP21–373–000.
Applicants: Southern LNG Company, L.L.C.
Description: Compliance filing Cash Management Agreement.
Filed Date: 1/6/21.
Accession Number: 20210106–5022.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: RP21–374–000.
Applicants: Elba Express Company, L.L.C.
Description: Compliance filing Cash Management Agreement.
Filed Date: 1/6/21.
Accession Number: 20210106–5023.
Comments Due: 5 p.m. ET 1/19/21.

Docket Numbers: RP21–375–000.
Applicants: Kinder Morgan Louisiana Pipeline LLC.
Description: Compliance filing Filing of Amended and Restated Cash Management Agreement—RM02–14 et al.
Filed Date: 1/6/21.
Accession Number: 20210106–5030.
Comments Due: 5 p.m. ET 1/19/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 7, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00512 Filed 1–12–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC21–3–000 and RD20–4–000]

Commission Information Collection Activities (Ferc-725d); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, Department of Energy.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on a renewal of currently approved information collection, FERC–725D (Facilities Design, Connections and Maintenance Reliability Standards). This notice includes all modified standards included in FERC725D (FAC–001–3, FAC–002–3, FAC–010–2, FAC–011–3, and FAC–014–2) in Docket no. IC21–3–000 for renewal which already reflect the changes mentioned in version update RD20–4–000 published separately. All burden totals supersede previous notices for both dockets.

DATES: Comments on the collection of information are due February 12, 2021.

ADDRESSES: You may submit comments (identified by Docket No. IC21–3–000 and RD20–4–000) by one of the following methods:

- *eFiling at Commission's website: http://www.ferc.gov.*
- *U.S. Postal Service Mail:* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426
- Effective 7/1/2020, delivery of filings other than by eFiling or the U.S. Postal Service should be delivered to Federal Energy Regulatory Commission, Office of the Secretary 12225 Wilkins Avenue, Rockville, Maryland 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Ellen Brown may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–8663.

SUPPLEMENTARY INFORMATION:

Title: FERC–725D ,[1] Facilities Design, Connections and Maintenance Reliability Standards.

OMB Control No.: 1902–0247.

Type of Request: Three-year approval of the FERC–725D information collection requirements, with no changes to the reporting or recordkeeping requirements. (There are adjustments to the estimates to update the totals that represent the numbers reflected in the NERC Compliance Registry as of July 17, 2020).

Abstract: On August 8, 2005, The Electricity Modernization Act of 2005, which is Title XII of the Energy Policy Act of 2005 (EPAct 2005), was enacted into law. EPAct 2005 added a new section 215 to the Federal Power Act (FPA), which requires a Commission-certified Electric Reliability Organization (ERO) to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO, subject to Commission oversight, or by the Commission independently. Section 215 of the FPA requires a Commission-certified ERO to develop mandatory and enforceable Reliability Standards, subject to Commission review and approval. Once approved, the Reliability Standards may be enforced by the ERO subject to Commission oversight or by

[1] This renewal is being submitted to extend the OMB expiration date and will not have an effect on the Docket No. RD20–4 that was also addressed separately.

the Commission independently. In 2006, the Commission certified NERC (now called the North American Electric Reliability Corporation) as the ERO pursuant to section 215 of the FPA. On March 16, 2007 (pursuant to section 215(d) of the FPA), the Commission issued Order No. 693, approving 83 of the 107 initial Reliability Standards filed by NERC. In the intervening years, numerous changes have been made to update, eliminate, or establish various Reliability Standards.

The information collected by FERC–725D is required to implement the statutory provisions of section 215 of the Federal Power Act (FPA) (16 U.S.C. 824c). The following standards are included in FERC–725D.

• FAC–001–3 (Facility Interconnection Requirements) [2] requires each transmission owner and applicable generator owner to document facility interconnection requirements, and to make them available upon request to entities seeking to interconnect. In addition, Reliability Standard FAC–001–3 requires each transmission owner and applicable generator owner to include procedures for coordinating studies to determine the impact of interconnecting facilities on existing interconnections as well as on affected systems.

• FAC–002–3 (Facility Interconnection Studies) [3] requires each transmission planner and each planning coordinator to study the reliability impact of interconnecting new—or materially modifying existing—generation, transmission, or electricity end-user facilities on affected systems. In particular, Reliability Standard FAC–002–3 requires transmission planners and planning coordinators to perform steady-state, short-circuit, and dynamic studies to evaluate system performance under both normal and contingency conditions. In addition, Reliability Standard FAC–002–3 requires each generator owner seeking to interconnect, each transmission owner, each distribution provider, and each load-serving entity that is seeking to interconnect new—or materially modifying existing—transmission facilities or end-user facilities to coordinate and cooperate on studies with its transmission planner and planning coordinator.

• FAC–010–3 (System Operating Limits Methodology for the Planning Horizon) [4] requires the planning authority to have a documented methodology for use in developing system operating limits (SOLs) and must retain evidence that it issued its SOL methodology to relevant reliability coordinators, transmission operators and adjacent planning authorities. Likewise, the planning authority must respond to technical comments on the methodology within 45 days of receipt. Further, each planning authority must self-certify its compliance to the compliance monitor once every three years.

• FAC–011–3 (System Operating Limits Methodology for the Operations Horizon) [5] requires the reliability coordinator to have a documented methodology for use in developing SOLs and must retain evidence that it issued its SOL methodology to relevant reliability coordinators, transmission operators and adjacent planning authorities. Likewise, the reliability coordinator must respond to technical comments on the methodology within 45 days of receipt. Further, each reliability coordinator must self-certify its compliance to the compliance monitor once every three years.

• FAC–014–2 (Establish and Communicate System Operating Limits) [6] requires the reliability coordinator, planning authority, transmission operator, and transmission planner to verify compliance through self-certification submitted to the compliance monitor annually. These entities must also document that they have developed SOLs consistent with the applicable SOL methodology and that they have provided SOLs to entities identified in Requirement 5 of the Reliability Standard. Further, the planning authority must maintain a list of multiple contingencies and their associated stability limits.

The associated reporting and recordkeeping requirements included in the Reliability Standards FAC–001–3, FAC010–3, FAC–011–3 and FAC–014–2 above are not being revised, and the Commission requests to extend these requirements for three years. The Commission's request also reflects the following:

• Implementation of FAC–002–3 (as approved by order in Docket No. RD20–4–000).[7] This includes elimination of the burden associated with the load-serving entity (LSE) function in Requirement R3 of proposed Reliability Standard FAC–002–3. The NERC petition states as the load-serving entity is no longer a NERC registration category, NERC proposed to remove this entity from the applicability section of proposed Reliability Standard FAC–002–3 and remove reference to this entity in Requirement R3.[8]

• Adjustments to the burden estimates due to changes in the NERC Compliance Registry for Reliability Standard FAC–002–3.[9]

The 60-day notice was published on November 5, 2020 (85 FR 70606), and no comments were received. The burden estimate in the 60-day notice has been updated below to correct the net decrease in burden for Reliability Standard FAC–002–3.

Type of Respondents Type of Respondents: PA/PC, TP, TO, DP, & GO.[10]

Estimate of Annual Burden [11] *and Cost:* [12] Renewal Docket No. IC21–3.

[2] FAC–001–3 is included in the OMB-approved inventory for FERC–725D.

[3] The burden associated FAC–002–2 is included in the OMB-approved inventory for FERC–725D. Reliability Standard FAC–002–3 was approved October 30, 2020 by order in Docket No. RD20–4–000. The net reduction in burden associated with FAC–002–3 is pending OMB approval in Docket No. RD20–4–000 and is reflected in this request for a three-year renewal.

[4] The burden associated with FAC–010–2 is included in the OMB-approved inventory for FERC–725D. Reliability Standard FAC–010–2.1 was approved April 19, 2010 by order in Docket No. RD10–9–000. FAC–010–2.1 did not change the burden associated with FAC–010–2 because it included errata renumbering of specific requirements. Reliability Standard FAC–010–3 was approved November 19, 2015 in FERC Order No. 818, Docket No. RM15–13–000. The only change to the standard was replacing the term ''special protection system'' with ''remedial action scheme.'' This change did not result in a change in the information collection.

[5] The burden associated with FAC–011–2 is included in the OMB-approved inventory for FERC–725D. Reliability Standard FAC–011–3 was approved November 19, 2015 in FERC Order No. 818, Docket No. RM15–13–000. The only change to the standard was replacing the term ''special protection system'' with ''remedial action scheme.'' This change did not result in a change in the information collection.

[6] The burden associated with FAC–014–2 is included in the OMB-approved inventory for FERC–725D.

[7] The burden associated with FAC–002–2 is included in the OMB-approved inventory for FERC–725D. Reliability Standard FAC–002–3 was approved October 30, 2020 by order in Docket No. RD20–4–000. The change in burden associated with FAC–002–3 is pending OMB approval in Docket No. RD20–4–000 and is reflected in this request for a three-year renewal.

[8] The petition and exhibits are posted in the Commission's eLibrary system in Docket No. RD20–4–000 (Standards Alignment with Registration Petition).

[9] The adjustments to burden estimates associated with FAC–002–3 is pending OMB approval in Docket No. RD20–4–000.

[10] PA = Planning Authority; PC = Planning Coordinator; TO = Transmission Owner; GO = Generator Owner; DP = Distribution Provider; TP = Transmission Provider.

[11] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

[12] The estimates for cost per hour are derived as follows:

The Commission estimates an increase (adjustment) in the annual public reporting burden for the FERC–725D that follow the standards FAC–001–3, FAC–002–3, FAC–010–3, FAC–011–3, and FAC–014–2. The Commission estimates a net decrease (adjustment) in the annual public reporting burden for the FERC–725D for the Reliability Standard FAC–002–3. The estimate for Reliability Standard FAC–002–3 decreased from 399 to 326 responses.[13]

Burden estimates for the remaining Reliability Standards in FERC–725D are unchanged as follows:

- FAC–001–3 remain unchanged at 498 responses.[14]
- FAC–010–3, FAC–011–3 and FAC–014–2 remains unchanged at 470 responses.[15]

The following table shows the previous figures from the 60-day renewal notice in Docket No. IC21–3, the program changes and adjustments from Docket No. RD20–4, and the resulting totals. RD20–4 version update); Version Update RD20–4 has a net decrease (−146) in responses for FAC002–3 (previously FAC002–2) which created a total of 1,957 responses (net change was already calculated in the renewal but omitted the retention totals in prior renewals. For this notice and moving forward, Record Retention will be included in the burden estimates for all standards), as shown below in the table:

PROPOSED CHANGES TO BURDEN DUE TO DOCKET NO. RD20–4–000 AND ADJUSTMENTS AND CLARIFICATIONS [16]

[Version update for FAC–002–3 (formerly FAC–002–2)]

	Number and type of respondent (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden per response (hours) & cost per response (4)	Total annual burden (hours) & total annual cost ($) (3) * (4) = (5)
FERC–725D, OMB Control No. 1902–0247					
FAC–002–3 (Facility Interconnection Studies) R1 Record Retention—adjustment.	+20 (PC & TP)	1	+20	32	640.
FAC–002–3 (Facility Interconnection Studies) R1 Record Retention—adjustment.	+20 (PC & TP)	1	+20	1	20.
FAC–002–3 (Facility Interconnection Studies) R2–R5 Coordination—(program decrease & adjustment decrease) [17].	−93 (TO, GO & DP) [18]	1	93	16	1,488.
FAC–002–3 (Facility Interconnection Studies) R2–R5 Record Retention—(program decrease & adjustment decrease) [19].	−93 (TO, GO & DP)	1	−93	1	−93.
Net Total for FERC–725D			−146 (net reduction)		−921 (net reduction).

(RENEWAL FOR DOCKET NO. IC21–3–000) FERC–725D: (MANDATORY RELIABILITY STANDARDS: FAC (FACILITIES, DESIGN, CONNECTIONS, AND MAINTENANCE) **

	Number and type of respondent [20] (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden per response (hours) [21] & cost per response (4)	Total annual burden (hours) & total annual cost [22] ($) (3) * (4) = (5)
FAC–001–3, FAC–002–3, FAC–010–3, FAC–011–3, and FAC–014–2					
FAC–001–3 (Documentation & Updates)	GO/TO 498	1	498	34 hrs.; $1,338.72	16,932 hrs.; $1,416,700.44.
Record Retention	GO 5	1	5	1 hr.; $41.03	5 hrs.; $205.15.
	TO 332	1	332	1 hr.; $41.03	332 hrs.; $13,621.96.
	GO/TO 161	1	161	1 hr.; [23] $41.03	161 hrs.; [23] $6,605.83.
FAC–002–3 (Study & Coordination)	PC, TP 399	1	399	32 hrs.; $2008.08	12,768 hrs.; [24] $1,068,298.56.
Record Retention	PC, TP 183	1	183	1 hr.; $41.03	183 hrs.; $7,325.49.
	TO, DP, LSE, GO 216	1	216	1 hr.; $41.03	216 hrs.; $8,862.48.
FAC–010–2, FAC–011–3, FAC–014–2 (Transmission & Planning).	PA/RC/TP/TO 470 [25]	1	470	295.7 hrs.; $24,741.219	138,979 hrs.; $11,628,372.93.
Sub-Totals for FERC–725D	1,367	1	1,367	361.7 hrs	168,679 hrs.; $14,113,371.93.

- $83.67/hour, the average of the salary plus benefits for a manager ($97.15/hour) and an electrical engineer ($70.19/hour), from Bureau of Labor and Statistics at *http://bls.gov/oes/current/naics3_221000.htm,* as of June 2020.
- Record and Information Clerks (43–4199): $41.03/hour, based on a Commission staff study of record retention burden cost.

[13] The OMB-approved burden for FAC–002–2 of 399 responses does not include the responses for record retention as shown in Docket No. RD14–12–000. The net reduction in burden of 146 responses for FAC–002–3 is pending OMB approval under Docket No. RD20–4–000 and reflects

- an adjusted addition of 20 PCs and TPs for studies and evidence retention, which results in an increase of 40 responses; and
- a program and adjusted reduction of 63 de-registered load-serving entities and 30 TOs, GOs, and DPs for coordination and evidence retention, which results in a decrease of 186 responses.

[14] This is the sum of the OMB-approved burden for FAC–001–2 of 337 responses plus the additional OMB-approved burden for FAC–001–3 of 161 responses. These burden estimates do not include the responses for record retention as shown in Docket No. RD14–12–000.

[15] The OMB-approved burden for FAC–010–3, FAC–011–3 and FAC–014–2 is a joint burden estimate of 470 responses as shown in the 2011 supporting statement for FERC–725D.

(RENEWAL FOR DOCKET NO. IC21–3–000) FERC–725D: (MANDATORY RELIABILITY STANDARDS: FAC (FACILITIES, DESIGN, CONNECTIONS, AND MAINTENANCE) **—Continued

	Number and type of respondent [20] (1)	Annual number of responses per respondent (2)	Total number of responses (1) * (2) = (3)	Average burden per response (hours) [21] & cost per response (4)	Total annual burden (hours) & total annual cost [22] ($) (3) * (4) = (5)
FAC–001–3, FAC–002–3, FAC–010–3, FAC–011–3, and FAC–014–2 Totals including Record Retention.	1,957	1	1,957	366.7 hrs	168,655 hrs.; [26] $14,079,040.68.

[16] The adjustments, due to normal industry fluctuations, are based on figures in the NERC registry as of April 10, 2020.

[17] The reduction of 93 respondents and corresponding burden hours include 63 LSEs that were de-registered (program decrease of 1,008 hrs.) and an adjustment decrease of 30 respondents (480 hrs.) due to normal industry fluctuations.

Out of the total decrease of 1,488 hours, the program decrease of 1,008 hours [corresponding decrease of 63 responses] is due to Docket No. RD20–4–000. The reduction of 480 hours is due to normal adjustments.

[18] Although 1,232 entities are registered as TO, DP, or GO, we expect at the most 123 entities (ten percent) will seek to interconnect and go through the study phase that may require coordination in any given year.

[19] For Record retention—The reduction of 93 respondents and corresponding burden hours include 63 LSEs that were de-registered (program decrease of 63 hrs., due to Docket No. RD20–4–000) and an adjustment decrease of 30 respondents (30 hrs.) due to normal industry fluctuations—this results in doubling of decrease in 93 respondents and increase of 20 additional respondents.

[20] The number of respondents is based on the NERC Compliance Registry as of September 24, 2014. Although 2,163 entities are registered as TO, DP, LSE, or GO, as relates to Docket RD14–12, we expect at the most 216 entities (ten percent) will seek to interconnect and go through the study phase that may require coordination in any given year.

[21] Of the average estimated 295.702 hours per response, 210 hours are for recordkeeping, and 85.702 hours are for reporting.

[22] The estimates for cost per hour are derived as follows:

- $83.67/hour, the average of the salary plus benefits for a manager ($97.15/hour) and an electrical engineer ($70.19/hour), from Bureau of Labor and Statistics at *http://bls.gov/oes/current/naics3_221000.htm,* as of June 2020.
- Record and Information Clerks (43–4199): $41.03/hour, based on a Commission staff study of record retention burden cost.

[23] The average burden hours per response related to FAC–001–3 was listed as 2 hours in the RM16–13 Final Rule, resulting in an annual burden related to FAC–001–3 is 322 hours (from 161 hours in the issued Final Rule).

[24] The Previous burden in 60-day notice published on 11/5/2020 was modified to reflect the net changes in burden mention in RD20–4 and incorporated previously omitted record retention burden.

[25] The total number of Planning Authorities, Reliability Coordinators, Transmission Planners and Transmission Operators equals 470 (taken from the October 2020, version of NERC's compliance registry).

[26] Deducts net proposed changes (−921 hours) totals with retention.

Comments: Comments are invited on: (1) Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: January 7, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00513 Filed 1–12–21; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC21–39–000.
Applicants: Brookfield Asset Management Inc.
Description: Application for Authorization Under Section 203 of the Federal Power Act of Brookfield Asset Management Inc., on behalf of its Public Utility Affiliates.
Filed Date: 1/5/21.
Accession Number: 20210105–5204.
Comments Due: 5 p.m. ET 1/26/21.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG21–62–000.
Applicants: KCE TX 23, LLC.
Description: Notice of Self-Certification of EWG Status of KCE TX 23, LLC.
Filed Date: 12/23/20.
Accession Number: 20201223–5428.
Comments Due: 5 p.m. ET 1/13/21.

Docket Numbers: EG21–63–000.
Applicants: Midway-Sunset Cogeneration Company.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Midway-Sunset Cogeneration Company.
Filed Date: 12/30/20.
Accession Number: 20201230–5503.
Comments Due: 5 p.m. ET 1/21/21.

Docket Numbers: EG21–64–000.
Applicants: Lily Solar, LLC.
Description: Notice of Self-Certification of Exempt Wholesale Generator Status of Lily Solar, LLC.
Filed Date: 1/6/21.
Accession Number: 20210106–5141.
Comments Due: 5 p.m. ET 1/27/21.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER15–1883–011; ER10–1852–050; ER10–1890–017; ER10–1951–032; ER10–1962–016; ER10–1989–017; ER11–2160–017; ER11–4462–053; ER11–4677–017; ER11–4678–017; ER12–2444–016; ER12–631–018; ER13–1991–016; ER13–1992–016; ER13–2112–012; ER15–1016–010; ER15–1375–010; ER15–1418–011; ER15–2243–008; ER15–2477–010; ER16–2443–007; ER16–632–009; ER16–90–010; ER16–91–011; ER17–2340–007; ER17–582–008; ER17–583–008; ER17–822–007; ER17–823–007; ER17–838–028; ER18–241–006; ER20–819–003; ER20–820–003.
Applicants: Adelanto Solar, LLC, Adelanto Solar II, LLC, Blythe Solar II, LLC, Blythe Solar III, LLC, Blythe Solar IV, LLC, Blythe Solar 110, LLC, Desert Sunlight 250, LLC, Desert Sunlight 300, LLC, Florida Power & Light Company, FPL Energy Green Power Wind, LLC, FPL Energy Montezuma Wind, LLC, Genesis Solar, LLC, Golden Hills Interconnection, LLC, Golden Hills North Wind, LLC, Golden Hills Wind, LLC, High Winds, LLC, Luz Solar Partners Ltd., III, Luz Solar Partners Ltd., IV, Luz Solar Partners Ltd., V, McCoy Solar, LLC, NextEra Blythe Solar

Energy Center, LLC, NextEra Energy Montezuma II Wind, LLC, NextEra Energy Marketing, LLC, NEPM II, LLC, NextEra Energy Services Massachusetts, LLC, North Sky River Energy, LLC, Shafter Solar, LLC, Silver State Solar Power South, LLC, Sky River LLC, Vasco Winds, LLC, Westside Solar, LLC, Whitney Point Solar, LLC, Windpower Partners 1993, LLC.

Description: Notice of Change in Status of NextEra Resources Entities.

Filed Date: 1/5/21.

Accession Number: 20210105–5161.

Comments Due: 5 p.m. ET 1/26/21.

Docket Numbers: ER20–1839–001.

Applicants: VETCO.

Description: Compliance filing: Amended Order No. 864 Compliance to be effective 3/26/2020.

Filed Date: 1/7/21.

Accession Number: 20210107–5035.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–822–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021–01–07_SA 3201 Termination of Shiawassee Wind-METC GIA (J602) to be effective 5/6/2020.

Filed Date: 1/7/21.

Accession Number: 20210107–5009.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–823–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021–01–07_SA 3378 Termination of NIPSCO-Poplar Wind Project GIA (J883) to be effective 3/4/2021.

Filed Date: 1/7/21.

Accession Number: 20210107–5011.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–824–000.

Applicants: Southern California Edison Company.

Description: § 205(d) Rate Filing: Amended Letter Agreement IP Oberon LLC SA No. 248 to be effective 1/8/2021.

Filed Date: 1/7/21.

Accession Number: 20210107–5016.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–825–000.

Applicants: Otter Tail Power Company.

Description: § 205(d) Rate Filing: Filing of Revised Certificate of Concurrence—NSP TCRA to be effective 2/16/2021.

Filed Date: 1/7/21.

Accession Number: 20210107–5025.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–826–000.

Applicants: Peetz Logan Interconnect, LLC.

Description: Notice of cancellation of Transmission Service Agreements of Peetz Logan Interconnect, LLC.

Filed Date: 1/5/21.

Accession Number: 20210105–5206.

Comments Due: 5 p.m. ET 1/26/21.

Docket Numbers: ER21–827–000.

Applicants: Versant Power.

Description: § 205(d) Rate Filing: Original Service Agreement under Schedule 20A–VP the ISO–NE Tariff to be effective 11/1/2020.

Filed Date: 1/7/21.

Accession Number: 20210107–5026.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–828–000.

Applicants: Midcontinent Independent System Operator, Inc.

Description: § 205(d) Rate Filing: 2021–01–07_SA 2687 METC-New Covert 1st Rev FCA (T94) to be effective 1/4/2021.

Filed Date: 1/7/21.

Accession Number: 20210107–5042.

Comments Due: 5 p.m. ET 1/28/21.

Docket Numbers: ER21–829–000.

Applicants: Weaver Wind, LLC.

Description: § 205(d) Rate Filing: Notice of Non-Material Change in Status and Revised MBR Tariff to be effective 1/8/2021.

Filed Date: 1/7/21.

Accession Number: 20210107–5045.

Comments Due: 5 p.m. ET 1/28/21.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH21–5–000.

Applicants: New Jersey Resources Corporation.

Description: New Jersey Resources Corporation submits FERC–65–A Notice of Material Change in Facts and Exemption Notification.

Filed Date: 1/6/21.

Accession Number: 20210106–5181.

Comments Due: 5 p.m. ET 1/27/21.

Take notice that the Commission received the following electric reliability filings:

Docket Numbers: RD21–2–000.

Applicants: North American Electric Reliability Corporation.

Description: Petition of The North American Electric Reliability Corporation For Approval of Proposed Reliability Standards CIP–013–2, CIP–005–7, and CIP–010–4 Addressing Supply Chain Cybersecurity Risk Management.

Filed Date: 12/14/20.

Accession Number: 20201214–5246.

Comments Due: 5 p.m. ET 1/28/21.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: January 7, 2021.

Nathaniel J. Davis, Sr.,

Deputy Secretary.

[FR Doc. 2021–00511 Filed 1–12–21; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0848, FRS 17302]

Information Collection Being Submitted for Review and Approval to Office of Management and Budget

Correction

In notice document 2020–28021 appearing on pages 83081–83082 in the issue of Monday, December 21, 2020, make the following correction:

On page 83081, in the third column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28021 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0716, 3060–0991 and 3060–1248; FRS 17318]

Information Collections Being Submitted for Review and Approval to Office of Management and Budget

Correction

In notice document 2020–28022 appearing on pages 83079–83081 in the issue of Monday, December 21, 2020, make the following correction:

On page 83079, in the third column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28022 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

FEDERAL REGISTER CITATION NOTICE OF PREVIOUS ANNOUNCEMENT: 86 FR 1970.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Thursday, January 14, 2021 at 10:00 a.m. Virtual Meeting.

CHANGES IN THE MEETING: The matter number for the following item has been corrected: Audit Division Recommendation Memorandum on the Mississippi Republican Party (A17–15).

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Authority: Government in the Sunshine Act, 5 U.S.C. 552b.

Dated: January 11, 2021.

Laura E. Sinram,

Acting Secretary and Clerk of the Commission.

[FR Doc. 2021–00695 Filed 1–11–21; 4:15 pm]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Privacy Act of 1974; System of Records

Correction

In notice document 2020–27990 appearing on pages 83084–83086 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83084, in the third column, in the **DATES** section, on line two, change ''January 20, 2021'' to read ''January 21, 2021.''

(2) On page 83084, in the third column, in the **DATES** section, on line four, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27990 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

FEDERAL TRADE COMMISSION

[File No. 172 3092]

Tapjoy, Inc.; Analysis of Proposed Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices. The attached Analysis of Proposed Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before February 12, 2021.

ADDRESSES: Interested parties may file comments online or on paper by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write ''Tapjoy, Inc.; File No. 172 3092'' on your comment, and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580, or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024.

FOR FURTHER INFORMATION CONTACT: Matthew H. Wernz (415–848–5125), Midwest Regional Office, John C. Kluczynski Federal Building, 230 South Dearborn Street, Suite 3030, Chicago, IL 60604.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained at *https://www.ftc.gov/news-events/commission-actions.*

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before February 12, 2021. Write ''Tapjoy, Inc.; File No. 172 3092'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to the COVID–19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write ''Tapjoy, Inc.; File No. 172 3092'' on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC–5610 (Annex D), Washington, DC 20580; or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Constitution Center, 400 7th Street SW, 5th Floor, Suite 5610 (Annex D), Washington, DC 20024. If possible, submit your paper comment to the Commission by courier or overnight service.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov,* you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any ''trade secret or any commercial or financial information which . . . is privileged or confidential''—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including in particular competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled ''Confidential,'' and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on the *https://www.regulations.gov* website—as legally

required by FTC Rule 4.9(b)—we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website at *http://www.ftc.gov* to read this Notice and the news release describing the proposed settlement. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before February 12, 2021. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy.*

Analysis of Proposed Consent Order to Aid Public Comment

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an agreement containing a consent order from Tapjoy, Inc. (''Tapjoy''). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement's proposed order.

Tapjoy operates an advertising platform within mobile gaming applications. On the platform, Tapjoy promotes offers of in-app rewards (*e.g.,* virtual currency) to consumers who complete an action, such as taking a survey or otherwise engaging with third-party advertising. To induce consumers to engage with third-party advertisers, Tapjoy offers in-app rewards in the form of a specified amount of virtual currency that can be used in the in-app games. However, in many instances, Tapjoy never issued the promised reward to consumers who complete an action as instructed, or only issued the currency after a substantial delay. Consumers who attempt to contact Tapjoy to complain about missing rewards have found it difficult to do so, and even consumers who have been able to submit a complaint nevertheless did not receive the promised reward.

The Commission's proposed complaint alleges that Tapjoy has violated Section 5 of the FTC Act. In particular, the proposed complaint alleges that Tapjoy has represented that consumers will receive a reward of virtual currency upon completion of a specific action when, in many instances, that representation was false, misleading, or not substantiated at the time the representation was made.

The proposed order contains injunctive provisions addressing the alleged deceptive conduct. Part I.A of the proposed order prohibits Tapjoy from making the misrepresentations alleged in the complaint. Part I.B requires Tapjoy to make certain disclosures, specifically that its advertisers determine whether rewards are likely to issue, and when consumers are likely to receive rewards. Part I.C requires Tapjoy to obtain specified agreements from the associated advertiser before a reward is promoted or offered. Part I.D of the proposed order requires Tapjoy, before a reward is promoted or offered, to obtain the materials used to promote or offer the reward, to use those materials to attempt to obtain the reward, to validate the accuracy of those materials, and to validate that the reward is delivered promptly or that any delay is disclosed. Part I.E requires Tapjoy to provide a prominently disclosed and easy-to-use method by which consumers may submit support requests. Part I.F requires Tapjoy to investigate patterns of customer support requests or other information indicating that a particular promotion or offer of a reward has inaccurate instructions or is failing to deliver the reward.

Parts II through V of the proposed order are reporting and compliance provisions. Part II requires acknowledgments of the order. Part III requires Tapjoy to notify the Commission of changes in corporate status and mandates that the company submit an initial compliance report to the Commission. Part IV requires the company to create certain documents relating to its compliance with the order for 10 years and to retain those documents for a 5-year period. Part V mandates that the company make available to the Commission information or subsequent compliance reports, as requested.

Finally, Part VI states that the proposed order will remain in effect for 20 years, with certain exceptions.

The purpose of this analysis is to aid public comment on the proposed order. It is not intended to constitute an official interpretation of the complaint or proposed order, or to modify in any way the proposed order's terms.

By direction of the Commission.

April J. Tabor,

Acting Secretary.

Statement of Commissioner Rohit Chopra Joined by Commissioner Rebecca Kelly Slaughter Summary

- The explosive growth of mobile gaming has led to mounting concerns about harmful practices, including unlawful surveillance, dark patterns, and facilitation of fraud.
- Tapjoy's failure to properly police its mobile gaming advertising platform cheated developers and gamers out of promised compensation and rewards.
- The Commission must closely scrutinize today's gaming gatekeepers, including app stores and advertising middlemen, to prevent harm to developers and gamers.

The video game business has solidified its place as a fixture of America's entertainment industry. During the pandemic, revenues in the sector have reportedly eclipsed those of the sports and film businesses combined.[1] This period has brought about a massive increase in mobile gaming app installs and spending, cementing gaming as a major magnet for Americans' attention.[2] The latest industry offerings rely on deeper social connectivity features and facilitate content creation by players. Americans are hosting birthday parties through gaming apps, and tens of millions have attended concerts by major artists on Fortnite and Roblox.[3]

Mobile gaming is the fastest growing segment of the market, where revenues are primarily generated through in-app purchases and advertising. Importantly, this segment is characterized by a unique market structure dominated by new gatekeepers, particularly app stores

[1] Ben Gilbert, *Video-game industry revenues grew so much during the pandemic that they reportedly exceeded sports and film combined,* Business Insider (Dec. 23, 2020), *https://www.businessinsider.com/video-game-industry-revenues-exceed-sports-and-film-combined-idc-2020-12.*

[2] Robert Williams, *Mobile gaming surges as pandemic drives 45% jump in app installs,* Marketing Drive (Dec. 2, 2020), *https://www.marketingdive.com/news/mobile-gaming-surges-as-pandemic-drives-45-jump-in-app-installs/591417/.* Gaming expert Joost van Dreunen recently offered helpful analysis about emerging trends in this growing industry. The Prof G Show with Scott Galloway, *Pandemic Learnings with Dr. Abdul El-Sayed* (Dec. 15, 2020), *https://westwoodonepodcasts.com/pods/the-prof-g-show-with-scott-galloway/.*

[3] *See, e.g.,* Gil Kaufman, *Here's How Many People Tuned Into Lil Nas X's Roblox Show,* Billboard (Nov. 17, 2020), *https://www.billboard.com/articles/columns/hip-hop/9485495/lil-nas-x-roblox-show-viewers; see also* Joost van Dreunen, *The future is user-generated,* SuperJoost Playlist (Nov. 23, 2020), *https://superjoost.substack.com/p/the-future-is-user-generated.*

and advertising middlemen. This structure is rightfully under more intense scrutiny, given the challenges facing developers and the downstream practices that can harm gamers.

Against this backdrop, the Federal Trade Commission evaluates an appropriate remedy to address conduct of Tapjoy, a mobile advertising platform that connects gamers, game developers, and advertisers. As detailed in the Commission's complaint, Tapjoy's practices allowed users to be cheated of promised rewards, and developers to be cheated of promised compensation. The proposed settlement does not remedy these past harms, but will require Tapjoy to better police its platform to prevent abuses going forward.[4]

Tapjoy's Middleman Misconduct

Tapjoy is a major mobile advertising platform that acts as a middleman between advertisers, gamers, and game developers. The platform woos developers into integrating its technology by promising payments for user activity. In a mobile gaming experience where developers use Tapjoy's advertising platform, Tapjoy displays ''offers.'' When gamers complete these ''offers,'' such as by signing up for subscriptions or making purchases, Tapjoy credits the user's account with coins or other currency for use in the game, and developers receive a percentage of Tapjoy's advertising revenue.[5]

However, according to the FTC's complaint, many players jumped through hoops—and even spent money and turned over sensitive data—to complete Tapjoy's offers, only to receive nothing in return.[6] It appears Tapjoy amplified false offers by its business partners, who baited gamers with big rewards only to cheat them when it was time to pay up.[7] Tapjoy did little to clean up the mess, even when hundreds of thousands of gamers filed complaints.[8] This also harmed developers of mobile games, who were cheated of advertising revenue they were entitled to.

In my view, Tapjoy's conduct violated the FTC Act's prohibition on unfair practices, as well as the prohibition on deceptive practices.[9] The FTC's proposed settlement requires the platform to implement screening and testing procedures to weed out advertisers that cheat gamers and developers. This provision will help ensure Tapjoy takes more responsibility for fraud, rather than facilitating it.[10]

Gaming Gatekeepers and Trickle-Down Abuse

Tapjoy is not the only platform squeezing developers. In fact, the firm is a minnow next to the gatekeeping whales of the mobile gaming industry, Apple and Google. By controlling the dominant app stores, these firms enjoy vast power to impose taxes and regulations on the mobile gaming industry, which was generating nearly $70 billion annually even before the pandemic.[11]

We should all be concerned that gatekeepers can harm developers and squelch innovation. The clearest example is rent extraction: Apple and Google charge mobile app developers on their platforms up to 30 percent of sales, and even bar developers from trying to avoid this tax through offering alternative payment systems.[12] While larger gaming companies are pursuing legal action against these practices, developers and small businesses risk severe retaliation for speaking up, including outright suspension from app stores—an effective death sentence.[13]

This market structure also has cascading effects on gamers and consumers. Under heavy taxation by Apple and Google, developers have been forced to adopt alternative monetization models that rely on surveillance, manipulation, and other harmful practices.

For example, many developers are turning to ''loot boxes'' to squeeze more revenue out of gamers. These loot boxes deploy dark patterns and other deceptions to lure gamers—often children—into purchasing in-app rewards of randomly assigned value, turning videogames into virtual casinos. As detailed in a recent FTC report, this addictive phenomenon emerged as a direct consequence of changing monetization models in the industry, as developers increasingly rely on recurring revenue, such as through in-app purchases, rather than upfront sales.[14]

Mobile gaming's market structure is also forcing developers to create revenue streams that are not subject to app store taxation, including through intrusive behavioral advertising. Last year, for example, the FTC brought an action against Hyperbeard, a developer of child-directed games charged with allowing major ad networks to surveil users—including children—in order to serve behavioral advertising.[15] This type of conduct violates the Children's Online Privacy Protection Act, but Hyperbeard's surveillance practices are not unique. In fact, Google encourages game developers on its platform to adopt this monetization model, claiming ''users expect free games.''[16]

Today's action against Tapjoy reveals another monetization model developers turn to in the face of fees and restrictions imposed by app stores. By offering a platform connecting advertisers, gamers, and game developers, Tapjoy allows these developers to generate advertising revenue that Apple and Google do not tax. But this monetization model also creates opportunities for fraud, and the Commission's complaint details how Tapjoy allowed this fraud to fester.

Monitoring the Middlemen

Developers of mobile games deliver creative content that keeps Americans entertained and engaged, but face many middlemen, even beyond the dominant

[4] This matter is another example where the lack of clarity regarding the scope of immunities conferred by Section 230 of the Communications Decency Act has given legal ammunition to platforms seeking to shirk responsibility for their commercial activity, including sales and advertising practices. This lack of clarity undermines the ability of the FTC and other regulators to obtain adequate monetary relief for misconduct.

[5] In other instances, users can receive rewards directly through the game.

[6] Compl. In the Matter of Tapjoy, Inc., ¶¶ 21–29.

[7] Compl., *id.* ¶¶ 8, 15–29.

[8] Compl., *id.* ¶¶ 30–40.

[9] The Commission's proposed complaint charges Tapjoy with deception, but fails to include a charge of unfairness. However, the settlement includes injunctive relief that addresses Tapjoy's failure to police fraud.

[10] I respectfully disagree with the proposed order provision requiring Tapjoy to disclose that advertisers are responsible for issuing rewards. This disclaimer undermines the goal of ensuring that Tapjoy takes adequate responsibility for its business partners' practices.

[11] *See* Omer Kaplan, *Mobile gaming is a $68.5 billion global business, and investors are buying in,* TechCrunch (Aug. 22, 2019), *https://techcrunch.com/2019/08/22/mobile-gaming-mints-money/.*

[12] *See* Staff of H. Comm. On the Judiciary, 116th Cong., Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations at 221 (Google); 339 (Apple). Although Google allows users to ''sideload'' apps from outside the Play Store, it has been alleged that Google makes this process ''technically complex, confusing and threatening[.]'' *Id.* at 220 (quoting Epic lawsuit).

[13] Developers have alleged retaliatory practices by both Google and Apple, such as when they have tried to circumvent these gatekeepers' preferred monetization tools. *Id.* at 222, 348–349.

[14] Press Release, Fed. Trade Comm'n, FTC Staff Issue Perspective Paper on Video Game Loot Boxes Workshop (Aug. 14, 2020), *https://www.ftc.gov/news-events/press-releases/2020/08/ftc-staff-issue-perspective-paper-video-game-loot-boxes-workshop.*

[15] Press Release, Fed. Trade Comm'n, Developer of Apps Popular with Children Agrees to Settle FTC Allegations It Illegally Collected Kids' Data without Parental Consent (June 4, 2020), *https://www.ftc.gov/news-events/press-releases/2020/06/developer-apps-popular-children-agrees-settle-ftc-allegations-it.*

[16] *Mobile ads: the key to monetizing gaming apps,* Google AdMob, *https://admob.google.com/home/resources/monetize-mobile-game-with-ads/* (last visited on Jan. 5, 2021).

app stores. Game developers relied on Tapjoy to generate revenue for themselves and offer gamers a way to earn currency to enhance their play. However, Tapjoy's failure to screen fraudulent offers left both gamers and developers holding the bag.

The settlement proposed today should help reverse the lax policing practices that led hundreds of thousands of gamers to file complaints. But when it comes to addressing the deeper structural problems in this marketplace that threaten both gamers and developers, the Commission will need to use all of its tools—competition, consumer protection, and data protection—to combat middlemen mischief, including by the largest gaming gatekeepers.

[FR Doc. 2021–00568 Filed 1–12–21; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0200; Docket No. 2020–0053; Sequence No. 19]

Submission for OMB Review; Protecting Life in Global Health Assistance

Correction

In notice document 2020–28152 appearing on pages 83086–83087 in the issue of Monday, December 21, 2020, make the following correction:

On page 83087, in the first column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28152 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

GENERAL SERVICES ADMINISTRATION

[Notice-MG–2021–01; Docket No. 2021–0002; Sequence No. 1]

Office of Federal High-Performance Buildings; Green Building Advisory Committee; Notification of Upcoming Web Meeting

AGENCY: Office of Government-Wide Policy, General Services Administration (GSA).

ACTION: Meeting notice.

SUMMARY: In accordance with the requirements of the Federal Advisory Committee Act, this notice provides the agenda for the January 28, 2021 Web meeting of the Green Building Advisory Committee (the Committee). Interested individuals must register to attend as instructed below under Supplementary Information.

DATES: The Committee's Web meeting will be held on Thursday, January 28, 2021, from 11:00 a.m. to 4:30 p.m. Eastern time (ET).

FOR FURTHER INFORMATION CONTACT: Dr. Ken Sandler, Designated Federal Officer, Office of Federal High-Performance Buildings, Office of Government-wide Policy, General Services Administration, 1800 F Street NW, (Mail-code: MG), Washington, DC 20405, at *ken.sandler@gsa.gov* or 202–219–1121. Additional information about the Committee, including meeting materials and agendas, will be available on-line at *http://www.gsa.gov/gbac.*

SUPPLEMENTARY INFORMATION:

Procedures for Attendance and Public Comment

Contact Dr. Ken Sandler at *ken.sandler@gsa.gov* or 202–219–1121 to register to attend the Committee meeting. To attend, submit your full name, organization, email address, and phone number. Requests to attend the meeting must be received by 5:00 p.m. ET, on Monday, January 25, 2021. (GSA will be unable to provide technical assistance to any listener experiencing technical difficulties. Testing access to the Web meeting site before the calls is recommended.)

Contact Dr. Sandler to register to comment during the meeting public comment period. Registered speakers/organizations will be allowed a maximum of five minutes each and will need to provide written copies of their presentations. Requests to comment at the meeting must be received by 5:00 p.m., ET, on Monday, January 25, 2021.

Background

The Administrator of GSA established the Committee on June 20, 2011 (**Federal Register**/Vol. 76, No. 118) pursuant to Section 494 of the Energy Independence and Security Act of 2007 (EISA, 42 U.S.C. 17123). Under this authority, the Committee provides independent policy advice and recommendations to GSA to advance federal building innovations in planning, design, and operations to reduce costs, enable agency missions, enhance human health and performance, and minimize environmental impacts.

January 28, 2021 Meeting Agenda

- Updates and introductions
- Embodied energy task group findings & recommendations
- Election for Committee Chair
- Sustainable response to COVID–19 task group findings & recommendations
- Energy storage task group findings & recommendations
- New committee directions & topics to explore
- Public comment
- Next steps and closing comments

Kevin Kampschroer,

Federal Director, Office of Federal High-Performance Buildings, General Services Administration.

[FR Doc. 2021–00515 Filed 1–12–21; 8:45 am]

BILLING CODE 6820–14–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2008–N–0312]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Extralabel Drug Use in Animals

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by February 12, 2021.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0325. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed collection of information to OMB for review and clearance.

Extralabel Drug Use for Animals—21 CFR 530

OMB Control Number 0910–0325—Extension

The Animal Medicinal Drug Use Clarification Act of 1994 (Pub. L. 103–396) allows a veterinarian to prescribe the extralabel use of approved new animal drugs. Also, it permits FDA, if it finds that there is a reasonable probability that the extralabel use of an animal drug may prevent the risk to the public health, to establish a safe level for a residue from the extralabel use of the drug and to require the development of an analytical method for the detection of residues above that established safe level (21 CFR 530.22(b)). Although to date, we have not established a safe level for a residue from the extralabel use of any new animal drug and, therefore, have not required the development of analytical methodology, we believe that there may be instances when analytical methodology will be required. We are, therefore, estimating the reporting burden based on two methods being required annually. The requirement to establish an analytical method may be fulfilled by any interested person. We believe that the sponsor of the drug will be willing to develop the method in most cases. Alternatively, FDA, the sponsor, and perhaps a third party may cooperatively arrange for method development. The respondents may be sponsors of new animal drugs; State, Federal, and/or State Agencies; academia; or individuals.

In the **Federal Register** of August 6, 2020 (85 FR 47794), we published a 60-day notice requesting public comment on the proposed collection of information. One comment was received but was not responsive to topics solicited regarding the information collection.

We estimate the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

21 CFR part	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
530.22(b); Submission(s) of Analytical Method	2	1	2	4,160	8,320

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: January 5, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00475 Filed 1–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2010–N–0161]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Export of Food and Drug Administration-Regulated Products: Export Certificates

Correction

In notice document 2020–28064 appearing on pages 83091–83092 in the issue of Monday, December 21, 2020, make the following correction:

On page 83091, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28064 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2014–N–0913]

Agency Information Collection Activities; Proposed Collection; Comment Request; 513(g) Request for Information

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing an opportunity for public comment on the proposed collection of certain information by the Agency. Under the Paperwork Reduction Act of 1995 (PRA), Federal Agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information and to allow 60 days for public comment in response to the notice. This notice solicits comments on the information collection burden estimate for requests for a written statement from FDA regarding the classification and regulatory requirements that may be applicable to a particular device (513(g) requests).

DATES: Submit either electronic or written comments on the collection of information by March 15, 2021.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. Electronic comments must be submitted on or before March 15, 2021. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of March 15, 2021. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your

comments, that information will be posted on *https://www.regulations.gov.*

• If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

• *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.

• For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2014–N–0913 for ''Agency Information Collection Activities; Proposed Collection; Comment Request; 513(g) Request for Information.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Ila S. Mizrachi, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–7726, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3521), Federal Agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes Agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires Federal Agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, FDA is publishing notice of the proposed collection of information set forth in this document.

With respect to the following collection of information, FDA invites comments on these topics: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

513(g) Request for Information

OMB Control Number 0910–0705—Extension

This information collection supports Agency regulations and accompanying guidance. Section 513(g) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 360c(g)) provides a means for obtaining the Agency's views about the classification and regulatory requirements that may be applicable to a particular device. Section 513(g) provides that, within 60 days of the receipt of a written request of any person for information respecting the class in which a device has been classified or the requirements applicable to a device under the FD&C Act, the Secretary of Health and Human Services shall provide such person a written statement of the classification (if any) of such device and the requirements of the FD&C Act applicable to the device. Regulations governing medical device classification procedures are codified under 21 CFR part 860.

The guidance document entitled ''FDA and Industry Procedures for Section 513(g) Requests for Information Under the Federal Food, Drug, and Cosmetic Act; Guidance for Industry and Food and Drug Administration Staff''[1] establishes procedures for submitting, reviewing, and responding to requests for information respecting the class in which a device has been classified or the requirements applicable to a device under the FD&C Act that are submitted in accordance with section 513(g) of the FD&C Act. FDA does not review data related to substantial equivalence or safety and effectiveness in a 513(g) request for information. FDA's responses to 513(g) requests for information are not device classification decisions and do not constitute FDA clearance or approval for marketing. Classification decisions and clearance or approval for marketing require submissions under different sections of the FD&C Act.

Relatedly, the FD&C Act, as amended by the Food and Drug Administration Amendments Act of 2007 (Pub. L. 110–85), requires FDA to collect user fees for 513(g) requests for information. The guidance document entitled ''User Fees for 513(g) Requests for Information; Guidance for Industry and Food and

[1] *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/fda-and-industry-procedures-section-513g-requests-information-under-federal-food-drug-and-cosmetic.*

Drug Administration Staff'' [2] assists FDA staff and regulated industry by describing the user fees associated with 513(g) requests. The Medical Device User Fee Cover Sheet (Form FDA 3601), which accompanies the supplemental material described in this information collection is approved under OMB control number 0910–0511.

FDA estimates the burden of this collection of information as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Center for Devices and Radiological Health 513(g) requests	114	1	114	12	1,368
Center for Biologics Evaluation and Research 513(g) requests	4	1	4	12	48
Total					1,416

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

Based on a review of the information collection since our last request for OMB approval, we have made no adjustments to our burden estimate.

Dated: January 5, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00470 Filed 1–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2020–N–0008]

Circulatory System Devices Panel of the Medical Devices Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA or the Agency) announces a forthcoming public advisory committee meeting of the Circulatory System Devices Panel of the Medical Devices Advisory Committee. The general function of the committee is to provide advice and recommendations to the Agency on FDA's regulatory issues. The meeting will be open to the public.

DATES: The meeting will take place virtually on February 17, 2021, from 9 a.m. Eastern Time to 6 p.m. Eastern Time.

ADDRESSES: Please note that due to the impact of this COVID–19 pandemic, all meeting participants will be joining this advisory committee meeting via an online teleconferencing platform. Answers to commonly asked questions about FDA advisory committee meetings may be accessed at: *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm408555.htm.*

FOR FURTHER INFORMATION CONTACT: Aden Asefa, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 5214, Silver Spring, MD 20993–0002, *aden.asefa@fda.hhs.gov,* 301–796–0400, or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last-minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's website at *https://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee meeting link, or call the advisory committee information line to learn about possible modifications before the meeting.

SUPPLEMENTARY INFORMATION:

Agenda: The meeting presentations will be heard, viewed, captioned, and recorded through an online teleconferencing platform. On February 17, 2021, the committee will discuss, make recommendations, and vote on information regarding the premarket approval application (PMA) for the Lutonix 014 Drug Coated Balloon Percutaneous Transluminal Angioplasty (PTA) catheter. The proposed Indication for Use for the Lutonix 014 Drug Coated Balloon PTA catheter is indicated for percutaneous transluminal angioplasty, after appropriate vessel preparation, of obstructive *de novo* or non-stented restenotic lesions in native popliteal, tibial, and peroneal arteries up to 320 mm in length and 2.0 to 4.0 mm in diameter.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its website prior to the meeting, the background material will be made publicly available on FDA's website at the time of the advisory committee meeting, and the background material will be posted on FDA's website after the meeting. Background material and the link to the online teleconference meeting room will be available at *https://www.fda.gov/advisory-committees/medical-devices-advisory-committee/circulatory-system-devices-panel.* Select the link for the 2021 Meeting Materials. The meeting will include slide presentations with audio components to allow the presentation of materials in a manner that most closely resembles an in-person advisory committee meeting.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before February 10, 2021. Oral presentations from the public will be scheduled between approximately 1 p.m. Eastern Time and 2 p.m. Eastern Time. Those individuals interested in making formal oral presentations should notify the contact person (see **FOR FURTHER INFORMATION CONTACT**). The notification should include a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time

[2] *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/user-fees-513g-requests-information.*

requested to make their presentation on or before February 2, 2021. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by February 3, 2021.

For press inquiries, please contact the Office of Media Affairs at *fdaoma@fda.hhs.gov* or 301–796–4540.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with disabilities. If you require accommodations due to a disability, please contact AnnMarie Williams at *Annmarie.Williams@fda.hhs.gov* or 301–796–5966 at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our website at *https://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: January 6, 2021.

Lauren K. Roth,

Acting Principal Associate Commissioner for Policy.

[FR Doc. 2021–00469 Filed 1–12–21; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Resources and Services Administration

Agency Information Collection Activities: Proposed Collection: Public Comment Request Information Collection Request Title: Scientific Registry of Transplant Recipients Information Collection Effort for Potential Donors for Living Organ Donation OMB No. 0906–0034—Extension

Correction

In notice document 2020–28017 appearing on pages 83098–83099 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83098, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28017 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Privacy Act of 1974; System of Records

AGENCY: National Institutes of Health (NIH), Department of Health and Human Services (HHS).

ACTION: Notice of a Modified System of Records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, as amended, the Department of Health and Human Services is updating and renaming an existing system of records maintained by the National Institutes of Health (NIH), 09–25–0165, ''National Institutes of Health (NIH) Office of Loan Repayment and Scholarship (OLRS) Record System, HHS/NIH/OD'' (to be renamed ''NIH Loan Repayment Records''). In a separate Notice of Proposed Rulemaking (NPRM) published elsewhere in today's **Federal Register**, HHS/NIH is proposing to exempt a subset of records in the system of records from certain requirements of the Privacy Act, based on subsection (k)(5) of the Privacy Act.

DATES: The comment period for this modified System of Records Notice (SORN) is co-extensive with the 60-day comment period provided in the companion NPRM also published in today's **Federal Register**. Written comments on the SORN should be submitted on or before March 15, 2021. The modified SORN will be applicable when the proposed exemptions are made effective by publication of a Final Rule, which will not occur until after the 60-day comment period ends and any comments received on the NPRM (or on this SORN) have been addressed.

ADDRESSES: You may submit comments, identified by the Privacy Act System of Records Number (09–25–0165), by any of the following methods: Email: *privacy@mail.nih.gov* and include Privacy Act System of Record (PA SOR) number (09–25–0165) in the subject line of the message. Phone: (301) 402–6201. Fax: (301) 402–0169. Mail or hand-delivery: NIH Privacy Act Officer, Office of Management Assessment, National Institutes of Health, 6011 Executive Blvd., Suite 601, MSC 7669, Rockville, MD 20852. Comments received will be available for public inspection at this same address from 9 a.m. to 3 p.m., Monday through Friday, except federal holidays. Please call 301–496–4606 for an appointment.

FOR FURTHER INFORMATION CONTACT: General questions about the proposed modified system of records may be submitted to Celeste Dade-Vinson, NIH Privacy Act Officer, Office of Management Assessment, Office of the Director, National Institutes of Health (NIH), 6011 Executive Blvd., Suite 601, MSC 7669, Rockville, MD 20852, or telephone 301 402–6201.

SUPPLEMENTARY INFORMATION: This system of records (hereafter referred to as the ''NIH Loan Repayment Records''), covers records maintained in a particular NIH information technology (IT) system managed by NIH's Division of Loan Repayment (DLR) that are used to manage and evaluate the intramural and extramural educational Loan Repayment Programs (LRP) at NIH. As of the date of this publication, there are eight such programs that provide student loan repayments for qualified individuals who agree to conduct biomedical and behavioral research; recipients include NIH employee researchers as well as scientists conducting research at non-profit organizations outside NIH. Scholarship program records at NIH are now covered by the following NIH SORNs, so are omitted from modified SORN 09–25–0165:

- 09–25–0014—Clinical Research: Student Records, HHS/NIH/OD/OIR/OE
- 09–25–0108—Personnel: Guest Researchers, Special Volunteers, and Scientists Emeriti, HHS/NIH/OHRM
- 09–25–0140—International Scientific Researchers in Intramural Laboratories, ORS/DIRS
- 09–25–0158—Administration Records of Applicants and Awardees of the Intramural Research Training Awards Program, HHS/NIH/OD/OE

The System of Records Notice (SORN) for System 09–25–0165 has been reformatted in accordance with OMB Circular A–108 and updated with these changes:

- *System name.* The system name has been changed from ''National Institutes of Health (NIH) Office of Loan Repayment and Scholarship Records system, HHS/NIH/OD'' to ''NIH Loan Repayment Records.''
- *Throughout the SORN.* References to scholarship program records have been omitted; for example, the abbreviation ''LRSPs'' is now ''LRPs.''
- *System Location and System Manager.* Office names and addresses have been updated.
- *Authority.* This section has been updated to remove all authorities

previously cited, except 42 U.S.C. 288–1 and 288–2, and to cite 31 U.S.C. 7701 as authorizing collection of applicants' social security numbers (SSNs).

• *Purposes.* The purpose descriptions have been reorganized, so that the three purposes in the previously published SORN are now within the first purpose description in the modified SORN. The first purpose description is now more detailed. Two new purposes have been added to indicate that records are used to evaluate the long-term impact of the LRP on scientists' research career development and to execute LRP ambassador and alumni activities.

• *Categories of Individuals.* This section now includes more categories of individuals. In addition to loan applicants and awardees, it now also includes appointees to the LRP ambassador program, alumni of the LRP, and NIH staff. A note has been added at the end of this section explaining that reviewers who make recommendations to DLR about applicants for loan repayment are not included as subject individuals because their personal identifiers are not used to retrieve records in this system of records.

• *Categories of Records.* Information compiled in the NIH Loan Repayment system remains the same, but the records description in the SORN is now separated into two categories of records (award information and pre-award information) and arranged to indicate whether one or both categories apply to each type of individual. A sentence has been added to clarify the scope of the SORN, so that it does not duplicate related SORNs.

• *Routine Uses.*

○ No substantive changes were made to the first three routine uses.

○ Routine use 4 (authorizing disclosures to contractors and subcontractors) has been revised to include additional recipients—consultants, volunteers, awardees, and other agencies engaged by HHS—and to describe more broadly the purposes for which they might be engaged by HHS and require access to records in this system of records. The previous description was limited to ''collecting, compiling, aggregating, analyzing, or refining records in the system.''

○ Routine use 5's language has been updated for clarity, but the scope has not been substantively changed.

○ Routine use 6 still authorizes disclosures to the National Student Clearinghouse, but no longer covers disclosures to consumer reporting agencies for purposes of vetting loan applications, because such disclosures are inapplicable to this system of records.

○ Debt collection related routine uses (numbered 7 through 15 in the previously published SORN) and a separate section titled ''Disclosure to Consumer Reporting Agencies'' have been deleted because they are no longer applicable to this system of records.

○ The routine use that was numbered as 16 in the previously published SORN (authorizing disclosures to officials or representatives of grantee institutions) is now numbered as 7 in the modified SORN and has not been changed.

○ The routine use that was numbered as 17 in the previously published SORN (pertaining to the scholarship programs) is no longer relevant to this system of records and has been deleted.

○ The routine use that was numbered as 18 in the previously-published SORN (authorizing disclosures to HHS contractors and subcontractors for the purpose of recruiting, screening, and matching health professionals for NIH employment in qualified research positions under the loan and scholarship programs) is now encompassed within the scope of revised routine use 4.

○ Routine uses 8 through 11 are new.

○ The two breach response-related routine uses which were added by a partial modification published at 83 FR 6591 (Feb. 14, 2018) are now numbered as 12 and 13.

• *Storage.* This section has been updated to provide examples of electronic media currently used for storage such as mobile or portable storage devices like laptops, smart phones, and DVDs, and to omit microfiche, tape, and discs.

• *Retrieval.* This section has been updated to include an additional personal identifier, NIH Electronic Research Administration (eRA) Commons identification number, which can be used to retrieve records about individuals registered in Commons (an online interface where signing officials, principal investigators, trainees and Postdoctoral researchers at institutions/organizations can access and share administrative information relating to research grants).

• *Retention.* This section has been updated to identify National Archives and Records Administration (NARA) General Records Schedules 1.1.010 and 2.4.090, instead of an NIH records control schedule, as the applicable disposition authority. The disposition periods and practices remain the same, except that two additional retention periods have been added: ''Grantee applicant case files are destroyed six years after disapproval or withdrawal of the associated application'' and ''NIH is authorized to retain electronic records of applicants until the agency's business needs cease, to help facilitate follow up assessment regardless of award status.''

• *Safeguards.* This section has been updated to reflect current safeguards.

• *Exemptions.* This section now reflects that the system of records is exempt from the access, amendment, and accounting of disclosures requirements of the Privacy Act to the extent that compliance with those requirements would reveal the identity of a source who furnished information to the Federal Government under an express promise that the identity of the source would be held in confidence. The exemptions protect reviewers who make recommendations to DLR about loan repayment applicants from being subject to threats, bribery, intimidation, retaliation, and any other form of improper influence that may cause bias during the review and award processes. Reviewers include peer reviewers, referees, and other recommenders.

Because these changes are significant, a report on the modified system of records has been sent to the Office of Management and Budget (OMB) and Congress in accordance with 5 U.S.C. 552a(r).

Dated: November 19, 2020.

Alfred Johnson,

Deputy Director for Management, National Institutes of Health.

SYSTEM NAME AND NUMBER:

NIH Loan Repayment Records, 09–25–0165.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Division of Loan Repayment, Office of Extramural Research, Office of the Director (OD), National Institutes of Health (NIH), 6700B Rockledge Drive, Suite 2300, Bethesda, MD, 20892.

SYSTEM MANAGER(S):

Director, Division of Loan Repayment, Office of Extramural Research, Office of the Director, National Institutes of Health, 6700B Rockledge Drive, Suite 2300, Bethesda, MD, 20892. Telephone number: 866–849–4047. Email: *lrp@nih.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The legal authority to maintain these records is 42 U.S.C. 288–1 and 288–2. Section 7701 of Title 31 U.S.C. authorizes collection of Social Security Numbers.

PURPOSE(S) OF THE SYSTEM:

The records are used by NIH's Division of Loan Repayment for the following purposes:

(1) To manage intramural and extramural educational Loan Repayment Programs (LRPs) at NIH; specifically to:

• Identify and select applicants for the NIH LRPs;

• Verify applicants' information and program eligibility;

• Select LRP awardees and administer their LRP contracts or awards, including checking research service verifications (receiving institutional certifications that awardees are performing the research project/work proposed in their application), continued employment, and continued financial and program eligibility; and

• Monitor loan repayment activities, such as payment tracking, payment verifications, loan statuses, and loan default.

(2) To evaluate the LRP programmatic goals and the long-term impact of the LRP on scientists' research career development.

(3) To execute LRP ambassador and alumni activities, the three goals of which are to a) advocate to interested parties about the benefits of choosing a biomedical research career, b) advise current and future potential LRP applicants and policy makers regarding the benefits of the LRP, and c) mentor current and future potential LRP applicants regarding strategies for applying to the LRP.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

The records are about the following categories of individuals (these are the only individuals whose personal identifiers are used to retrieve records from this system of records):

1. Applicants for, or awardees of, the NIH Loan Repayment Programs (LRPs).

2. Applicants for, or appointees as, ambassador of the NIH LRP.

3. Alumni of the NIH LRP.

Reviewers who provide materials and recommendations to DLR about applicants are not included as subject individuals, because records are not retrieved by their names or other personal identifiers.

CATEGORIES OF RECORDS IN THE SYSTEM:

This system includes a variety of pre-award and award management records that contain information needed to process applications and manage loan repayment awards across the award lifecycle. Listed below are the categories of individuals mentioned above, matched with the records collected about them:

1. Applicants to the NIH LRP—pre-award information;

2. Awardees of NIH LRPs—pre-award and post-award information;

3. LRP applicants and awardees as appointees to the LRP ambassador program—pre-award and post-award information;

4. Appointees to the LRP ambassador program or LRP Ambassadors–professional description and contact information;

5. Alumni of the NIH LRP—pre-award and post-award information.

Note that NIH may maintain some of the same records in more than one IT system and has opted to create a separate SORN for each IT system. This SORN covers records in the NIH IT system managed by NIH's Division of Loan Repayment.

Pre-award information includes the (1) LRP application and (2) associated forms. It consists of name; address; Social Security Numbers; NIH Commons ID Number; non-LRP-program service pay-back obligations; employment data; personal, professional, and demographic background information; academic and research descriptions and progress reports (which can include related data, correspondence, and professional performance information such as continuing education, performance awards, and adverse or disciplinary actions); financial data including account names and financial account numbers, loan balances, deferment, forbearance, and payment status information; commercial credit reports; recommendation letters; and peer review-related information such as application scores, reviewer critiques, summary statements, and express promises of confidentiality to reviewers who render scores or critiques.

Award management information consists of items such as (1) certifications and verifications of continued employment status; (2) financial information such as obligated award amounts, awardee financial reports, ongoing loan balances, loan repayment tracking and verifications, and any financial or credit information that represents a change from that reported in the application that occurs during the award or contract; (3) quarterly research service certifications; and (4) any change in award/contract management or status.

RECORD SOURCE CATEGORIES:

Information included in this system of records is collected directly from the applicants and awardees, and from reviewers, mentors, supervisors, institutional business officials, participating lending and loan servicing institutions, educational and awardee institutions, other federal agencies, consumer reporting agencies, credit bureaus, the National Student Clearinghouse, third parties that provide references concerning applicants, and commercial residential address databases which are used to find or verify current home addresses.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Records about an individual may be disclosed from this system of records to parties outside HHS, without the individual's prior written consent, for the following purposes:

1. To a congressional office from the record of an individual in response to an inquiry from the congressional office made at the written request of the individual.

2. To the Department of Justice (DOJ) or to a court or other adjudicative body in litigation or other proceedings when:

• HHS or any component thereof or another participating agency; or

• any employee of HHS or of another participating agency in the employee's official capacity; or

• any employee of HHS in the employee's individual capacity where the DOJ, HHS, or participating agency has agreed to represent the employee; or

• the United States, if it is a party to or has a direct and substantial interest in the proceeding and the disclosure of such records is deemed by HHS to be relevant and necessary to the proceeding.

3. When a record on its face, or in conjunction with other records, indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, disclosure may be made to the appropriate public authority, whether federal, foreign, state, local, tribal, or otherwise responsible for enforcing, investigating, or prosecuting the violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

4. To appropriate federal agencies and HHS contractors, awardees, consultants, or volunteers who have been engaged by HHS to assist in the accomplishment of an HHS function relating to the purposes of this system of records and that need to have access to the records in order to assist HHS in performing the activity. Any contractor will be required to comply with the Privacy Act of 1974, as amended.

5. To present and former employers, references listed on applications and associated forms, other references, and

educational institutions to evaluate an individual's professional and academic accomplishments, plans, performance, credentials, and educational background, and to determine if an applicant is suitable for participation in a LRP.

6. To the National Student Clearinghouse using the Loan Locator internet System or similar system to assist in the verification of loan data submitted by LRP applicants. Disclosures are limited to the applicant's name, address, social security number, and other information necessary to identify the applicant; locate all student loans; verify payment addresses; identify the funding being sought or amount and status of the debt; and identify the program under which the applicant or claim is being processed.

7. To institution officials or representatives that serve in a supervisory role to the awardee to support the review of an LRP application, or to carry out performance or administration under the terms and conditions of the LRP award, or to monitor, manage, and resolve problems that might arise in performance or administration of the LRP contract.

8. To the National Archives and Records Administration (NARA) in records management inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

9. To a federal, state, local or tribal agency in response to its request in connection with the hiring or retention of an employee, the issuance or retention of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance or retention of a license, grant, cooperative agreement, loan repayment, or other benefit by the requesting agency, to the extent that the record is relevant and necessary to the requesting agency's decision in the matter. The other agency or licensing organization may then make a request supported by the written consent of the individual for further information if it so chooses. HHS will not make an initial disclosure unless the information has been determined to be sufficiently reliable to support a referral to another office within the agency or to another federal agency for criminal, civil, administrative, personnel, or regulatory action.

10. To qualified experts, not within the definition of agency employees as prescribed in agency regulations or policies, to obtain their opinions on applications for loans or other awards as part of the peer review process.

11. To the Department of the Treasury (Treasury) for purposes of verifying payment eligibility affecting loan reimbursement payments, including under a computer matching agreement between HHS and Treasury for disbursement-related purposes authorized by 31 U.S.C. 3321 note and Executive Order 13520, if the matching program requires data from this system of records.

12. To appropriate agencies, entities, and persons when (1) HHS suspects or has confirmed that there has been a breach of the system of records; (2) HHS has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HHS (including its information systems, programs, and operations), the federal government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HHS's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

13. To another federal agency or federal entity, when HHS determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the federal government, or national security, resulting from a suspected or confirmed breach.

NIH may also disclose information about an individual, without the individual's prior written consent, from this system of records to parties outside HHS for any of the purposes authorized directly in the Privacy Act at 5 U.S.C. 552a(b)(2) and (b)(4)–(11).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in various electronic media (secure servers and mobile/portable storage devices, such as laptops, tablets, Universal Serial Bus (USB) drives, media cards, portable hard drives, smart phones, Compact Disc (CD)s and Digital Versatile Disc (DVD)s) and in paper form.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by the subject individual's name, social security number, loan repayment number, or NIH eRA Commons ID number for LRP awardees.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

Records are retained and disposed of under the authority of NARA General Records Schedules 1.1.010, *Financial transactions records related to procuring goods and services, paying bills, collecting debts, and accounting;* and 2.4.090, *Incentive package records.* Participant case files are transferred to a federal records center one year after closeout and destroyed five years later. Closeout is the process by which it is determined that all applicable administrative actions and disbursements of benefits have been completed by the NIH's DLR and that all service obligations have been completed by the participant. NIH staff case files are destroyed three years after disapproval or withdrawal of the application. Applicant case files are destroyed six years after disapproval or withdrawal of the application. In accordance with both NARA General Records Schedules 1.1.010 and 2.4.090, NIH may retain certain electronic records about applicants indefinitely, until the agency's business needs cease, to help facilitate follow up assessment of applicants regardless of their award status.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Measures to prevent unauthorized disclosures are implemented as appropriate for each location or form of storage and for the types of records maintained. Safeguards conform to the HHS Information Security and Privacy Program, *https://www.hhs.gov/ocio/securityprivacy/index.html.* Site(s) implement personnel and procedural safeguards such as the following:

Authorized Users: Access is strictly limited according to the principle of least privilege which means giving a user only those privileges which are essential to that user's work.

Administrative Safeguards: Controls to ensure proper protection of information and information technology systems include the completion of a Security Assessment and Authorization (SA&A), a Privacy Impact Assessment (PIA), and completion of annual NIH Information Security and Privacy Awareness training. The SA&A consists of a Security Categorization, e-Authentication Risk Assessment, System Security Plan, evidence of Security Control Testing, Plan of Action and Milestones, Contingency Plan, and evidence of Contingency Plan Testing. When the design, development, or operation of a system of records about individuals is required to accomplish an agency function, DLR includes the

applicable Privacy Act Federal Acquisition Regulation (FAR) clauses in the solicitations and contracts.

Physical Safeguards: Controls to secure the data and protect paper and electronic records, buildings, and related infrastructure against threats associated with their physical environment include the use of the HHS Employee ID or badge number and NIH key cards, security guards, cipher locks, biometrics, and closed-circuit TV. Paper records are secured in locked file cabinets, offices and facilities. Electronic media are kept on secure servers or computer systems.

Technical Safeguards: Controls executed by the computer system are employed to minimize the possibility of unauthorized access, use, or dissemination of the data in the system. Examples include user identification, password protection, firewalls, virtual private network, encryption, intrusion detection system, common access cards, smart cards, biometrics and public key infrastructure.

RECORD ACCESS PROCEDURES:

This system of records is exempt from access under the Privacy Act to the extent that providing access to a subject individual would reveal the identity of a source who furnished information to the Federal Government under an express promise that the identity of the source would be held in confidence. However, DLR will consider all access requests addressed to the System Manager. To request access to a record about you, write to the System Manager at the address identified above, and reasonably specify the record contents sought. The request should include (a) your full name, (b) your address, (c) the approximate date(s) the information was collected, (d) the type(s) of information collected, and (e) the office(s) or official(s) responsible for the collection of information. You may also request an accounting of disclosures, if any, that have been made of any records maintained about you.

You must verify your identity by providing either (a) a notarization of your signed request or (b) a written statement certifying under penalty of perjury that you are the individual who you claim to be, and that you understand that the knowing and willful request for a record pertaining to an individual under false pretenses is a criminal offense under the Privacy Act, subject to a fine of up to five thousand dollars.

CONTESTING RECORD PROCEDURES:

This system of records is exempt from the amendment provisions of the Privacy Act to the extent that responding to an amendment request would reveal the identity of a source who furnished information to the Federal Government under an express promise that the identity of the source would be held in confidence. However, DLR will consider all amendment requests addressed to the System Manager. To contest information in a record about you, write to the System Manager identified above, provide the same information required for an access request, and verify your identity in the manner required for an access request. Reasonably identify the record and specify the information contested, state the corrective action sought and the reason(s) for requesting the correction, and include any supporting documentation. The right to contest records is limited to information that is factually inaccurate, incomplete, irrelevant, or untimely (obsolete).

NOTIFICATION PROCEDURES:

This system of records is not exempt from the notification provisions of the Privacy Act. To request notification of whether this system of records contains a record about you, you must make a written request to System Manager identified above, provide the same information required for an access request, verify your identity in the manner required for an access request, and include the name and number of this system of records.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

The records in this system of records constitute investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal contracts pursuant to 5 U.S.C. 552a(k)(5). The system of records is exempt from the access, amendment, and accounting of disclosures requirements of the Privacy Act, at 5 U.S.C. 552a(c)(3) and (d)(1) through (4), to the extent that compliance with those requirements would reveal the identity of a source who furnished information to the Federal Government under an express promise that the identity of the source would be held in confidence.

HISTORY:

67 FR 6043 (Feb. 8, 2002), 83 FR 6591 (Feb. 14, 2018).

[FR Doc. 2020–28887 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Integrative, Functional and Cognitive Neuroscience Integrated Review Group; Neurotoxicology and Alcohol Study Section.

Date: February 11–12, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Sepandarmaz Aschrafi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040D, Bethesda, MD 20892, (301) 451–4251, *Armaz.aschrafi@nih.gov*.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Probes and Contrast Agents Study Section.

Date: February 11–12, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Donald Scott Wright, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5108, MSC 7854, Bethesda, MD 20892, (301) 435–8363, *wrightds@csr.nih.gov*.

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Human Studies of Diabetes and Obesity Study Section.

Date: February 11–12, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Hui Chen, MD, Scientific Review Officer, Center for Scientific Review,

National Institutes of Health, 6701 Rockledge Drive, Room 6164, Bethesda, MD 20892, 301–435–1044, *chenhui@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Psychosocial Risks and Disease Prevention.

Date: February 11, 2021.

Time: 2:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Telephone Conference Call).

Contact Person: Weijia Ni, Ph.D., Chief/Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3100, MSC 7808, Bethesda, MD 20892, 301–594–3292, *niw@csr.nih.gov*.

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Bioengineering, Technology and Surgical Sciences Study Section.

Date: February 16–17, 2021.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Khalid Masood, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5120, MSC 7854, Bethesda, MD 20892, 301–435–2392, *masoodk@csr.nih.gov*.

Name of Committee: AIDS and Related Research Integrated Review Group; Vector Biology Study Section.

Date: February 16–17, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Liangbiao Zheng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, MSC 7808, Bethesda, MD 20892, 301–402–5671, *zhengli@csr.nih.gov*.

Name of Committee: Oncology 1—Basic Translational Integrated Review Group; Tumor Progression and Metastasis Study Section.

Date: February 16–17, 2021.

Time: 9:00 a.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rolf Jakobi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7806, Bethesda, MD 20892, 301–495–1718, *jakobir@mail.nih.gov*.

Name of Committee: Oncology 2—Translational Clinical Integrated Review Group; Cancer Biomarkers Study Section.

Date: February 16–17, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lawrence Ka-Yun Ng, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6152, MSC 7804, Bethesda, MD 20892, 301–357–9318, *ngkl@csr.nih.gov*.

Name of Committee: Cell Biology Integrated Review Group; Molecular and Integrative Signal Transduction Study Section.

Date: February 16, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Charles Selden, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5187, MSC 7840, Bethesda, MD 20892, 301–451–3388, *seldens@mail.nih.gov*.

Name of Committee: Vascular and Hematology Integrated Review Group; Hemostasis, Thrombosis, Blood Cells and Transfusion Study Section.

Date: February 16–17, 2021.

Time: 10:00 a.m. to 7:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Ai-Ping Zou, MD, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4118, MSC 7814, Bethesda, MD 20892, 301–408–9497, *zouai@csr.nih.gov*.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function A Study Section.

Date: February 16–17, 2021.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: David R. Jollie, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, (301) 408–9072, *jollieda@csr.nih.gov*.

Name of Committee: Risk, Prevention and Health Behavior Integrated Review Group; Addiction Risks and Mechanisms Study Section.

Date: February 16–17, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kristen Prentice, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3112, MSC 7808, Bethesda, MD 20892, (301) 496–0726, *prenticekj@mail.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 7, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00492 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Brain Disorders and Clinical Neuroscience Integrated Review Group; Pathophysiology of Eye Disease—2 Study Section.

Date: February 11–12, 2021.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Julius Cinque, MSC, MS Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, 301–435–1252, *cinquej@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Neuroimmunology and Brain Tumors.

Date: February 11, 2021.

Time: 11:00 a.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Samuel C Edwards, Ph.D., Chief, Brain Disorders and Clinical Neuroscience, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Healthcare and Health Disparities Study Section.

Date: February 16–18, 2021.

Time: 9:00 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Jessica Bellinger, Ph.D., Scientific Review Administrator, Center for Scientific of Review, National Institutes of Health, 6701 Rockledge Drive, Room 3158, Bethesda, MD 20892, 301–827–4446, *bellingerjd@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 8, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00544 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Center for Scientific Review Special Emphasis Panel; Cardiovascular and Respiratory Sciences.

Date: February 1, 2021.

Time: 1:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Xiang-Ning Li, MD, Ph.D. Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5112, MSC 7854, Bethesda, MD 20892, (301) 435–1744 *lixiang@csr.nih.gov.*

Name of Committee: Cardiovascular and Respiratory Sciences Integrated Review Group; Lung Cellular, Molecular, and Immunobiology Study Section.

Date: February 2–3, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: George M. Barnas, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2180, MSC 7818, Bethesda, MD 20892, (301) 435–0696, *barnasg@csr.nih.gov.*

Name of Committee: Cell Biology Integrated Review Group; Development—2 Study Section.

Date: February 8–9, 2021.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Rass M. Shayiq, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, (301) 435–2359, *shayiqr@csr.nih.gov.*

Name of Committee: Healthcare Delivery and Methodologies Integrated Review Group; Clinical Management in General Care Settings Study Section.

Date: February 8–9, 2021.

Time: 9:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Lauren Fordyce, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3214, Bethesda, MD 20892, (301) 435–6998, *fordycelm@mail.nih.gov.*

Name of Committee: Genes, Genomes, and Genetics Integrated Review Group; Molecular Genetics B Study Section.

Date: February 8–9, 2021.

Time: 9:30 a.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Michael L. Bloom, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6187, MSC 7804, Bethesda, MD 20892, (301) 451–0132, *bloomm2@mail.nih.gov.*

Name of Committee: Endocrinology, Metabolism, Nutrition and Reproductive Sciences Integrated Review Group; Basic Mechanisms of Diabetes and Metabolism Study Section.

Date: February 9–10, 2021.

Time: 9:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Liliana Norma Berti-Mattera, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, RM 6158, MSC 7890, Bethesda, MD 20892, (301) 827–7609, *liliana.berti-mattera@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 7, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00491 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 Institute on Aging Special Emphasis Panel; Aging Adult Brain Connectome.

Date: March 15, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Joshua Jin-Hyouk Park, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6208, *joshua.park4@nih.gov.*

Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00490 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of 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 open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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 Heart, Lung, and Blood Advisory Council.

Date: February 2, 2021.

Closed: 10:00 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications and/or proposals.

Place: National Institutes of Health, Building 31, 9000 Rockville Pike, Bethesda, MD 20892 (Virtual Meeting).

Open: 2:00 p.m. to 5:00 p.m.

Agenda: To discuss program policies and issues.

Place: National Institutes of Health, Building 31, 9000 Rockville Pike, Bethesda, MD 20892 (Virtual Meeting).

Virtual Access: The meeting will be videocast and can be accessed from the NIH Videocast. *https://www.nhlbi.nih.gov/about/advisory-and-peer-review-committees/advisory-council.* Please note, the link to the videocast meeting will be posted within a week of the meeting date.

Contact Person: Laura K. Moen, Ph.D., Director, Division of Extramural Research Activities, National Heart, Lung, and Blood Institute, National Institutes of Health, 6705 Rockledge Drive, Room 206–Q, Bethesda, MD 20892, 301–827–5517, *moenl@mail.nih.gov.*

Any member of the public interested in presenting oral comments to the committee may notify the Contact Person listed on this notice at least 10 days in advance of the meeting. Interested individuals and representatives of organizations may submit a letter of intent, a brief description of the organization represented, and a short description of the oral presentation. Only one representative of an organization may be allowed to present oral comments and if accepted by the committee, presentations may be limited to five minutes. Both printed and electronic copies are requested for the record. In addition, any interested person may file written comments with the committee by forwarding their statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *www.nhlbi.nih.gov/meetings/nhlbac/index.htm,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00487 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Arthritis and Musculoskeletal and Skin Diseases; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

The meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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 Arthritis and Musculoskeletal and Skin Diseases Advisory Council.

Date: January 26, 2021.

Open: 9:30 a.m. to 12:30 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Democracy I, Suite 800, Bethesda, MD 20892–4872 (Virtual Meeting).

Virtual Access: The meeting will be videocast and can be accessed from the NIH Videocast *http://videocast.nih.gov.* Please note, the link to the videocast meeting will be posted within a week of the meeting date. Any member of the public may submit written comments no later than 15 days after the meeting.

Closed: 2:00 p.m. to 2:40 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Arthritis and Musculoskeletal and Skin Diseases, 6701 Democracy Blvd., Democracy I, Suite 800, Bethesda, MD 20892–4872 (Virtual Meeting).

Contact Person: Melinda Nelson, Ph.D., Director, Office of Extramural Operations, 6701 Democracy Blvd., Democracy I, Suite 800, Bethesda, MD 20892–4872, (301) 435–5278, *nelsonm@mail.nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.846, Arthritis, Musculoskeletal and Skin Diseases Research, National Institutes of Health, HHS)

Dated: January 8, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00543 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; 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: Musculoskeletal, Oral and Skin Sciences Integrated Review Group; Musculoskeletal Tissue Engineering Study Section.
Date: February 9–10, 2021.
Time: 9:30 a.m. to 5:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Srikanth Ranganathan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4214, MSC 7802, Bethesda, MD 20892, 301–435–1787, *srikanth.ranganathan@nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Skeletal Biology Structure and Regeneration.
Date: February 10, 2021.
Time: 11:00 a.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Chee Lim, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4128, Bethesda, MD 20892, 301–435–1850, *limc4@csr.nih.gov*.

Name of Committee: Bioengineering Sciences & Technologies Integrated Review Group; Biomaterials and Biointerfaces Study Section.
Date: February 11–12, 2021.
Time: 8:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Joseph D. Mosca, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5158, MSC 7808, Bethesda, MD 20892, (301) 408–9465, *moscajos@csr.nih.gov*.

Name of Committee: Interdisciplinary Molecular Sciences and Training Integrated Review Group; Enabling Bioanalytical and Imaging Technologies Study Section.
Date: February 11–12, 2021.
Time: 8:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Kenneth Ryan, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3218, MSC 7717, Bethesda, MD 20892, 301–435–0229, *kenneth.ryan@nih.hhs.gov*.

Name of Committee: Brain Disorders and Clinical Neuroscience Integrated Review Group; Clinical Neuroimmunology and Brain Tumors Study Section.
Date: February 11–12, 2021.
Time: 8:30 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Aleksey Gregory Kazantsev, Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5201, Bethesda, MD 20817, 301–435–1042, *aleksey.kazantsev@nih.gov*.

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Synthetic and Biological Chemistry B Study Section.
Date: February 11–12, 2021.
Time: 9:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Michael Eissenstat, Ph.D., Scientific Review Officer, BCMB IRG, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4166, MSC 7806, Bethesda, MD 20892, 301–435–1722, *eissenstatma@csr.nih.gov.*

Name of Committee: Biological Chemistry and Macromolecular Biophysics Integrated Review Group; Macromolecular Structure and Function B Study Section.
Date: February 11–12, 2021.
Time: 9:00 a.m. to 2:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: C–L. Albert Wang, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4146, MSC 7806, Bethesda, MD 20892, 301–435–1016, *wangca@csr.nih.gov.*

Name of Committee: Surgical Sciences, Biomedical Imaging and Bioengineering Integrated Review Group; Imaging Guided Interventions and Surgery Study Section.
Date: February 11–12, 2021.
Time: 9:00 a.m. to 7:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Ileana Hancu, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5116, Bethesda, MD 20817, 301–402–3911, *ileana.hancu@nih.gov.*

Name of Committee: Infectious Diseases and Microbiology Integrated Review Group; Pathogenic Eukaryotes Study Section.
Date: February 11–12, 2021.
Time: 9:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Tera Bounds, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3198, MSC 7808, Bethesda, MD 20892, 301–435–2306, *boundst@csr.nih.gov.*

Name of Committee: Vascular and Hematology Integrated Review Group; Atherosclerosis and Vascular Inflammation Study Section.
Date: February 11–12, 2021.
Time: 9:30 a.m. to 8:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Natalia Komissarova, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5207, MSC 7846, Bethesda, MD 20892, 301–435–1206, *komissar@mail.nih.gov.*

Name of Committee: Immunology Integrated Review Group; Host Interactions with Bacterial Pathogens Study Section HIBP.
Date: February 11–12, 2021.
Time: 9:45 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Fouad A. El-Zaatari, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3186, MSC 7808, Bethesda, MD 20892, (301) 435–1149, *elzaataf@csr.nih.gov.*

Name of Committee: Molecular, Cellular and Developmental Neuroscience Integrated Review Group; Biophysics of Neural Systems Study Section.
Date: February 11–12, 2021.
Time: 10:00 a.m. to 6:00 p.m.
Agenda: To review and evaluate grant applications.
Place: National Institutes of Health, Rockledge II, 6701 Rockledge Drive, Bethesda, MD 20892 (Virtual Meeting).
Contact Person: Geoffrey G. Schofield, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4040–A, MSC 7850, Bethesda, MD 20892, 301–435–1235, *geoffreys@csr.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: January 7, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00495 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Dental & Craniofacial Research; 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 Institute of Dental and Craniofacial Research Special Emphasis Panel; Dental Fear and Anxiety RFA Review Meeting.

Date: February 26, 2021.

Time: 1:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Nisan Bhattacharyya, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute of Dental and Craniofacial Research, National Institutes of Health, 6701 Democracy Boulevard, Suite 668, Bethesda, MD 20892, 301–451–2405, *nisan_bhattacharyya@nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.121, Oral Diseases and Disorders Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00494 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; 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 contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; A Solicitation of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) for Small Business Innovation Research (SBIR) Contract Proposals (N01), Topic 88 Phase II.

Date: January 21, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Scientific Review Program, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892, 301–761–7176, *dimitrios.vatakis@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2021–1: Therapeutic Targeting of Intracellular HIV–1 Proteins or Nucleic Acids (Topic 88).

Date: January 21, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Scientific Review Program, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892, 301–761–7176, *dimitrios.vatakis@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; A Solicitation of the National Institutes of Health (NIH) and the Centers for Disease Control and Prevention (CDC) for Small Business Innovation Research (SBIR) Contract Proposals (N01), Topic 89.

Date: January 22, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Scientific Review Program, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892, 301–761–7176, *dimitrios.vatakis@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; HHS–NIH–CDC–SBIR PHS 2021–1: Particle-based Co-delivery of HIV immunogens as Next-generation HIV Vaccines (Topic 89).

Date: January 22, 2021.

Time: 11:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate contract proposals.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892 (Telephone Conference Call).

Contact Person: Dimitrios Nikolaos Vatakis, Ph.D., Scientific Review Officer, Scientific Review Program, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G21A, Rockville, MD 20892, 301–761–7176, *dimitrios.vatakis@nih.gov*.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: January 8, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00545 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 Institute on Aging Special Emphasis Panel; Diversity in Aging.

Date: February 26, 2021.

Time: 2:00 p.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Dario Dieguez, Jr., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827–3101, *dario.dieguez@nih.gov*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00488 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Eye Institute; 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 Eye Institute Special; Emphasis Panel BRAIN Initiative: New Concepts and Early—Stage Research for Large—Scale Recording and Modulation in the Nervous System (R21).

Date: February 2, 2021.

Time: 12:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Brian Hoshaw, Ph.D., Designated Federal Official, Division of Extramural Research, National Eye Institute, National Institutes of Health, 6700B Rockledge Drive, Suite 3400, Rockville, MD 20892, 301–451–2020, *hoshawb@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.867, Vision Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

Melanie J. Pantoja, Program Analyst,

Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00493 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Council for Nursing Research.

The meeting will be open to the public as indicated below via videocast. The URL link to this meeting is *https://videocast.nih.gov/watch=40143.* Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the 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 Advisory Council for Nursing Research.

Date: January 26, 2021.

Open: 10:00 a.m. to 1:15 p.m.

Agenda: Discussion of Program Policies and Issues.

Place: National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, One Democracy Plaza, Bethesda, MD 20892, *https://videocast.nih.gov/watch=40143* (Virtual Meeting).

Closed: 1:45 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Nursing Research, National Institutes of Health, 6701 Democracy Boulevard, One Democracy Plaza, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Kay Wanke, Ph.D., MPH, Acting Director, Division of Extramural Science Programs (DESP), National Institute of Nursing Research, 31 Center Drive, Room 5B–13L, Bethesda, MD 20892, (301) 451–1856, *kay.wanke@nih.gov.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.ninr.nih.gov/,* where an agenda and any additional information for the meeting will be posted when available.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.361, Nursing Research, National Institutes of Health, HHS)

Dated: January 8, 2021.

Tyeshia M. Roberson,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00542 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; 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 on Aging Special Emphasis Panel; Transition to Aging.

Date: February 17–18, 2021.

Time: 2:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Dario Dieguez, Jr., Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, Suite 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 827–3101, *dario.dieguez@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Molecular Determinants of AD Risk.

Date: March 16, 2021.

Time: 12:30 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Video Meeting).

Contact Person: Joshua Jin-Hyouk Park, Ph.D., Scientific Review Officer, Scientific Review Branch, National Institute on Aging, National Institutes of Health, Gateway Building, 2W200, 7201 Wisconsin Avenue, Bethesda, MD 20892, (301) 496–6208, *joshua.park4@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: January 7, 2021.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2021–00489 Filed 1–12–21; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2020–0016]

Meeting To Implement Pandemic Response Voluntary Agreement Under Section 708 of the Defense Production Act

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Announcement of meeting; request for comments.

SUMMARY: The Federal Emergency Management Agency (FEMA) will hold a meeting remotely via web conference to implement the Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic. A portion of the meeting will be open to the public.

DATES: The meeting will take place on Friday, January 15, 2021, from 2 to 4 p.m. Eastern Time (ET). The first portion of the meeting, from approximately 2 to 3 p.m. ET, will be open to the public.

Written comments for consideration at the meeting must be submitted and received by 12 p.m. ET on Thursday, January 14, 2021. Follow-up comments must be received by 5 p.m. ET on Friday, January 22, 2021, to be considered.

ADDRESSES: The meeting will be held via web conference. Members of the public may view the public portion of the meeting online at *https://pandemicdpa708.com.*

Reasonable accommodations are available for people with disabilities. To request a reasonable accommodation, contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section below as soon as possible. Last minute requests will be accepted but may not be possible to fulfill.

To facilitate public participation, members of the public are invited to provide written comments on the issues to be considered at the meeting. The Meeting Objectives listed below outline these issues. Written comments must be identified by Docket ID FEMA–2020–0016, and submitted by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments.
- *Email:* FEMA's Office of Business, Industry, Infrastructure Integration, *OB3I@fema.dhs.gov.*

Instructions: All submissions must include the docket ID FEMA–2020–0016. Comments received, including any personal information provided, may be posted without alteration at *https://www.regulations.gov.*

Docket: For access to the docket and to read comments received by FEMA, go to *https://www.regulations.gov* and search for Docket ID FEMA–2020–0016.

FOR FURTHER INFORMATION CONTACT: Robert Glenn, Office of Business, Industry, Infrastructure Integration, via email at *OB3I@fema.dhs.gov* or via phone at (202) 212–1666.

SUPPLEMENTARY INFORMATION: Notice of this meeting is provided as required by section 708(h)(8) of the Defense Production Act (DPA), 50 U.S.C. 4558(h)(8), and consistent with 44 CFR part 332.

The DPA authorizes the making of ''voluntary agreements and plans of action'' with, among others, representatives of industry and business to help provide for the national defense.[1] The President's authority to facilitate voluntary agreements was delegated to the Secretary of Homeland Security with respect to responding to the spread of COVID–19 within the United States in Executive Order 13911.[2] The Secretary of Homeland Security has further delegated this authority to the FEMA Administrator.[3]

On August 17, 2020, after the appropriate consultations with the Attorney General and the Chairman of the Federal Trade Commission, FEMA completed and published in the **Federal Register** a ''Voluntary Agreement for the Manufacture and Distribution of Critical Healthcare Resources Necessary to Respond to a Pandemic'' (Voluntary Agreement).[4] Unless terminated prior to that date, the Voluntary Agreement is effective until August 17, 2025, and may be extended subject to additional approval by the Attorney General after consultation with the Chairman of the Federal Trade Commission. The Agreement may be used to prepare for or respond to any pandemic, including COVID–19, during that time.

On December 7, 2020, the first plan of action under the Voluntary Agreement—the Plan of Action to Establish a National Strategy for the Manufacture, Allocation, and Distribution of Personal Protective Equipment (PPE) to Respond to COVID–19 (Plan of Action)—was finalized.[5] The Plan of Action established several sub-committees under the Voluntary Agreement, focusing on different aspects of the Plan of Action.

The meeting will be chaired by the FEMA Administrator or his delegate, and attended by the Attorney General or his delegate and the Chairman of the Federal Trade Commission or his delegate. In implementing the Voluntary Agreement, FEMA adheres to all procedural requirements of 50 U.S.C. 4558 and 44 CFR part 332.

[1] 50 U.S.C. 4558(c)(1).

[2] 85 FR 18403 (Apr. 1, 2020).

[3] DHS Delegation 09052, Rev. 00.1 (Apr. 1, 2020); DHS Delegation Number 09052 Rev. 00 (Jan. 3, 2017).

[4] 85 FR 50035 (Aug. 17, 2020). The Attorney General, in consultation with the Chairman of the Federal Trade Commission, made the required finding that the purpose of the voluntary agreement may not reasonably be achieved through an agreement having less anticompetitive effects or without any voluntary agreement and published the finding in the **Federal Register** on the same day. 85 FR 50049 (Aug. 17, 2020).

[5] *See* 85 FR 78869 (Dec. 7, 2020). *See also* 85 FR 79020 (Dec. 8, 2020).

Meeting Objectives: The objective of the meeting is to update the general public, and private industry partners, on the status of the Voluntary Agreement, PPE Plan of Action, and potential future Plans of Action.

Meeting Closed to the Public: By default, the DPA requires meetings held to implement a voluntary agreement or plan of action be open to the public.[6] However, attendance may be limited if the Sponsor[7] of the voluntary agreement finds that the matter to be discussed at a meeting falls within the purview of matters described in 5 U.S.C. 552b(c). The Sponsor of the Voluntary Agreement, the FEMA Administrator, found that a portion of this meeting to implement the Voluntary Agreement involves matters which fall within the purview of matters described in 5 U.S.C. 552b(c) and that portion of the meeting will therefore be closed to the public.

Specifically, the meeting to implement the Voluntary Agreement may require participants to disclose trade secrets or commercial or financial information that is privileged or confidential. Disclosure of such information allows for meetings to be closed pursuant to 5 U.S.C. 552b(c)(4). In addition, the success of the Voluntary Agreement depends wholly on the willing and enthusiastic participation of private sector participants. Failure to close this meeting could have a strong chilling effect on participation by the private sector and cause a substantial risk that sensitive information will be prematurely released to the public, resulting in participants withdrawing their support from the Voluntary Agreement and thus significantly frustrating the implementation of the Voluntary Agreement. Frustration of an agency's objective due to premature disclosure of information allows for the closure of a meeting to pursuant to 5 U.S.C. 552b(c)(9)(B).

Pete Gaynor,

Administrator, Federal Emergency Management Agency.

[FR Doc. 2021–00505 Filed 1–12–21; 8:45 am]

BILLING CODE 9111–19–P

[6] *See* 50 U.S.C. 4558(h)(7).

[7] ''[T]he individual designated by the President in subsection (c)(2) [of section 708 of the DPA] to administer the voluntary agreement, or plan of action.'' 50 U.S.C. 4558(h)(7).

DEPARTMENT OF HOMELAND SECURITY

[Docket No. DHS–2011–0108]

RIN 1601–ZA11

Identification of Foreign Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

AGENCY: Office of the Secretary, DHS.

ACTION: Notice.

SUMMARY: Under Department of Homeland Security (DHS) regulations, U.S. Citizenship and Immigration Services (USCIS) may generally only approve petitions for H–2A and H–2B nonimmigrant status for nationals of countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated by notice published in the **Federal Register**. Each such notice shall be effective for one year after its date of publication. This notice announces that the Secretary of Homeland Security, in consultation with the Secretary of State, is identifying 81 countries whose nationals are eligible to participate in the H–2A program and 80 countries whose nationals are eligible to participate in the H–2B program for the coming year.

DATES: The designations in this notice are effective from January 19, 2021, and shall be without effect after January 18, 2022.

FOR FURTHER INFORMATION CONTACT: Ihsan Gunduz, Office of Strategy, Policy, and Plans, Department of Homeland Security, Washington, DC 20528, (202) 282–9708.

SUPPLEMENTARY INFORMATION:

Background

Generally, USCIS may approve H–2A and H–2B petitions for nationals of only those countries that the Secretary of Homeland Security, with the concurrence of the Secretary of State, has designated as participating countries.[1] Such designation must be published as a notice in the **Federal Register** and expires after one year. In designating countries to include on the list, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will take into account factors including, but not limited to: (1) The country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal; (2) the number of final and unexecuted orders of removal against citizens, subjects, nationals, and residents of that country; (3) the number of orders of removal executed against citizens, subjects, nationals, and residents of that country; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1). Examples of specific factors serving the U.S. interest that are taken into account when considering whether to designate or terminate the designation of a country include, but are not limited to: Fraud (including but not limited to fraud in the H–2 petition or visa application process by nationals of the country, the country's level of cooperation with the U.S. government in addressing H–2 associated visa fraud, and the country's level of information sharing to combat immigration-related fraud), nonimmigrant overstay[2] rates for nationals of the country (including but not limited to H–2 nonimmigrants), non-compliance with the terms and conditions of the H–2 visa programs by nationals of the country, and the country's level of compliance with U.S. immigration policies.

In evaluating the U.S. interest, the Secretary of Homeland Security, with the concurrence of the Secretary of State, further considers visa overstay rates of 10 percent or higher to pose an unreasonably high risk to the integrity of our immigration system. The Department believes that a failure of one out of every 10 nationals of a country to comply with his or her nonimmigrant status through timely departure is indicative of significant underlying problems relating to the country's

[1] With respect to all references to ''country'' or ''countries'' in this document, it should be noted that the Taiwan Relations Act of 1979, Public Law 96–8, Section 4(b)(1), provides that ''[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.'' 22 U.S.C. 3303(b)(1). Accordingly, all references to ''country'' or ''countries'' in the regulations governing whether nationals of a country are eligible for H–2 program participation, 8 CFR 214.2(h)(5)(i)(F)(1)(i) and 8 CFR 214.2(h)(6)(i)(E)(1), are read to include Taiwan. This is consistent with the United States' one-China policy, under which the United States has maintained unofficial relations with Taiwan since 1979.

[2] An overstay is a nonimmigrant lawfully admitted to the United States for an authorized period, but who remained in the United States beyond his or her authorized period of admission. U.S. Customs and Border Protection (CBP) identifies two types of overstays: (1) Individuals for whom no departure was recorded (Suspected In-Country Overstays), and (2) individuals whose departure was recorded after their authorized period of admission expired (Out-of-Country Overstays). For purposes of this **Federal Register** Notice, DHS uses FY 2019 U.S. Customs and Border Protection H–2A and H–2B nonimmigrant overstay data.

designation for H–2A or H–2B program participation. Naturally, with greater numbers of participants from any country comes more significant risk when the overstay rate of a country's nationals is unreasonably high. DHS believes that countries with more than 50 expected departures in a given fiscal year whose nationals overstay at rate of more than 10 percent (*i.e.,* at least 5 overstays) present an appreciable and considerable degree of risk to the integrity of these nonimmigrant programs.

Accordingly, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will ascribe significant negative weight to evidence that a country had a suspected-in-country visa overstay rate of 10 percent or higher with a number of expected departures of 50 individuals or higher in either the H–2A or H–2B classification according to U.S. Customs and Border Protection overstay data, and generally will terminate designation of that country from the H–2A or H–2B nonimmigrant visa program, as appropriate, unless, after consideration of other relevant factors, it is determined not to be in the U.S. interest to do so. Overstay rates greater than 10 percent and/or involving more expected than 50 departures will bear increasingly negative weight. Overstay rates that are lower than 10 percent or which involve less than 50 expected departures may also be weighed negatively, but less so as the numbers decrease.

Similarly, the Department of Homeland Security recognizes that countries designated under long-standing practice by U.S. Immigration and Customs Enforcement (ICE) as ''At Risk of Non-Compliance'' or ''Uncooperative'' with removals based on ICE data put the integrity of the immigration system and the American people at risk. Therefore, unless other favorable factors in the U.S. interest outweigh such designations by ICE, the Secretary of Homeland Security, with the concurrence of the Secretary of State, will terminate designation of such countries from the H–2A and H–2B nonimmigrant visa programs in recognition that the U.S. typically cannot continue to admit individuals from countries that do not consistently cooperate with the removal of their citizens and nationals. Note that, as there are separate lists for the H–2A and H–2B categories, it is possible that, in applying the above-described regulatory criteria for listing countries, a country may appear on one list but not on the other.

Even where the Secretary of Homeland Security has terminated designation of a country as not being in the U.S. interest, however, DHS, through USCIS, may allow, on a case-by-case basis, a national from a country that is not on the list to be named as a beneficiary of an H–2A or H–2B petition based on a determination that the individual alien's participation is in the U.S. interest. Determination of such U.S. interest will take into account factors, including but not limited to: (1) Evidence from the petitioner demonstrating that a worker with the required skills is not available either from among U.S. workers or from among foreign workers from a country currently on the list described in 8 CFR 214.2(h)(5)(i)(F)(1)(i) (H–2A nonimmigrants) or 214.2(h)(6)(1)(E)(1) (H–2B nonimmigrants), as applicable; (2) evidence that the beneficiary has been admitted to the United States previously in H–2A or H–2B status; (3) the potential for abuse, fraud, or other harm to the integrity of the H–2A or H–2B visa program through the potential admission of a beneficiary from a country not currently on the list; and (4) such other factors as may serve the U.S. interest. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2).

In December 2008, DHS published in the **Federal Register** two notices, ''Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2A Visa Program,'' and ''Identification of Foreign Countries Whose Nationals Are Eligible to Participate in the H–2B Visa Program,'' which designated 28 countries whose nationals were eligible to participate in the H–2A and H–2B programs. *See* 73 FR 77043 (Dec. 18, 2008); 73 FR 77729 (Dec. 19, 2008). The notices ceased to have effect on January 17, 2010, and January 18, 2010, respectively. *See* 8 CFR 214.2(h)(5)(i)(F)(2) and 8 CFR 214.2(h)(6)(i)(E)(3). In implementing these regulatory provisions, the Secretary of Homeland Security, with the concurrence of the Secretary of State, has published a series of notices on a regular basis. *See* 75 FR 2879 (Jan. 19, 2010) (adding 11 countries); 76 FR 2915 (Jan. 18, 2011) (removing 1 country and adding 15 countries); 77 FR 2558 (Jan. 18, 2012) (adding 5 countries); 78 FR 4154 (Jan. 18, 2013) (adding 1 country); 79 FR 3214 (Jan.17, 2014) (adding 4 countries); 79 FR 74735 (Dec. 16, 2014) (adding 5 countries); 80 FR 72079 (Nov. 18, 2015) (removing 1 country from the H–2B program and adding 16 countries); 81 FR 74468 (Oct. 26, 2016) (adding 1 country); 83 FR 2646 (Jan. 18, 2018) (removing 3 countries and adding 1 country); 84 FR 133 (Jan. 18, 2019) (removing 2 countries from both the H–2A program and the H–2B program, removing 1 country from only the H–2B program, and adding 2 countries to both programs and 1 country to only the H–2A program); 85 FR 3067 (January 17, 2020) (remained unchanged).

Determination of Countries With Continued Eligibility

The Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that 81 countries previously designated to participate in the H–2A program in the January 17, 2020 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H–2A program. Additionally, the Secretary of Homeland Security has determined, with the concurrence of the Secretary of State, that 80 countries previously designated to participate in the H–2B program in the January 17, 2020 notice continue to meet the regulatory standards for eligible countries and therefore should remain designated as countries whose nationals are eligible to participate in the H–2B program. These determinations take into account how the regulatory factors identified above apply to each of these countries.

Countries No Longer Designated as Eligible

The Secretary of Homeland Security has now determined, with the concurrence of the Secretary of State, that the following countries should no longer be designated as eligible countries because they no longer meet the regulatory standards identified above: Mongolia (H–2A only), the Independent State of Samoa (''Samoa''), and Tonga.

Mongolia has a high H–2A visa overstay rate. In FY 2019, DHS estimated that 67 H–2A visa holders from Mongolia were expected to depart the United States. However, DHS estimated that 40.3% of those H–2A visa holders from Mongolia overstayed their period of authorized stay. This high H–2A visa overstay rate demonstrates an unacceptable level of harm to the integrity of the H–2A visa program; continued eligibility of Mongolian nationals for the H–2A visa program thus does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Mongolia from the list of eligible countries for the H–2A program. By contrast, in FY 2019,

DHS estimated that none of the H–2B visa holders from Mongolia overstayed their period of authorized stay. Given this compliance with H–2B program, and absent additional derogatory information indicating an unacceptable potential for fraud or program abuse, DHS and DOS are not removing Mongolia from the list of eligible countries for the H–2B program at this time.

Samoa has been designated as ''At Risk of Non-Compliance'' according to ICE's FY 2020 mid-year assessment of the country's cooperation with respect to issuance of travel documents for citizens, subjects, nationals, and residents of that country who are subject to a final order of removal. Samoa was removed from the H–2 list in 2018 due to its designation as ''At Risk of Non-Compliance.'' 83 FR 2646, 2647. When Samoa demonstrated increased cooperation with the United States regarding the return of its nationals with final orders of removal, DHS and DOS added Samoa back to the list of H–2 eligible countries in 2019. 84 FR 133, 135. However, Samoa reverted back to being ''At Risk of Non-Compliance'' in ICE's FY 2019 mid-year assessment and has continued to be ''At Risk of Non-Compliance'' since then. Samoa's inconsistent cooperation with the United States regarding the return of its nationals and citizens with final orders of removal does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Samoa from the list of H–2A and H–2B eligible countries.

Tonga has been designated as ''At Risk of Non-Compliance'' according to ICE's FY 2020 mid-year assessment of the country's cooperation with respect to the refusal to accept ICE charter flights for the repatriation of its nationals that have been ordered removed from the United States. Tonga's inconsistent cooperation with the United States regarding the return of its nationals and citizens with final orders of removal does not serve the U.S. interest. Therefore, the Secretary of Homeland Security, with the concurrence of the Secretary of State, is removing Tonga from the list of H–2A and H–2B eligible countries.

On the basis of the foregoing analysis, DHS has removed three countries from the H–2A and/or H–2B country eligibility lists for 2021. Nonetheless, nationals of non-designated countries may still be beneficiaries of approved H–2A and H–2B petitions upon the request of the petitioner if USCIS determines, as a matter of discretion and on a case-by-case basis, that it is in the U.S. interest for the individual to be a beneficiary of such petition. *See* 8 CFR 214.2(h)(5)(i)(F)(1)(ii) and 8 CFR 214.2(h)(6)(i)(E)(2). USCIS may favorably consider a beneficiary of an H–2A or H–2B petition who is not a national of a country included on the H–2A or H–2B eligibility list as serving the national interest, depending on the totality of the circumstances. Factors USCIS may consider include, among other things, whether a beneficiary has previously been admitted to the United States in H–2A or H–2B status and complied with the terms of the program. An additional factor for beneficiaries of H–2B petitions, although not necessarily determinative standing alone, would be whether the H–2B petition qualifies under section 1049 of the National Defense Authorization Act (NDAA) for FY 2018, Public Law 115–91 or section 1045 of the NDAA for FY 2019, Public Law 115–232. However, any ultimate determination of eligibility will be made according to all of the relevant factors and evidence in each individual circumstance.

Countries Now Designated as Eligible

The Secretary of Homeland Security has also determined, with the concurrence of the Secretary of State, that the Philippines should be designated as eligible to participate in the H–2B non-immigrant visa program because the participation of the Philippines is in the U.S. interest consistent with the regulations governing this program.

The U.S. military realignment away from Japan and subsequent military construction on Guam requires a sizeable workforce that cannot be sustained by the local workforce in Guam. According to the U.S. Department of Defense, the need for more labor to work in military construction is likely to grow significantly in the next five years. Additionally, the influx of military personnel and activity on Guam will cause a surge in demand in the civilian construction sector (*i.e.,* homes, expansion of hospitals, commercial projects, etc.). The U.S. Department of Interior continues to register the significant dependence that Guam and the Commonwealth of the Northern Mariana Islands (CNMI) has on foreign workers from the Philippines to supplement necessary and essential components of their workforce. As such, to ensure the labor needs of the U.S. military realignment projects in Guam and the labor shortages experienced in the CNMI are met properly, adding the Philippines to the H–2B eligible countries list serves the U.S. interest.

Designation of Countries Whose Nationals Are Eligible To Participate in the H–2A and H–2B Nonimmigrant Worker Programs

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals from the following countries to be eligible to participate in the H–2A nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Brazil
8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Dominican Republic
18. Ecuador
19. El Salvador
20. Estonia
21. Fiji
22. Finland
23. France
24. Germany
25. Greece
26. Grenada
27. Guatemala
28. Honduras
29. Hungary
30. Iceland
31. Ireland
32. Israel
33. Italy
34. Jamaica
35. Japan
36. Kiribati
37. Latvia
38. Liechtenstein
39. Lithuania
40. Luxembourg
41. Madagascar
42. Malta
43. Mexico
44. Moldova
45. Monaco
46. Montenegro
47. Mozambique
48. Nauru
49. The Netherlands
50. New Zealand
51. Nicaragua
52. North Macedonia (formerly Macedonia)
53. Norway
54. Panama
55. Papua New Guinea
56. Paraguay
57. Peru
58. Poland
59. Portugal
60. Romania

61. San Marino
62. Serbia
63. Singapore
64. Slovakia
65. Slovenia
66. Solomon Islands
67. South Africa
68. South Korea
69. Spain
70. St. Vincent and the Grenadines
71. Sweden
72. Switzerland
73. Taiwan
74. Thailand
75. Timor-Leste
76. Turkey
77. Tuvalu
78. Ukraine
79. United Kingdom
80. Uruguay
81. Vanuatu

Pursuant to the authority provided to the Secretary of Homeland Security under sections 214(a)(1), 215(a)(1), and 241 of the Immigration and Nationality Act (8 U.S.C. 1184(a)(1), 1185(a)(1), and 1231), I am designating, with the concurrence of the Secretary of State, nationals from the following countries to be eligible to participate in the H–2B nonimmigrant worker program:

1. Andorra
2. Argentina
3. Australia
4. Austria
5. Barbados
6. Belgium
7. Brazil
8. Brunei
9. Bulgaria
10. Canada
11. Chile
12. Colombia
13. Costa Rica
14. Croatia
15. Czech Republic
16. Denmark
17. Ecuador
18. El Salvador
19. Estonia
20. Fiji
21. Finland
22. France
23. Germany
24. Greece
25. Grenada
26. Guatemala
27. Honduras
28. Hungary
29. Iceland
30. Ireland
31. Israel
32. Italy
33. Jamaica
34. Japan
35. Kiribati
36. Latvia
37. Liechtenstein
38. Lithuania
39. Luxembourg
40. Madagascar
41. Malta
42. Mexico
43. Monaco
44. Mongolia
45. Montenegro
46. Mozambique
47. Nauru
48. The Netherlands
49. New Zealand
50. Nicaragua
51. North Macedonia (formerly Macedonia)
52. Norway
53. Panama
54. Papua New Guinea
55. Peru
56. Philipinnes
57. Poland
58. Portugal
59. Romania
60. San Marino
61. Serbia
62. Singapore
63. Slovakia
64. Slovenia
65. Solomon Islands
66. South Africa
67. South Korea
68. Spain
69. St. Vincent and the Grenadines
70. Sweden
71. Switzerland
72. Taiwan
73. Thailand
74. Timor-Leste
75. Turkey
76. Tuvalu
77. Ukraine
78. United Kingdom
79. Uruguay
80. Vanuatu

This notice does not affect the current status of aliens who at the time of publication of this notice hold valid H–2A or H–2B nonimmigrant status. Aliens currently holding such status, however, will be affected by this notice should they seek an extension of stay in H–2 classification, or a change of status from one H–2 status to another, for employment on or after the effective date of this notice. Similarly, aliens holding nonimmigrant status other than H–2 status are not affected by this notice unless they seek a change of status to H–2 status.

Nothing in this notice limits the authority of the Secretary of Homeland Security or his designee or any other federal agency to invoke against any foreign country or its nationals any other remedy, penalty, or enforcement action available by law.

The Senior Official Performing the Duties of the Deputy Secretary, Kenneth T. Cuccinelli II, having reviewed and approved this document, is delegating the authority to electronically sign this document to Ian J. Brekke, who is the Senior Official Performing the Duties of the General Counsel for DHS, for purposes of publication in the **Federal Register**.

Ian J. Brekke,

Senior Official Performing the Duties of the General Counsel.

[FR Doc. 2021–00671 Filed 1–12–21; 8:45 am]

BILLING CODE 4410–10–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 332–584]

Squash: Effect of Imports on U.S. Seasonal Markets, With A Focus on the U.S. Southeast

ACTION: Notice of investigation and scheduling of a public hearing.

SUMMARY: Following receipt on December 7, 2020, of a request from the U.S. Trade Representative (USTR), under section 332(g) of the Tariff Act of 1930, the U.S. International Trade Commission (Commission) instituted Investigation No. 332–584, *Squash: Effect of Imports on U.S. Seasonal Markets, with a Focus on the U.S. Southeast.* The USTR asked that the investigation cover all imports that fall within the product description of U.S. Harmonized Tariff Schedule subheading 0709.93.20 (squash, fresh or chilled).

DATES:

March 25, 2021: Deadline for filing requests to appear at the public hearing.

March 29, 2021: Deadline for filing prehearing briefs and statements.

April 1, 2021: Deadline for filing electronic copies of oral hearing statements.

April 8, 2021: Public hearing.

April 15, 2021: Deadline for filing post-hearing briefs and statements.

April 27, 2021: Deadline for filing all other written submissions.

December 7, 2021: Transmittal of Commission report to the USTR.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Project Leader Lesley Ahmed (*lesley.ahmed@usitc.gov* or 202–205–3459), Deputy Project Leader Fernando Gracia (202–205–2747 or

fernando.gracia@usitc.gov) for information specific to these investigations. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website (*https://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: As requested by the USTR, the Commission in its report will focus on the effect of imports on the domestic seasonal markets of squash, with a particular focus on production and competitiveness of such products grown in the Southeastern United States. In particular, the USTR asked that the report:

(1) Include information on recent trends in trade in these products between the United States and its trading partners, including information on seasonal patterns of trade;

(2) include descriptions of monthly price trends for these products in the United States, including an analysis and comparison of the prices of domestically produced and imported products in the U.S. market; and

(3) focus primarily on the 2015–2020 time period.

The USTR requested that the Commission transmit its report no later than 12 months following receipt of this request. In his request letter, the USTR stated that his office intends to make the Commission's report available to the public in its entirety and asked that the Commission not include any confidential business information.

Public Hearing: A public hearing in connection with this investigatio will be held beginning at 9:30 a.m. on April 8, 2021, nusing a videoconference platform. More detailed information about the hearing, including how to participate, will be posted on the Commission's website at (*https://usitc.gov/research_and_analysis/what_we_are_working_on.htm*). Once on that web page, scroll down to Investigation No. 332–583, *Cucumbers: Effect of Imports on U.S. Seasonal Markets, with a Focus on the U.S. Southeast,* and click on the link to ''Hearing Information.'' Interested parties should check the Commission's website periodically for updates.

Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., March 25, 2021, in accordance with the requirements in the ''Written Submissions'' section below. All prehearing briefs and statements should be filed not later than 5:15 p.m., March 29, 2021. To facilitate the hearing, including the preparation of an accurate written transcript of the hearing, oral testimony to be presented at the hearing must be submitted to the Commission electronically no later than noon, April 1, 2021. All post-hearing briefs and statements should be filed no later than 5:15 p.m., April 15, 2021. Post-hearing briefs and statements should address matters raised at the hearing. For a description of the different types of written briefs and statements, see the ''Definitions'' section below.

In the event that, as of the close of business on March 25, 2021, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should check the Commission website in the preceding paragraph for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than the dates provided for in this notice. All written submissions must conform to the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8), as temporarily amended by 85 FR 15798 (March 19, 2020). Under that rule waiver, the Office of the Secretary will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS,). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202–205–1802), or consult the Commission's Handbook on Filing Procedures.

Definitions of Types of Documents That May Be Filed; Requirements: In addition to requests to appear at the hearing, this notice provides for the possible filing of four types of documents: Prehearing briefs, oral hearing statements, posthearing briefs, and other written submissions.

(1) *Prehearing briefs* refers to written materials relevant to the investigation and submitted in advance of the hearing, and includes written views on matters that are the subject of the investigation, supporting materials, and any other written materials that you consider will help the Commission in understanding your views. You should file a prehearing brief particularly if you plan to testify at the hearing on behalf of an industry group, company, or other organization, and wish to provide detailed views or information that will support or supplement your testimony.

(2) *Oral hearing statements (testimony)* refers to the actual oral statement that you intend to present at the public hearing. *Do not* include any confidential business information in that statement. If you plan to testify, you must file a copy of your oral statement by the date specified in this notice. This statement will allow Commissioners to understand your position in advance of the hearing and will also assist the court reporter in preparing an accurate transcript of the hearing (*e.g.,* names spelled correctly).

(3) *Post-hearing briefs* refers to submissions filed after the hearing by persons who appeared at the hearing. Such briefs: (a) Should be limited to matters that arose during the hearing, (b) should respond to any Commissioner and staff questions addressed to you at the hearing, (c) should clarify, amplify, or correct any statements you made at the hearing, and (d) may, at your option, address or rebut statements made by other participants in the hearing.

(4) *Other written submissions* refer to any other written submissions that interested persons wish to make, regardless of whether they appeared at the hearing, and may include new information or updates of information previously provided.

There is no standard format that briefs or other written submissions must follow. However, each such document must identify on its cover (1) the type of document filed (*i.e.,* prehearing brief, oral statement of (name), post-hearing brief, or written submission), (2) the name of the person or organization filing it, and (3) whether it contains confidential business information (CBI). If it contains CBI, it must comply with the marking and other requirements set out below in this notice relating to CBI. Submitters of written documents (other than oral hearing statements) are encouraged to include a short summary of their position or interest at the beginning of the document, and a table

of contents when the document addresses multiple issues.

Confidential Business Information: Any submissions that contain confidential business information must also conform to the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

As requested by the USTR, the Commission will not include any confidential business information in its report. However, all information, including confidential business information, submitted in this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel for cybersecurity purposes. The Commission will not otherwise disclose any confidential business information in a way that would reveal the operations of the firm supplying the information.

Summaries of Written Submissions: Persons wishing to have a summary of their position included in the report that the Commission sends to the USTR should include a summary with their written submission and should mark the summary as having been provided for that purpose. The summary should be clearly marked as ''summary for inclusion in the report'' at the top of the page. The summary may not exceed 500 words, should be in MS Word format or a format that can be easily converted to MS Word, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. The Commission will list the name of the organization furnishing the summary and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.

Issued: January 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–00565 Filed 1–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 332–583]

Cucumbers: Effect of Imports on U.S. Seasonal Markets, With A Focus on the U.S. Southeast

ACTION: Notice of investigation and scheduling of a public hearing.

SUMMARY: Following receipt on December 7, 2020, of a request from the U.S. Trade Representative (USTR), under section 332(g) of the Tariff Act of 1930, the U.S. International Trade Commission (Commission) instituted Investigation No. 332–583, *Cucumbers: Effect of Imports on U.S. Seasonal Markets, with a Focus on the U.S. Southeast.* The USTR asked that the investigation cover all imports that fall within the product description of U.S. Harmonized Tariff Schedule subheading 0707.00 (cucumbers, including gherkins, fresh or chilled).

DATES:

March 25, 2021: Deadline for filing requests to appear at the public hearing.

March 29, 2021: Deadline for filing prehearing briefs and statements.

April 1, 2021: Deadline for filing electronic copies of oral hearing statements.

April 8, 2021: Public hearing.

April 15, 2021: Deadline for filing post-hearing briefs and statements.

April 27, 2021: Deadline for filing all other written submissions.

December 7, 2021: Transmittal of Commission report to the USTR.

ADDRESSES: All Commission offices, including the Commission's hearing rooms, are located in the U.S. International Trade Commission Building, 500 E Street SW, Washington, DC. All written submissions should be addressed to the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

FOR FURTHER INFORMATION CONTACT: Project Leader Lesley Ahmed (*lesley.ahmed@usitc.gov* or 202–205–3459), or Deputy Project Leader Kelsi Van Veen (202–708–3086 or *kelsi.vanveen@usitc.gov*) for information specific to these investigations. For information on the legal aspects of this investigation, contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its website (*https://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

Background: As requested by the USTR, the Commission in its report will focus on the effect of imports on the domestic seasonal markets of cucumbers, including gherkins, with a particular focus on production and competitiveness of such products grown in the Southeastern United States. In particular, the USTR asked that the report:

(1) Include information on recent trends in trade in these products between the United States and its trading partners, including information on seasonal patterns of trade;

(2) include descriptions of monthly price trends for these products in the United States, including an analysis and comparison of the prices of domestically produced and imported products in the U.S. market; and

(3) focus primarily on the 2015–2020 time period.

The USTR requested that the Commission transmit its report no later than 12 months following receipt of this request. In his request letter, the USTR stated that his office intends to make the Commission's report available to the public in its entirety and asked that the Commission not include any confidential business information.

Public Hearing: A public hearing in connection with this investigation will be held beginning at 9:30 a.m. on April 8, 2021, using a videoconference platform. More detailed information about the hearing, including how to participate, will be posted on the Commission's website at (*https://usitc.gov/research_and_analysis/what_we_are_working_on.htm*). Once on that web page, scroll down to Investigation No. 332–583, *Cucumbers: Effect of Imports on U.S. Seasonal Markets, with a Focus on the U.S. Southeast,* and click on the link to ''Hearing Information.'' Interested parties should check the Commission's website periodically for updates.

Requests to appear at the public hearing should be filed with the Secretary no later than 5:15 p.m., March 25, 2021, in accordance with the requirements in the ''Written Submissions'' section below. All prehearing briefs and statements should be filed not later than 5:15 p.m., March 29, 2021. To facilitate the hearing, including the preparation of an accurate written transcript of the hearing, oral testimony to be presented at the hearing must be submitted to the Commission electronically no later than noon, April 1, 2021. All post-hearing briefs and statements should be filed no later than 5:15 p.m., April 15, 2021. Post-hearing briefs and statements should address matters raised at the hearing. For a description of the different types of written briefs and statements, see the ''Definitions'' section below.

In the event that, as of the close of business on March 25, 2021, no witnesses are scheduled to appear at the hearing, the hearing will be canceled. Any person interested in attending the hearing as an observer or nonparticipant should check the Commission website in the preceding paragraph for information concerning whether the hearing will be held.

Written Submissions: In lieu of or in addition to participating in the hearing, interested parties are invited to file written submissions concerning this investigation. All written submissions should be addressed to the Secretary, and should be received not later than the dates provided for in this notice. All written submissions must conform to the provisions of section 201.8 of the Commission's Rules of Practice and Procedure (19 CFR 201.8), as temporarily amended by 85 FR 15798 (March 19, 2020). Under that rule waiver, the Office of the Secretary will accept only electronic filings at this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov*). No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding electronic filing should contact the Office of the Secretary, Docket Services Division (202–205–1802), or consult the Commission's Handbook on Filing Procedures.

Definitions of Types of Documents That May be Filed; Requirements: In addition to requests to appear at the hearing, this notice provides for the possible filing of four types of documents: prehearing briefs, oral hearing statements, post-hearing briefs, and other written submissions.

(1) *Prehearing briefs* refers to written materials relevant to the investigation and submitted in advance of the hearing, and includes written views on matters that are the subject of the investigation, supporting materials, and any other written materials that you consider will help the Commission in understanding your views. You should file a prehearing brief particularly if you plan to testify at the hearing on behalf of an industry group, company, or other organization, and wish to provide detailed views or information that will support or supplement your testimony.

(2) *Oral hearing statements (testimony)* refers to the actual oral statement that you intend to present at the public hearing. *Do not* include any confidential business information in that statement. If you plan to testify, you must file a copy of your oral statement by the date specified in this notice. This statement will allow Commissioners to understand your position in advance of the hearing and will also assist the court reporter in preparing an accurate transcript of the hearing (*e.g.,* names spelled correctly).

(3) *Post-hearing briefs* refers to submissions filed after the hearing by persons who appeared at the hearing. Such briefs: (a) Should be limited to matters that arose during the hearing, (b) should respond to any Commissioner and staff questions addressed to you at the hearing, (c) should clarify, amplify, or correct any statements you made at the hearing, and (d) may, at your option, address or rebut statements made by other participants in the hearing.

(4) *Other written submissions* refer to any other written submissions that interested persons wish to make, regardless of whether they appeared at the hearing, and may include new information or updates of information previously provided.

There is no standard format that briefs or other written submissions must follow. However, each such document must identify on its cover (1) the type of document filed (*i.e.,* prehearing brief, oral statement of (name), post-hearing brief, or written submission), (2) the name of the person or organization filing it, and (3) whether it contains confidential business information (CBI). If it contains CBI, it must comply with the marking and other requirements set out below in this notice relating to CBI. Submitters of written documents (other than oral hearing statements) are encouraged to include a short summary of their position or interest at the beginning of the document, and a table of contents when the document addresses multiple issues.

Confidential Business Information: Any submissions that contain confidential business information must also conform to the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6). Section 201.6 of the rules requires that the cover of the document and the individual pages be clearly marked as to whether they are the ''confidential'' or ''non-confidential'' version, and that the confidential business information is clearly identified by means of brackets. All written submissions, except for confidential business information, will be made available for inspection by interested parties.

As requested by the USTR, the Commission will not include any confidential business information in its report. However, all information, including confidential business information, submitted in this investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel for cybersecurity purposes. The Commission will not otherwise disclose any confidential business information in a way that would reveal the operations of the firm supplying the information.

Summaries of Written Submissions: Persons wishing to have a summary of their position included in the report that the Commission sends to the USTR should include a summary with their written submission and should mark the summary as having been provided for that purpose. The summary should be clearly marked as ''summary for inclusion in the report'' at the top of the page. The summary may not exceed 500 words, should be in MS Word format or a format that can be easily converted to MS Word, and should not include any confidential business information. The summary will be published as provided if it meets these requirements and is germane to the subject matter of the investigation. The Commission will list the name of the organization furnishing the summary and will include a link to the Commission's Electronic Document Information System (EDIS) where the full written submission can be found.

By order of the Commission.

Issued: January 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–00535 Filed 1–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–567 (Advisory Opinion Proceeding 2)]

Certain Foam Footwear; Institution of an Advisory Opinion Proceeding

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to institute an advisory opinion proceeding in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Clint Gerdine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 708–2310. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal, telephone (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted the underlying investigation on May 11, 2006, based on a complaint, as amended, filed by Crocs, Inc. (''Crocs'') of Niwot, Colorado. 71 FR 27514–15 (May 11, 2006). The complaint alleged, *inter alia,* violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain foam footwear, by reason of infringement of claims 1–2 of U.S. Patent No. 6,993,858 (''the '858 patent'') and U.S. Patent No. D517,789 (''the '789 patent''). The notice of investigation named several respondents, including Double Diamond Distribution Ltd. (''Double Diamond'') of Saskatoon, Canada.

On July 25, 2008, the Commission issued a final determination finding no violation of section 337 based on non-infringement and failure to satisfy the technical prong of the domestic industry requirement with respect to the '789 patent, and based on invalidity of the '858 patent as obvious under 35 U.S.C. 103. 73 FR 45073–74 (Aug. 1, 2008). On July 15, 2011, after an appeal to the U.S. Court of Appeals for the Federal Circuit and subsequent remand vacating the Commission's previous finding of no violation, the Commission found a violation of section 337 based on infringement of the asserted claims of the patents and issued a general exclusion order (''GEO'') and, *inter alia,* a cease and desist order (''CDO'') directed against Double Diamond. 76 FR 43723–24 (July 21, 2011).

On March 28, 2020, the '789 patent expired, so the GEO and CDO are now only directed to articles that infringe one or more of claims 1 and 2 of the '858 patent. Subsequently, on December 8, 2020, Double Diamond petitioned for institution of an expedited advisory opinion proceeding to determine whether its Original Beach DAWGS™ shoes with plastic washers are covered by the GEO or CDO. On December 18, 2020, Crocs opposed Double Diamond's petition for an expedited advisory opinion proceeding. On December 22, 2020, Double Diamond moved for leave to file a reply to Crocs' opposition.

The Commission has determined that Double Diamond's petition complies with the requirements for institution of an advisory opinion proceeding under Commission Rule 210.79 to determine whether its Original Beach DAWGS™ shoes with plastic washers fall within the scope of the GEO or CDO. Accordingly, the Commission has determined to institute an advisory opinion proceeding and refer it to the Office of the General Counsel. The parties will furnish the Office of the General Counsel with information as requested in the accompanying order, and the Commission will issue an advisory opinion within ninety (90) days of the date of publication of this notice in the **Federal Register**. The following entities are named as parties to the proceeding: (1) Double Diamond and (2) Crocs. The Commission has determined to grant Double Diamond's motion for leave to file a reply to Crocs' opposition.

The Commission vote for this determination took place on January 7, 2021.

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: January 7, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–00477 Filed 1–12–21; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the International Trade Commission has received a complaint entitled *Certain Wireless Communications Equipment and Components Thereof, DN 3522;* the Commission is soliciting comments on any public interest issues raised by the complaint or complainant's filing pursuant to the Commission's Rules of Practice and Procedure.

FOR FURTHER INFORMATION CONTACT: Lisa R. Barton, Secretary to the Commission, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2000. The public version of the complaint can be accessed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.*

General information concerning the Commission may also be obtained by accessing its internet server at United States International Trade Commission (USITC) at *https://www.usitc.gov.* The public record for this investigation may be viewed on the Commission's Electronic Document Information System (EDIS) at *https://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: The Commission has received a complaint and a submission pursuant to § 210.8(b) of the Commission's Rules of Practice and Procedure filed on behalf of Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. on January 7, 2021. The complaint alleges violations of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless communications equipment and components thereof. The

complaint names as respondents: Ericsson AB of Sweden; Telefonaktiebolaget LM Ericsson of Sweden; and Ericsson Inc. of Plano, TX The complainant requests that the Commission issue a limited exclusion order, cease and desist orders, and impose a bond upon respondents' alleged infringing articles during the 60-day Presidential review period pursuant to 19 U.S.C. 1337(j).

Proposed respondents, other interested parties, and members of the public are invited to file comments on any public interest issues raised by the complaint or § 210.8(b) filing. Comments should address whether issuance of the relief specifically requested by the complainant in this investigation would affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.

In particular, the Commission is interested in comments that:

(i) Explain how the articles potentially subject to the requested remedial orders are used in the United States;

(ii) identify any public health, safety, or welfare concerns in the United States relating to the requested remedial orders;

(iii) identify like or directly competitive articles that complainant, its licensees, or third parties make in the United States which could replace the subject articles if they were to be excluded;

(iv) indicate whether complainant, complainant's licensees, and/or third party suppliers have the capacity to replace the volume of articles potentially subject to the requested exclusion order and/or a cease and desist order within a commercially reasonable time; and

(v) explain how the requested remedial orders would impact United States consumers.

Written submissions on the public interest must be filed no later than by close of business, eight calendar days after the date of publication of this notice in the **Federal Register**. There will be further opportunities for comment on the public interest after the issuance of any final initial determination in this investigation. Any written submissions on other issues must also be filed by no later than the close of business, eight calendar days after publication of this notice in the **Federal Register**. Complainant may file replies to any written submissions no later than three calendar days after the date on which any initial submissions were due. Any submissions and replies filed in response to this Notice are limited to five (5) pages in length, inclusive of attachments.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above. Submissions should refer to the docket number (''Docket No. 3522'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, Electronic Filing Procedures [1]). Please note the Secretary's Office will accept only electronic filings during this time. Filings must be made through the Commission's Electronic Document Information System (EDIS, *https://edis.usitc.gov.*) No in-person paper-based filings or paper copies of any electronic filings will be accepted until further notice. Persons with questions regarding filing should contact the Secretary at *EDIS3Help@usitc.gov.*

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. All information, including confidential business information and documents for which confidential treatment is properly sought, submitted to the Commission for purposes of this Investigation may be disclosed to and used: (i) By the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of this or a related proceeding, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel,[2] solely for cybersecurity purposes. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.[3]

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and of §§ 201.10 and 210.8(c) of the Commission's Rules of Practice and Procedure (19 CFR 201.10, 210.8(c)).

By order of the Commission.

Issued: January 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–00518 Filed 1–12–21; 8:45 am]

BILLING CODE 7020–02–P

[1] Handbook for Electronic Filing Procedures: *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf.*

[2] All contract personnel will sign appropriate nondisclosure agreements.

[3] Electronic Document Information System (EDIS): *https://edis.usitc.gov.*

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–579]

Lobsters: Effects of the Canada-EU Trade Agreement on the U.S. Industry Termination of Investigation

AGENCY: United States International Trade Commission.

ACTION: Notice of termination of investigation.

SUMMARY: Pursuant to a letter from the U.S. Trade Representative (USTR) received on December 23, 2020, withdrawing his request of July 29, 2020 that the Commission conduct an investigation and prepare a report that details any negative effects of the Comprehensive Economic and Trade Agreement between Canada and the European Union on the United States lobster industry, the Commission has terminated Investigation No. 332–579: *Lobsters: Effects of the Canada-EU Trade Agreement on the U.S. Industry,* and will not release a report.

The USTR requested the investigation and report under authority delegated by the President and pursuant to section 332(g) of the Tariff Act of 1930. In his letter withdrawing the request, the USTR stated that the European Union's recent removal of tariffs on imported lobsters eliminated the need for a report analyzing any disadvantages to the U.S. lobster industry caused by the prior agreement between Canada and the European Union.

DATES:

July 29, 2020: Receipt of request for the investigation.

October 1, 2020: Public hearing.

December 23, 2020: Receipt of request to terminate the investigation.

[Publication in ***Federal Register****]*: Termination of investigation.

FOR FURTHER INFORMATION CONTACT: Project Leader Christopher Robinson (202–205–2602 or *christopher.robinson@usitc.gov*) or Deputy Project Leader Amelia Shister (202–205–2047 or *amelia.shister@usitc.gov*) for information specific to this investigation. For information on the legal aspects of these investigations,

contact William Gearhart of the Commission's Office of the General Counsel (202–205–3091 or *william.gearhart@usitc.gov*). The media should contact Margaret O'Laughlin, Office of External Relations (202–205–1819 or *margaret.olaughlin@usitc.gov*). Hearing-impaired individuals may obtain information on this matter by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission may also be obtained by accessing its internet server (*http://www.usitc.gov*). Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000.

By order of the Commission.

Issued: January 8, 2021.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2021–00567 Filed 1–12–21; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—R Consortium, Inc.

Notice is hereby given that, on December 28, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), R Consortium, Inc. (''R Consortium'') has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Stiftung für Qualitätssicherung und Transparenz im Gesundheitswesen, Berlin, GERMANY, has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and R Consortium intends to file additional written notifications disclosing all changes in membership.

On September 15, 2015, R Consortium filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on October 2, 2015 (80 FR 59815).

The last notification was filed with the Department on October 1, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65425).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–00457 Filed 1–12–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—OPEN RF Association, Inc.

Notice is hereby given that, on January 04, 2021 pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), Open RF Association, Inc. filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, National Instruments, Austin, TX has been added as a party to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and Open RF Association, Inc. intends to file additional written notifications disclosing all changes in membership.

On February 21, 2020, Open RF Association, Inc. filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on March 11, 2020 (85 FR 14247).

The last notification was filed with the Department on October 6, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020 (85 FR 65424).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–00455 Filed 1–12–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to The National Cooperative Research and Production Act of 1993—UHD Alliance, Inc.

Notice is hereby given that, on December 10, 2020, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* (''the Act''), UHD Alliance, Inc. (''UHD Alliance'') filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Fengmi (Beijing) Technology Co., Ltd., Beijing, PEOPLE's REPUBLIC OF CHINA, has been added as a party to this venture.

In addition, Charter Communications, St. Louis, MO; Technicolor SA, Cedex, FRANCE; and Westinghouse Electronics, Eastvale, CA have withdrawn as parties to this venture.

No other changes have been made in either the membership or planned activity of the group research project. Membership in this group research project remains open, and UHD Alliance intends to file additional written notifications disclosing all changes in membership.

On June 17, 2015, UHD Alliance filed its original notification pursuant to Section 6(a) of the Act. The Department of Justice published a notice in the **Federal Register** pursuant to Section 6(b) of the Act on July 17, 2015 (80 FR 42537).

The last notification was filed with the Department on September 22, 2020. A notice was published in the **Federal Register** pursuant to Section 6(b) of the Act on October 15, 2020(85 FR 65425).

Suzanne Morris,

Chief, Premerger and Division Statistics, Antitrust Division.

[FR Doc. 2021–00454 Filed 1–12–21; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Lodging of Proposed First Amendment To Consent Decree Under the Clean Air Act

On January 5, 2021, the Department of Justice lodged a proposed First Amendment to Consent Decree with the United States District Court for the

Eastern District of Pennsylvania in the lawsuit entitled *United States, et al.* v. *Lehigh Cement Company LLC and Lehigh White Cement Company, LLC,* Civil Action No. 5:19–cv–05688–JFL.

On December 3, 2019, the United States and seven states and state or local agencies filed a Complaint alleging violations of the Clean Air Act, its regulations, and related state provisions at one or more of eleven Portland cement facilities owned or operated by Lehigh and Lehigh White Cement Company, LLC (''Lehigh White''). One of these facilities is located in Mitchell, Indiana (the ''Mitchell facility''), and is owned and/or operated by Lehigh. The Mitchell facility is the subject of this amendment.

Simultaneously with filing the Complaint, the United States lodged a Consent Decree. The Consent Decree requires, *inter alia,* installation of emissions control technology for nitrogen oxides (''NO_X'') and sulfur dioxide (SO_2''), emissions monitoring systems, and specified NO_X and SO_2 emission limits (except that the emission limit for SO_2 at the Cupertino, CA facility will be established through a testing program). On November 19, 2020, following public comment, the Court approved and entered the Consent Decree.

The First Amendment would modify two dates contained in the Consent Decree relating to the Mitchell facility: (1) Extend by two months the date for electing between two injunctive relief measures (either building a new kiln or kilns or retrofitting the existing kilns), and (2) extend the deadline for retrofitting the one of the existing kilns by four months, should Lehigh choose that option. The First Amendment would also revise the Consent Decree to make building the new kiln(s) the default option, should Lehigh fail to meet the deadline for selecting between building a new kiln(s) and retrofitting the existing kilns. The First Amendment does not revise any deadlines relating to any of the other ten cement facilities subject to the Consent Decree, or make any changes other than those described above.

The publication of this notice opens a period for public comment on the First Amendment to Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States, et al.* v. *Lehigh Cement Company LLC and Lehigh White Cement Company, LLC,* Civil Action No. 5:19–cv–05688–JFL, D.J. Ref. No. 90–5–2–1–08531/1. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the First Amendment to Consent Decree may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the First Amendment to Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $1.75 (25 cents per page reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–00541 Filed 1–12–21; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Lodging of Proposed Consent Decree and Settlement Agreement Under the Clean Air Act and Bankruptcy Rule 9019

On January 7, 2021, a proposed Consent Decree and Settlement Agreement was lodged in the United States Bankruptcy Court for the Southern District of Texas in *In re Chesapeake Energy Corporation, et al.,* Case No. 20–33233 (DRJ).

The proposed Consent Decree and Settlement Agreement resolves civil claims by the United States, on behalf of the Environmental Protection Agency (EPA), against Debtors Chesapeake Exploration LLC and Chesapeake Appalachia LLC (collectively Chesapeake) relating to Clean Air Act (CAA) violations at 159 natural gas production facilities formerly owned and operated by Chesapeake in Ohio. Specifically, the United States has alleged that Chesapeake violated requirements set forth in Section 111 of the CAA, the Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution found at 40 CFR part 60, subpart OOOO, the Standards of Performance for Crude Oil and Natural Gas Production, Transmission, and Distribution for Which Construction, Modification, or Reconstruction Commenced After September 18, 2015 found in 40 CFR part 60, subpart OOOOa, and federally-enforceable general operating permits applicable to Chesapeake's natural gas production facilities issued by the Ohio Environmental Protection Agency. The Consent Decree and Settlement Agreement resolves the United States' claims for the above-described CAA violations and requires Chesapeake to pay a civil penalty of $1.2 million in full and without reduction from the Debtor's estate. The Consent Decree and Settlement Agreement requires approval of the Bankruptcy Court after a thirty-day public comment period.

The publication of this notice opens a period for public comment on the Consent Decree and Settlement Agreement. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division and should refer to *In re Chesapeake Energy Corporation, et al,* D.J. Ref. No. 90–5–2–1–11724. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By email	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree and Settlement Agreement may be examined and downloaded at this Justice Department website: *https://www.justice.gov/enrd/consent-decrees.* We will provide a paper copy of the Consent Decree and Settlement Agreement upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $7.75 (25 cents per page

reproduction cost) payable to the United States Treasury.

Patricia McKenna,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2021–00539 Filed 1–12–21; 8:45 am]

BILLING CODE P

DEPARTMENT OF LABOR

Employment and Training Administration

Agency Information Collection Activities; Comment Request; Registration and Equal Employment Opportunity in Apprenticeship Programs

ACTION: Notice.

SUMMARY: The Department of Labor's (DOL) Employment and Training Administration (ETA) is soliciting comments concerning a proposed revision for the authority to conduct the information collection request (ICR) titled, ''Registration and Equal Employment Opportunity in Apprenticeship Programs.'' This comment request is part of continuing Departmental efforts to reduce paperwork and respondent burden in accordance with the Paperwork Reduction Act of 1995 (PRA).

DATES: Consideration will be given to all written comments received by March 15, 2021.

ADDRESSES: A copy of this ICR with applicable supporting documentation, including a description of the likely respondents, proposed frequency of response, and estimated total burden, may be obtained free by contacting Stephanie Arku by telephone at 202–693–3965 (this is not a toll-free number), TTY 1–877–889–5627 (this is not a toll-free number), or by email at *OA-ICRs@dol.gov.*

Submit written comments about, or requests for a copy of, this ICR by mail or courier to the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship, Room C–5321, 200 Constitution Avenue NW, Washington, DC 20210; by email: *OA-ICRs@dol.gov;* or by fax 202–693–3799.

FOR FURTHER INFORMATION CONTACT: Stephanie Arku by telephone at 202–693–3965 (this is not a toll-free number) or by email at *OA-ICRs@dol.gov.*

Authority: 44 U.S.C. 3506(c)(2)(A).

SUPPLEMENTARY INFORMATION: DOL, as part of continuing efforts to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies an opportunity to comment on proposed and/or continuing collections of information before submitting them to the Office of Management and Budget (OMB) for final approval. This program helps to ensure requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements can be properly assessed.

ETA is requesting approval of a revision to a currently approved ICR pursuant to the Paperwork Reduction Act. The National Apprenticeship Act (NAA) of 1937 (29 U.S.C. 50) authorizes this information collection. If approved, this ICR will enable ETA to refine its data collection concerning the registration of apprenticeship programs and apprentices with DOL/ETA's Office of Apprenticeship and recognized State Apprenticeship Agencies, properly assess the types of sponsors that are seeking to register an apprenticeship program and the level of growth in apprenticeship, collect the data necessary to calculate national registered apprenticeship program and apprentice totals, and implement the requirements of the Veterans Apprenticeship and Labor Opportunity Reform (VALOR) Act (Pub. L. 115–89). This ICR will also continue to enable ETA to collect data from registered apprenticeship programs relating to equal employment opportunity, and from applicants and/or apprentices, who file a discrimination complaint. Under the NAA, the Secretary of Labor (Secretary) is charged with the establishment of labor standards designed to safeguard the welfare of apprentices and promote apprenticeship opportunity. The NAA also authorizes the Secretary to ''publish information relating to existing and proposed labor standards of apprenticeship.''

ETA seeks a revision of this ICR to include the following: a change to the ICR title from ''Title 29 CFR Part 29—Labor Standards for the Registration of Apprenticeship Programs'' to the ''Registration and Equal Employment Opportunity in Apprenticeship Programs'' to accurately reflect the collection of information contained in this revised ICR; modifications to ETA Form 671 (Program Registration and Apprenticeship Agreement); the addition (with minor modifications) of the information collection requirements currently approved under OMB Control Number 1205–0224 (titled ''Equal Employment Opportunity in Apprenticeship Training''), including ETA Form 9039 (Complaint Form—Equal Employment Opportunity in Apprenticeship Programs); and the addition of an information collection instrument pertaining to state program and apprentice registration (ETA Form 9186). ETA Forms 671 and 9039 are currently set to expire on March 31, 2023.

Overall adjustments to ETA Form 671 (Program Registration and Apprenticeship Agreement) include nonsubstantive textual and formatting edits to enhance clarity, technical corrections to reflect that 29 CFR part 29, subpart A, now governs the operation of registered apprenticeship programs, and the streamlining of fields that are no longer relevant or in use. The notable changes specific to ETA Form 671, Section I (Program Registration) include the addition of a subsection where a sponsor must attest to the assurances required under section 2(b)(1) of the Support for Veterans in Effective Apprenticeships Act of 2019 (Pub. L. 116–134) with respect to Title 38 educational assistance; the addition of a field where a sponsor must disclose the principal place of business (*i.e.,* the location of the sponsor's headquarters) in connection with section 2(b)(3) of Public Law 116–134 and section 2(c)(1) of Public Law 115–89; the addition of a field where a sponsor must indicate its willingness to be placed on the Eligible Training Provider List with respect to section 122 of the Workforce Innovation and Opportunity Act (Pub. L. 113–128); and the addition of multiple fields (*e.g.,* ratio of apprentices to journeyworkers, on-the-job learning/training plan, and minimum program requirements) and a subsection (*i.e.,* selection procedures) where a sponsor must disclose critical information that will inform the content of its apprenticeship program standards.

In ETA Form 671, Section II (Apprentice Agreement and Registration), ETA has modified the veteran status category in connection with Public Law 116–134 to enable registered apprenticeship programs to better service veterans; updated the sex, ethnicity, race, and veteran status categories to include an additional field for apprentices who elect not to disclose this information; slightly adjusted the education level category to align with the educational attainment categories for which the U.S. Government compiles workforce data by race, national origin, and sex; and aligned the overall content in the apprenticeship agreement with the various regulatory requirements specified in DOL's apprenticeship regulations under 29 CFR 29.7. ETA has not made any

adjustments to ETA Form 671, Section II (Voluntary Disability Disclosure).

ETA has added the information collection requirements that are currently approved under OMB Control Number 1205–0224 to this ICR in an effort to consolidate all information collection requirements pertaining to the registration of apprenticeship programs and apprentices into a single ICR. The adjustments to ETA Form 9039 (Complaint Form—Equal Employment Opportunity in Apprenticeship Programs) include minor, nonsubstantive textual edits, and technical corrections indicating that the regulatory requirements governing registered apprenticeship programs are now contained in 29 CFR part 29, subpart A. ETA will submit a request to discontinue the ICR approved under OMB Control Number 1205–0224 once approval is granted by OMB on this ICR.

ETA has also added a new information collection instrument, ETA Form 9186 (State Apprenticeship Agency (SAA) Self-Assessment Report for Program Data and Apprentice Demographics), to this ICR. If approved, this form will be completed by the SAAs that currently do not use DOL/ETA's Registered Apprenticeship Partners Information Database System (RAPIDS) to administer Registered Apprenticeship in their respective state/territory. This collection will enable ETA to calculate more precisely the total number of registered apprenticeship programs and apprentices on a nationwide basis.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

Interested parties are encouraged to provide comments to the contact shown in the **ADDRESSES** section. Comments must be written to receive consideration, and they will be summarized and included in the request for OMB approval of the final ICR. In order to help ensure appropriate consideration, comments should mention OMB Control Number 1205–0223.

Submitted comments will also be a matter of public record for this ICR and posted on the internet, without redaction. DOL encourages commenters not to include personally identifiable information, confidential business data, or other sensitive statements/information in any comments.

DOL 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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, (*e.g.,* permitting electronic submission of responses).

Agency: DOL–ETA.

Type of Review: REVISION.

Title of Collection: Registration and Equal Employment Opportunity in Apprenticeship Programs.

Forms: ETA Form 671, ETA Form 9039, and ETA Form 9186.

OMB Control Number: 1205–0223.

Affected Public: Individuals/households, state/local/tribal governments, Federal government, private sector (businesses or other for-profits, and, not-for-profit institutions).

Estimated Number of Respondents: 651,093.

Frequency: Varies.

Total Estimated Annual Responses: 957,452.

Estimated Average Time per Response: Varies.

Estimated Total Annual Burden Hours: 521,964 hours.

Total Estimated Annual Other Cost Burden: $0.

John Pallasch,

Assistant Secretary for Employment and Training.

[FR Doc. 2021–00503 Filed 1–12–21; 8:45 am]

BILLING CODE 4510–FR–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2013–0017]

QAI Laboratories, Ltd. Applications for Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the final decision to expand the scope of recognition for QAI Laboratories, Ltd., (QAI) as a Nationally Recognized Testing Laboratory (NRTL).

DATES: The expansion of the scope of recognition becomes effective on January 13, 2021.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor, telephone: (202) 693–1999; email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, phone: (202) 693–2110 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of Final Decision

OSHA hereby gives notice of the expansion of the scope of recognition for QAI to cover the addition of twenty-one test standards to the NRTL scope of recognition.

OSHA's recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes NRTL applications for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides the final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including QAI, detailing the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

QAI currently has two facilities (sites) recognized by OSHA for product testing and certification, with headquarters located at: QAI Laboratories, Ltd., 3980 North Fraser Way, Burnaby, BC, Canada, V5J 5K5. A complete list of QAI's scope of recognition is available at *https://www.osha.gov/dts/otpca/nrtl/qai.html.*

QAI submitted three applications, one dated October 16, 2017 (OSHA–2013–0017–0015), to expand recognition to include seventeen additional test standards. This application was amended on June 12, 2019 (OSHA–2013–0017–0016), to remove some standards from the original request and add others. This revised application was amended again on February 11, 2020 (OSHA–2013–0017–0017), to request twenty-one additional standards to be added to QAI's NRTL scope of recognition. OSHA staff performed a detailed analysis of the application packet and reviewed other pertinent information. OSHA did not perform any on-site reviews in relation to this application. OSHA published the preliminary notice announcing QAI's expansion applications in the **Federal Register** on September 22, 2020 (85 FR 59557). The agency requested comments by October 7, 2020, but it received no comments in response to this notice. OSHA is now proceeding with this final notice to grant expansion of QAI's scope of recognition.

To obtain or review copies of all public documents pertaining to QAI's applications, go to *www.regulations.gov* or contact the Docket Office, Occupational Safety and Health Administration at 202–693–2350. Docket No. OSHA–2013–0017 contains all materials in the record concerning QAI's recognition.

II. Final Decision and Order

OSHA examined QAI's expansion applications, the capability to meet the requirements of the test standards, and other pertinent information. Based on a review of this evidence, OSHA finds that QAI meets the requirements of 29 CFR 1910.7 for expansion of the scope of recognition, subject to the conditions listed below. OSHA, therefore, is proceeding with this final notice to grant the expansion of QAI's scope of recognition. OSHA limits the expansion of QAI's scope of recognition to testing and certification of products for demonstration of conformance to the test standards listed in Table 1.

TABLE 1—LIST OF APPROPRIATE TEST STANDARDS FOR INCLUSION IN QAI'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 1740	Standard for Robots and Robotic Equipment.
UL 22	Standard for Amusement and Gaming Machines.
UL 73	Standard for Motor-Operated Appliances.
UL 499	Standard for Electric Heating Machines.
UL 506	Standard for Specialty Transformers.
UL 676	Standard for Underwater Luminaires and Submersible Junction Boxes.
UL 1838	Standard for Low Voltage Landscape Lighting Systems.
UL 2202	Standard for Electric Vehicle (EV) Charging System Equipment.
UL 2388	Standard for Flexible Lighting Products.
UL 5085–1	Low Voltage Transformers—Part 1: General Requirements.
UL 5085–2	Low Voltage Transformers—Part 2: General Purpose Transformers.
UL 5085–3	Low Voltage Transformers—Part 3: Class 2 and Class 3 Transformers.
UL 8752	Organic Light Emitting Diode (OLED) Panels.
UL 60950–22	Information Technology Equipment—Safety—Part 22: Equipment to be Installed Outdoors.
UL 61010–2–010	Electrical Equipment Measurement, Control and Laboratory Use—Part 2–010: Particular Requirements for Laboratory Equipment for the Heating of Materials.
UL 61010–2–020	Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–020: Particular Requirements for Laboratory Equipment for Laboratory Centrifuges.
UL 61010–2–081	Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–081: Particular Requirements for Laboratory Equipment for Automatic and Semi-Automatic Equipment for Analysis and Other Purposes.
UL 61010–2–091	Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–091: Particular Requirements for Laboratory Equipment for Cabinet X-Ray Systems.
UL 61010–2–101	Electrical Equipment for Measurement, Control and Laboratory Use—Part 2–101: Particular Requirements for In Vitro Diagnostic (IVD) Medical Equipment.
UL 62368–1	Audio/Video, Information and Communication Technology Equipment—Part 1: Safety Requirements.
ASME A17.5–2014	Elevator and Escalator Electrical Equipment.

OSHA's recognition of any NRTL for a particular test standard is limited to equipment or materials for which OSHA standards require third-party testing and certification before using them in the workplace. Consequently, if a test standard also covers any products for which OSHA does not require such testing and certification, a NRTL's scope of recognition does not include these products.

The American National Standards Institute (ANSI) may approve the test standards listed above as American National Standards. However, for convenience, the designation of the standards-developing organization for the standard as opposed to the ANSI designation may be used. Under the NRTL Program's policy (see OSHA Instruction CPL 1–0.3, Appendix C, paragraph XIV), any NRTL recognized for a particular test standard may use either the proprietary version of the test

standard or the ANSI version of that standard. Contact ANSI to determine whether a test standard is currently ANSI-approved.

A. Conditions

In addition to those conditions already required by 29 CFR 1910.7, QAI must abide by the following conditions of the recognition:

1. QAI must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major change in the operations as a NRTL, and provide details of the change(s);

2. QAI must meet all the terms of the recognition and comply with all OSHA policies pertaining to this recognition; and

3. QAI must continue to meet the requirements for recognition, including all previously published conditions on QAI's scope of recognition, in all areas for which it has recognition.

Pursuant to the authority in 29 CFR 1910.7, OSHA hereby expands the scope of recognition of QAI, subject to the conditions specified in this notice.

III. Authority and Signature

Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, 200 Constitution Avenue NW, Washington, DC 20210, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC, on January 7, 2021.

Loren Sweatt,

Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2021–00502 Filed 1–12–21; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Submission for OMB Review, Comment Request, Proposed Collection Requests: 2021–2023 IMLS Native American Library Services Enhancement Grants Program Notice of Funding Opportunity

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Submission for OMB review, comment request.

SUMMARY: The Institute of Museum and Library Services announces the following information collection has been submitted to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments about the plan to offer a grant program targeted to the needs of Native American libraries. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this notice.

DATES: Written comments must be submitted to the office listed in the **FOR FURTHER INFORMATION CONTACT** section below on or before February 10, 2021.

OMB is particularly interested in comments that help the agency to:

- 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 through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (*e.g.,* permitting electronic submission of responses).

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 ''Institute of Museum and Library Services'' under ''Currently Under Review,'' then check ''Only Show ICR for Public Comment'' checkbox or mail to Office of Information and Regulatory Affairs, *Attn.:* OMB Desk Officer for Education, Office of Management and Budget, Room 10235, Washington, DC 20503, 202–395–7316.

FOR FURTHER INFORMATION CONTACT: Anthony D. Smith, Associate Deputy Director, Office of Library Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North, SW, Suite 4000, Washington, DC 20024–2135. Mr. Smith can be reached by telephone at 202–653–4716, or by email at *asmith@imls.gov.*

SUPPLEMENTARY INFORMATION: The Institute of Museum and Library Services is the primary source of federal support for the nation's libraries and museums. We advance, support, and empower America's museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

Current Actions: The purpose of this collection is to support Native American libraries in improving digital services, improving educational programs, and enhancing preservation and revitalization, particularly as they relate to the following goals in the Museum and Library Services Act (20 U.S.C. 9141).

1. Expanding services for learning and access to information and educational resources in a variety of formats (including new and emerging technology), in all types of libraries, for individuals of all ages in order to support such individuals' need for education, lifelong learning, workforce development, economic and business development, health information, critical thinking skills, digital library skills, and financial literacy and other types of literacy skills.

2. Establishing or enhancing electronic and other linkages and improved coordination among and between libraries and entities, as described in 20 U.S.C. 9134(b)(6), for the purpose of improving the quality of and access to library and information services.

3. Providing training and professional development, including continuing education, to enhance the skills of the current library workforce and leadership, and advance the delivery of library and information services; and enhancing efforts to recruit future professionals, including those from diverse and underrepresented backgrounds, to the field of library and information services.

4. Developing public and private partnerships with other agencies, tribes, and community-based organizations.

5. Targeting library services to individuals of diverse geographic,

cultural, and socioeconomic backgrounds, to individuals with disabilities, and to individuals with limited functional literacy or information skills.

6. Targeting library and information services to persons having difficulty using a library and to underserved urban and rural communities, including children (from birth through age 17) from families with incomes below the poverty line (as defined by the Office of Management and Budget and revised annually in accordance with 42 U.S.C. 9902(2)) applicable to a family of the size involved.

7. Developing library services that provide all users access to information through local, State, regional, national, and international collaborations and networks.

8. Carrying out other activities consistent with the purposes of the Library Services and Technology subchapter of the IMLS statute (20 U.S.C. 9121).

Indian tribes are eligible to apply for funding under the Native American Library Services Enhancement Grant program. Entities such as libraries, schools, tribal colleges, or departments of education are not eligible applicants, although they may be involved in the administration of this program and their staff may serve as project directors in partnership with an eligible applicant.

For purposes of funding under this program, ''Indian tribe'' means any tribe, band, nation, or other organized group or community, including any Alaska native village, regional corporation, or village corporation (as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*)), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. A list of eligible entities is available from the Bureau of Indian Affairs.

To be eligible for this program an applicant must be able to document an existing library that meets, at a minimum, three basic criteria: (1) Regularly scheduled hours, (2) staff, and (3) materials available for library users.

This action is to seek approval for the information collection for the 2021–2023 IMLS Native American Library Services Enhancement Grants Program Notice of Funding Opportunity for the next three years.

The 60-day notice for the 2021–2023 IMLS Native American Library Services: Enhancement Grants Program Notice of Funding Opportunity, was published in the **Federal Register** on June 29, 2020 (85 FR 38933–38934). No comments were received.

Agency: Institute of Museum and Library Services.

Title: 2021–2023 IMLS Native American Library Services Enhancement Grants Program Notice of Funding Opportunity

OMB Number: 3137–0110.

Frequency: Once per year.

Affected Public: American Indian tribes recognized by the Secretary of the Interior.

Number of Respondents: 51.

Estimated Average Burden per Response: 40 hours.

Estimated Total Annual Burden: 2,040 hours.

Total Annualized capital/startup costs: n/a.

Total Annual costs: $60,730.80.

Total Federal Costs: $2,667.71.

Dated: January 8, 2021.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2021–00549 Filed 1–12–21; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL FOUNDATION FOR THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Requests: IMLS Collections Assessment for Preservation Forms

AGENCY: Institute of Museum and Library Services, National Foundation for the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to solicit comments concerning the three-year approval of the forms necessary to support the implementation of the Collections Assessment for Preservation (CAP) program. They are designed to collect information to support applications to the program by both museums and conservators/assessors as well as pre-program questionnaires and post-program evaluations.

A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments must be submitted to the office listed in the addressee section below on or before March 12, 2021.

ADDRESSES: Send comments to Connie Bodner, Ph.D., Director of Grants Policy and Management, Office of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Dr. Bodner can be reached by telephone: 202–653–4636, or by email at *cbodner@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Christopher J. Reich, Chief Administrator, Office of Museum Services, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington DC 20024–2135. Mr. Reich can be reached by telephone at 202–653–4685, or by email at *creich@imls.gov.*

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in public comment that help the agency to:

- 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 through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

I. Background

The Institute of Museum and Library Services is the primary source of Federal support for the Nation's libraries and museums. We advance, support, and empower America's

museums, libraries, and related organizations through grant making, research, and policy development. Our vision is a nation where museums and libraries work together to transform the lives of individuals and communities. To learn more, visit *www.imls.gov.*

II. Current Actions

The Collections Assessment for Preservation (CAP) program allows a qualified conservator to study of all of a museum's collections, buildings and building systems, as well as its policies and procedures relating to collections care. Participants who complete the program receive an assessment report with prioritized recommendations to improve collections care. The forms submitted for public review in this Notice are application forms for assessors and participating museums; pre-visit site questionnaires for participating museums; CAP program evaluation forms for participating museums and assessors; and program Outcomes Based Evaluation forms.

Agency: Institute of Museum and Library Services.

Title: IMLS Collections Assessment for Preservation Forms.

OMB Control Number: 3137–NEW.

Agency Number: 3137.

Respondents/Affected Public: Museum professionals and professional conservators.

Total Estimated Number of Annual Respondents: TBD.

Frequency of Response: TBD.

Average Minutes per Response: TBD.

Total Estimated Number of Annual Burden Hours: TBD.

Cost Burden (dollars): TBD.

Public Comments Invited: Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: January 8, 2021.

Kim Miller,

Senior Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2021–00548 Filed 1–12–21; 8:45 am]

BILLING CODE 7036–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 30–10716; NRC–2020–0214]

Sigma-Aldrich Company; Fort Mims Site

Correction

In notice document 2020–28065 appearing on pages 83109–83111 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83109, in the first column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28065 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

OFFICE OF PERSONNEL MANAGEMENT

Federal Personnel Vetting Core Doctrine

AGENCY: Office of Personnel Management (OPM) and Office of the Director of National Intelligence (ODNI).

ACTION: General statement of policy.

SUMMARY: This action by the Acting OPM Director in the capacity as the Suitability and Credentialing Executive Agent, in consultation with the Director of National Intelligence (DNI) in the capacity as the Security Executive Agent, establishes a Federal Personnel Vetting Core Doctrine to guide transformative efforts to reform the U.S. Government personnel security vetting processes. This policy statement is consistent with direction established by the President in an Executive order entitled *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information,* mandating the Executive Agents to align, to the greatest extent practicable, the Federal workforce vetting processes to promote mobility, improve efficiencies and move towards an enhanced risk management approach. With the issuance of this general statement of policy, the Federal Personnel Vetting Core Doctrine establishes the philosophy for the Government's personnel vetting program and will guide development of Government-wide and agency policy. This Core Doctrine defines the personnel vetting mission, its guiding principles, key supporting processes, and policy priorities.

DATES: Comments must be received on or before February 12, 2021.

ADDRESSES: You may submit comments, identified by the docket number or Regulation Identifier Number (Z–RIN) for this document, by any of the following methods:

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

All submissions received must include the agency name and docket number or RIN (RIN 3206–ZA02, October 2020) for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at *http://www.regulations.gov* as they are received without change, including any personal identifiers or contact information. OPM will prepare and post a public response to major concerns raised in the comments, as appropriate, on its guidance Web portal, either before or when the guidance document is finalized and issued.

FOR FURTHER INFORMATION CONTACT: Dorianna Rice at Suitability Executive Agent Programs, OPM, *SuitEA@opm.gov* or *(202) 606–8460* and/or National Counterintelligence and Security Center, ODNI, at *SecEA@dni.gov.*

SUPPLEMENTARY INFORMATION:

Authority for This Action

Executive Order 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information* (June 30, 2008), as amended, established the DNI as the Security Executive Agent and the Director of OPM as the Suitability & Credentialing Executive Agent.[1] ODNI and OPM are the primary entities responsible for policy and oversight of the Federal Government's personnel vetting process. The ODNI and OPM are issuing this general statement of policy to inform Federal agencies and the public of a new framework designed to guide the fundamental transformation of the Federal Government's personnel vetting process. All other applicable authorities are cited within the body of the general statement of policy below. 5 U.S.C. 552(a)(1)(D) provides that agencies publish their general

[1] Previously, OPM was already responsible for issuing the standards by which candidates for the competitive and senior executive service were to be assessed for entry into the civil service, pursuant to the President's statutory authority to establish the criteria for entry into the competitive service, and his delegation of that authority to OPM through the Civil Service Rules. 5 U.S.C. 3301, 3302; E.O. 10577, Civil Service Rules II, and V, codified at 5 CFR parts 2 and 5, as amended. Under President Clinton's E.O. 12968 (Aug. 2, 1995), the Security Policy Board and successor Policy Coordinating Committee were responsible for recommending standards to the President by which eligibility for access to classified information was to be determined. With President George W. Bush's promulgation of E.O. 13467, the Director of National Intelligence assumed that function. E.O. 13467, and subsequent Executive Orders, have also made OPM responsible for issuing standards related to for eligibility for logical or physical access to Government systems and facilities; fitness for performing work on behalf of the Government under a contract; and fitness for appointment to the excepted service.

statements of policy in the **Federal Register** for the guidance of the public.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, except as authorized by law or incorporated into a contract. This document is intended to provide clarity to the public regarding existing requirements under the law or agency policies and to inform agencies of the framework that will guide their implementation of existing legal requirements, and any new requirements that are adopted. This document was created to explain to agencies the underlying philosophies that should animate the implementation of their responsibilities with respect to adjudicating suitability or fitness, eligibility to hold a position that is national security sensitive, and eligibility for logical or physical access to agency systems or facilities.

Regulatory Impact

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This guidance has been reviewed by OMB and designated a ''significant regulatory action,'' under Executive Order 12866. However, it is not economically significant.

Promoting International Regulatory Cooperation

As required by Executive Orders 13891 and 13609, OPM and ODNI have concluded that this guidance document is not a significant regulation having significant international impacts.

Reducing Regulation and Controlling Regulatory Costs

This guidance is not expected to be subject to the requirements of E.O. 13771(82 FR 9339, February 3, 2017) because it is expected to impose no more than de minimis costs.

Regulatory Flexibility Act

OPM and ODNI certify that this guidance document will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies.

Unfunded Mandates Act of 1995

This guidance will not 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 year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Congressional Review Act

The Congressional Review Act (5 U.S.C. 801 *et seq.*) requires rules (as defined in 5 U.S.C. 804) to be submitted to Congress before taking effect. OPM will submit to Congress and the Comptroller General of the United States a report regarding the issuance of this action before its effective date, as required by 5 U.S.C. 801. This action is not major as defined by the Congressional Review Act (CRA) (5 U.S.C. 804).

Paperwork Reduction Act

This guidance does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

I. Background: Trusted Workforce 2.0

Effective Government operations require that the Federal Government's workforce be trusted to deliver on the mission, provide excellent service, and demonstrate effective stewardship of taxpayer funds. Recognizing that establishing and maintaining trust [2] is the core goal of the Federal personnel vetting program, the Security Executive Agent and the Suitability and Credentialing Executive Agent in coordination and consultation with the Under Secretary of Defense for Intelligence and Security (USD(I&S)) and the Deputy Director for Management of OMB, in their roles as Principal Members of the Security, Suitability and Credentialing Performance Accountability Council (PAC), have initiated the ''Trusted Workforce 2.0'' (TW 2.0) transformational efforts to provide a roadmap for reformed and innovative Federal personnel vetting.

In March 2018, ODNI and OPM launched the TW 2.0 effort, in consultation with other agencies across the U.S. Government, to fundamentally overhaul the Federal personnel vetting process. The effort was organized into two phases. Phase One was designed to reduce and eliminate the then extant background investigation inventory,[3] which had grown substantially due to a confluence of prior events, while Phase Two sought to establish a new Government-wide approach to personnel vetting. This general statement of policy addresses Phase Two of TW 2.0.

II. Discussion of the Policy

With the issuance of this General Policy Statement, the *Federal Personnel Vetting Core Doctrine* establishes the philosophy of the Government's personnel vetting program and will guide development of Government-wide and agency policy. This Core Doctrine defines the personnel vetting mission, its guiding principles, key supporting processes, and policy priorities.

After the issuance of this *Federal Personnel Vetting Core Doctrine,* the next steps involve consulting with Federal agencies through interagency processes to refine and begin issuing and implementing the policies across the Federal Government to bring about change. In the coming months, ODNI and OPM anticipate several Executive Branch policies to be issued that will provide high-level direction, establish an aggressive path forward, and outline immediate steps to bridge to the future state. Public participation will be provided through applicable statutory procedures, such as notice-and-comment rulemaking under the Administrative Procedure Act for substantive rules, and 60-day and 30-day notices under the Paperwork Reduction Act for information collections.

[2] The nature of the trust determination depends on the legal requirements for each vetting program. Thus for suitability and fitness determinations the trust consideration is to ensure that admission into the Civil Service will ''best promote the efficiency of that service,'' by ascertaining ''the fitness of applicants . . . as to character . . . for the employment sought'' (5 U.S.C. 3301); for national security eligibility the trust consideration is to ensure that eligibility is ''clearly consistent with the national security interests of the United States,'' where adjudication of past conduct ''is only an attempt to predict . . . possible future behavior'' and ''does not equate with passing judgment upon the individual's character.'' (E.O. 12968, sec. 3.1; *Dep't of the Navy* v. *Egan,* 484 U.S. 518, 528 (1988)).

[3] See *https://www.performance.gov/CAP/action_plans/july_2020_Security_Suitability.pdf.* For the first time since August 2014, the background investigation case inventory has returned to a stable state of approximately 200,000 cases, from a high of 725,000 cases. The success of Phase One is the result of concerted efforts, including policy changes issued by ODNI and OPM as the Executive Agents for personnel vetting, and internal process improvements made by the National Background Investigations Bureau (formerly a division of OPM), and its successor, the Defense Counterintelligence and Security Agency (DCSA).

Federal Personnel Vetting Core Doctrine

RIN 3206–ZA02, October 2020

I. Overview

This Federal Personnel Vetting Core Doctrine (Core Doctrine) sets forth the defining elements of a successful program for vetting the individuals who make up a trusted Federal workforce. It provides the philosophy for and guides all personnel vetting policy, including all Executive Branch-wide and agency-specific policy and procedures. The Executive Agents will review the Core Doctrine regularly, at least every five years, to ensure it is current and that Federal personnel vetting business operations at all times further the principles, outcomes, and management and policy priorities set forth herein. Department and agency heads should review their departmental and agency policies and procedures periodically to ensure those policies and procedures further the principles, outcomes, and management and policy priorities set forth herein.

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way, except as authorized by law or incorporated into a contract. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies and guidance to Federal agencies implementing the legal requirements relating to Federal vetting processes. The guidance is not intended to revise or replace any previously issued guidance.

II. Authorities

This Core Doctrine is issued by the Security Executive Agent and the Suitability & Credentialing Executive Agents [4] pursuant to the following authorities:

A. 50 U.S.C. 3341 and 3352a.

B. 5 U.S.C. 1103, 1104, 3301, 7301, and 11001.

C. E.O. 12968, *Access to Classified Information* (August 2, 1995), as amended.

D. Homeland Security Presidential Directive 12, *Policy for a Common Identification Standard for Federal Employees and Contractors* (August 27, 2004).

E. E.O. 13467, *Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information* (June 30, 2008), as amended.

F. E.O. 13488, *Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust* (January 16, 2009), as amended.

G. Civil Service Rules II, V, and VI, codified in 5 CFR parts 2, 5, and 6.

H. Office of Management and Budget Circular No. A–123, *Management's Responsibility for Enterprise Risk Management and Internal Control.*

III. Good Governance

Governance structures exist to promote efficient and effective personnel vetting outcomes and facilitate accountability to the President; responsiveness to Congress; and transparency, to the extent possible, consistent with the underlying mission, to the workforce, the public, and other stakeholders. Every member of the trusted Federal workforce has a shared responsibility for the successful outcomes of the Federal personnel vetting programs. The Federal personnel vetting governance framework is set forth in E.O. 13467, as amended, which assigns the following entities key governance roles and responsibilities:

A. The Security Executive Agent and the Suitability & Credentialing Executive Agent.

B. The Security, Suitability, and Credentialing Performance Accountability Council (PAC).

C. Department and agency heads.

D. Authorized personnel vetting investigative service providers (ISP).

IV. Personnel Vetting Principles

The overarching principles applicable to the Federal personnel vetting enterprise are intended to reflect the nation's security and personnel priorities. The following principles are common to every aspect of personnel vetting and are the benchmark for successful personnel vetting operations:

A. *Consistent, Cogent, and Outcome-Based Policy Hierarchy.* Policy that is informed by this Core Doctrine, including specific guidelines that are outcome-based, as appropriate, and corresponding standards and appendices that provide information sources, methods, and implementation guidance.

B. *Holistic Risk Management for Federal Personnel Vetting.* Assessment of potential threats and vulnerabilities presented by those who are currently or would be trusted insiders throughout the Government to manage risk to people, property, information, and mission. Personnel vetting is one of multiple areas where risk is managed in the Government.

C. *Government-Wide Solutions.* Providing Government-wide policy mechanisms, information technology shared services, shared services for business functions, and Government-wide regulatory tools whenever possible.

D. *Continuous Data-Driven Improvements.* Continuous performance improvements that support data-driven policy decisions, integration of innovations and emerging technologies; and remedial action and resolution for when adverse events or other program failures occur.

E. *Lawful, Fair, and Effective Outcomes.* Consistent and equitable treatment of individuals through adherence to legal obligations and protections, including privacy, procedural, and constitutional rights, as appropriate, promotes protection of national security; protection of Government personnel, property, information and systems; and the efficiency and integrity of the civil service.

F. *Open Government.* Transparency of the Federal personnel vetting program to the Federal workforce, the public, and Congress, consistent with applicable privileges or statutory limitations on disclosure (*e.g.,* national security needs, classified information protection, controlled unclassified information (CUI), and other privileges such as the deliberative process privilege).

G. *Culture of Shared Responsibility.* A collective environment built upon mutual goals, effective training, appropriate behavior, and shared expectations and obligations by all stakeholders.

V. Personnel Vetting Outcomes

The Federal Government must effectively optimize the resources, information, and technology to support the goal of a trusted workforce to conduct the business of the Federal Government. Personnel vetting assesses the trustworthiness of individuals based on the core characteristics to protect people, property, information, and mission, as they relate to the particular purpose. Personnel vetting is successful when it:

A. Provides a trusted workforce based on an evaluation of conduct, integrity, judgment, loyalty, and reliability.

B. Consistently results in efficient, effective, and timely trust determinations, regardless of vetting domain, while complying with applicable law.

C. Produces timely, comprehensive, and appropriate organizational response to adverse events.

[4] Per Executive Order 13467, as amended, the Director of OPM is the Suitability and Credentialing Executive Agent and the Director of National Intelligence is the Security Executive Agent.

D. Quickly identifies and appropriately addresses issues that may adversely affect the trust determinations of individuals.

E. Promotes mobility of individuals between and within Federal agencies and Government contractors and enables efficient re-entry to Federal service from the private sector. Mobility is enhanced by efficient transfer of trust determinations and reciprocity between departments and agencies, and across roles for individuals who work for or on behalf of the Federal Government.

F. Inspires the public's confidence in a trusted Federal workforce and the wise stewardship of public resources.

G. Employs continuous data-driven performance improvement and outcome-based metrics.

H. Leverages research and innovation capabilities to advance the Federal personnel vetting mission and increase the effectiveness of decision-making.

I. Uses data-driven analytics, as appropriate, to improve decision-making regarding Federal policies, processes, resources, personnel, and programs.

VI. Policy Priorities

The success of the Government's personnel vetting program depends on thoughtful, complete, and supportable articulation of policy goals. Department and agency personnel achieve policy goals if they are clear and consistent. For policy priorities to be successful:

A. All personnel vetting policy is integrated and aligned within a unified policy framework that is consistent with applicable law. The personnel vetting policy framework includes issuance of guidelines, that describe the successful outcomes that are intended, and those outcomes are achieved through detailed compliance criteria (issued in ''standards'').

B. Policy is reviewed regularly to determine whether it remains consistent with law, still aligns with mission needs, is supported by current data, and responds to societal or other relevant changes, including emerging threats, to achieve its intended purpose.

C. Policy guides process and methodology and permits appropriate flexibility in the choice of methodology by agency practitioners charged with implementing it.

D. Policy drives the integration of business processes and capabilities for efficient and effective management of personnel vetting.

E. Policy promotes and enables multi-directional information-sharing to the greatest extent practical among personnel working in federal employee and contractor vetting, human resources, insider threat, military accessions, and complementary mission areas to identify risks in a timely manner, reduce waste, improve quality, increase effectiveness, and maximize efficiency.

F. Policy focuses on gathering and sharing all relevant information about an individual in a timely and efficient manner to identify the extent to which the individual exhibits the characteristics of a person who can be trusted to protect people, property, information, and mission, as appropriate under the relevant adjudicative standards.

G. Policy clearly describes the characteristics of a trusted person so that criteria are applied consistently, to the extent possible, across all vetting domains, resulting in basic trust determinations that are uniform across all agencies, and allowing for additional agency- or position-specific criteria to be applied only when necessary to meet unique needs of that agency or position.

H. Personnel vetting policy guidelines informed by this Core Doctrine are issued by the Executive Agents. Authority to issue standards and their appendices may be delegated by the Executive Agents pursuant to their respective authorities.

I. Departments and agencies must ensure that their policy is consistent with the Federal personnel vetting policy framework.

J. Departments and agencies must ensure sufficient funding and resources are dedicated in support of the personnel vetting mission.

VII. Risk Management

Risk is unavoidable when realizing an organization's objectives, and all governmental activities involve managing risk, including preventing, detecting, and mitigating both human and enterprise risk. Federal personnel vetting is one of multiple ways that the Government manages human risk; others include insider threat programs, human resources programs, drug testing, etc. Personnel vetting risk management is successful when:

A. It is applied both throughout the end-to-end process and at all levels of vetting to reduce risk to people, property, information, and mission.

B. It uses a layered risk management approach that (1) uses deterrence and remediates vulnerabilities and (2) takes into account enterprise risk management and human risk management in the development of policy and in the design and operation of government-wide and agency personnel vetting programs that implement the policy.

C. Personnel vetting integrates information from entities with complementary missions that also manage personnel risk (*e.g.,* insider threat programs, counterintelligence, human resources programs).

D. A senior agency official is assigned with the responsibilities to oversee the management of an effective personnel vetting program.

VIII. Information Management

Obtaining and using information about an individual to make a trust determination, whether obtained from internal agency or external Government and non-government sources, must meet the specific purpose as defined in the personnel vetting program. When gathering information departments and agencies must take into account the privacy and other legal rights of the individual. Properly managing and safeguarding information is essential to good government, maintaining the trust of the public and the workforce, and the quality and effectiveness of operations. For information management to be successful, Federal departments and agencies must ensure that:

A. Information used to make trust determinations and manage risk is accurate, relevant, timely, and as complete as is reasonably necessary to assure fairness to the individual.

B. Information collection is not unduly intrusive and is appropriately tailored to the purposes for which it is collected.

C. Information collection and management practices do not adversely affect, and are designed to promote, the Government's ability to attract talented and trustworthy individuals to public service and service to Government under contracts.

D. Vetting practitioners are engaged with individuals during the entire vetting process to collect information, resolve derogatory information, improve transparency, and cultivate effective two-way communication between the individual and the Government. Trusted insiders and the Government share responsibility for maintaining complete, accurate, and relevant information as part of an individual's personnel

E. Vetting record.

F. A trained and vetted staff is accountable for the protection of information, including information shared by complementary missions.

G. Mechanisms are in place to safeguard personnel vetting sources and methods, and to protect the collection, use, dissemination, and retention of information.

H. Efficiencies are maximized in the collection, use, dissemination, and

retention of information across Government when there is cooperation and timely sharing of relevant information among complementary missions both between and within departments and agencies.

I. A risk-based approach is used to identify and detect potential vulnerabilities and threats early in the process and undertake risk mitigation throughout the process to lessen or prevent the impact to people, property, information, and mission.

IX. Information Technology

Successfully vetting a trusted workforce and protecting personal data requires effective, secure, and innovative technology and the ability to integrate newer and better technology as it becomes available. Combating cyber threats, complying with data protection requirements, and managing information are integral to the vetting process. The successful execution of the Federal personnel vetting mission requires that Federal agencies ensure:

A. Security principles are embedded in all information technology (IT) systems in accordance with applicable law, E.O.s, rules, and regulations.

B. Development efforts incorporate government-wide guidance that adopts private sector best practices for the agile and iterative development and delivery of new or modified IT systems and capabilities.

C. Cutting-edge technologies are adopted to improve both quality and timeliness of personnel vetting, while outdated and legacy IT capabilities are decommissioned.

D. Federal IT shared services are used to maximize return on investment, reduce duplication, and improve effectiveness.

X. Awareness and Organizational Culture

A Federal trusted workforce requires that all levels of the Federal Government use good risk management techniques and promote an effective security posture. A strong culture of personal accountability and understanding potential risks allows the personnel vetting mission to effectively function. To achieve this organizational culture:

A. All members of the trusted workforce must understand their role and take personal ownership of their responsibilities in the success of the overall personnel vetting enterprise.

B. All members of the trusted workforce must understand, support, and execute the responsibilities that accompany a favorable trust determination.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–00547 Filed 1–12–21; 8:45 am]

BILLING CODE 6325–53–P

OFFICE OF PERSONNEL MANAGEMENT

Federal Prevailing Rate Advisory Committee; Virtual Public Meeting

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: According to the provisions of section 10 of the Federal Advisory Committee Act, notice is hereby given that a virtual meeting via teleconference of the Federal Prevailing Rate Advisory Committee will be held on Thursday, February 18, 2021. There will be no in-person gathering for this meeting.

DATES: The virtual meeting will be held on February 18, 2021, beginning at 10:00 a.m. (EST).

ADDRESSES: The meeting will convene virtually.

FOR FURTHER INFORMATION CONTACT: Ana Paunoiu, 202–606–2858, or email *pay-leave-policy@opm.gov.*

SUPPLEMENTARY INFORMATION: The Federal Prevailing Rate Advisory Committee is composed of a Chair, five representatives from labor unions holding exclusive bargaining rights for Federal prevailing rate employees, and five representatives from Federal agencies. Entitlement to membership on the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the Prevailing Rate System and other matters pertinent to establishing prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management.

Annually, the Chair compiles a report of pay issues discussed and concluded recommendations. These reports are available to the public. Reports for calendar years 2008 to 2019 are posted at *http://www.opm.gov/fprac.* Previous reports are also available, upon written request to the Committee.

The public is invited to submit material in writing to the Chair on Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information on these meetings may be obtained by contacting the Committee at Office of Personnel Management, Federal Prevailing Rate Advisory Committee, Room 7H31, 1900 E Street NW, Washington, DC 20415, (202) 606–2858.

This meeting is open to the public, with an audio option for listening. This notice sets forth the agenda for the meeting and the participation guidelines.

Meeting Agenda. The tentative agenda for this meeting includes the following Federal Wage System items:

- The definition of Monroe County, PA
- The definition of San Joaquin County, CA
- The definition of the Salinas-Monterey, CA, wage area
- The definition of the Puerto Rico wage area
- Prevailing Rate Advisory Committee Annual Summary for 2020

Public Participation: The February 18, 2021, meeting of the Federal Prevailing Rate Advisory Committee is open to the public through advance registration. Public participation is available for the teleconference by audio access only. All individuals who plan to attend the virtual public meeting to listen must register by sending an email to *pay-leave-policy@opm.gov* with the subject line ''February 18 FPRAC Meeting'' no later than Tuesday, February 16, 2021.

The following information must be provided when registering:

- Name.
- Agency and duty station.
- Email address.
- Your topic of interest.

Members of the press, in addition to registering for this event, must also RSVP to *media@opm.gov* by February 16, 2021.

A confirmation email will be sent upon receipt of the registration. Audio teleconference information for participation will be sent to registrants the morning of the virtual meeting.

Office of Personnel Management.

Alexys Stanley,

Regulatory Affairs Analyst.

[FR Doc. 2021–00466 Filed 1–12–21; 8:45 am]

BILLING CODE P

POSTAL SERVICE

Privacy Act; System of Records

AGENCY: Postal Service™.

ACTION: Notice of new system of records.

SUMMARY: The United States Postal Service™ (USPS™) is proposing to create a new Customer Privacy Act System of Records (SOR) to support the implementation of enhanced scanning functionality at the USPS Mail Recovery Center (MRC) in order to improve the customer experience. The new SOR will

also bring related functions under one new SOR as described below.

DATES: These revisions will become effective without further notice on February 12, 2021, unless comments received on or before that date result in a contrary determination.

ADDRESSES: Comments may be submitted via email to the Privacy and Records Management Office, United States Postal Service Headquarters (*privacy@usps.gov*). To facilitate public inspection, arrangements to view copies of any written comments received will be made upon request.

FOR FURTHER INFORMATION CONTACT: Janine Castorina, Chief Privacy and Records Management Officer, Privacy and Records Management Office, 202–268–3069 or *privacy@usps.gov.*

SUPPLEMENTARY INFORMATION: This notice is in accordance with the Privacy Act requirement that agencies publish their systems of records in the **Federal Register** when there is a revision, change, or addition, or when the agency establishes a new system of records. The Postal Service has determined that the creation of a new USPS Customer Privacy Act System of Records (SOR), USPS 830.100 Mail Recovery Center Search and Inventory System Records is needed to support the implementation of enhanced scanning functionality and to consolidate other related functions performed by the MRC under one SOR.

I. Background

The Mail Recovery Center (MRC) receives USPS undeliverable mail, packages and other items that are characterized as being undeliverable as addressed (UAA). Some of the reasons that UAA mail, packages and items do not reach their destination include missing address or address components, inadequate postage, and incorrect or ''bad'' addresses that cannot be returned to sender. The Mail Recovery Center (MRC) receives USPS undeliverable mail, packages and items found within the Postal Service mail processing and delivery network. U.S. Postal Service policies and procedures related to processing and handling of undeliverable mail are outlined in the Administrative Support Manual (ASM), the Domestic Mail Manual (DMM) and the Postal Operations Manual (POM).

The MRC processes undeliverable mail, packages, and items found loose in the mail that are sent to the MRC. The MRC processes and handles undeliverable mail in keeping with USPS policies and procedures. Those mail pieces and contents that meet established criteria for retention are entered into inventory through the Mail Recovery Center System (MRCS) application. USPS customers are able to initiate a search request to attempt to locate their missing mail or items, either by asking a USPS employee to enter a search form on their behalf in the MRCS application, or by directly submitting a Missing Mail search request via USPS.COM®. A daily matching process within the MRCS application attempts to match inventory items to search form requests, so that the undeliverable mail or missing item can either be returned to the sender or delivered to its intended destination. During this matching process, USPS customers receive periodic notifications via email or letter regarding the status of the search, including the outcome of an unsuccessful match.

II. Rationale for Creation of a New USPS Privacy Act Systems of Records

Mail Recovery Center (MRC) records and the Mail Recovery Center System (MRCS) records have previously been covered by USPS SOR 830.000 Customer Service and Correspondence. USPS SOR 830.100, Mail Recovery Center Search and Inventory System Records is being created to support the implementation of enhanced scanning functionality and to consolidate other related functions performed by the MRC, covering all records under one SOR.

Some of the undeliverable letter mail sent to the MRC may potentially contain items of value such as checks, cash, and coins, requiring further processing and handling. Mail Recovery Center (MRC) operations currently use a technology solution and equipment for the downstream processing of undeliverable letter mail that may contain contents of potential value such as checks, cash, and coins. The MRC is working towards updating and implementing new scanner technology and software to capture a greater percentage of letter mail volume for customer returns and inquiries. This new technology will enhance the ability to capture images of lost checks in a digital format, then integrate the lost check process into similar processes currently used to search for other items held in inventory. The new scanner technology will enable the MRC to improve efficiency, reduce operating costs, and increase the capacity to scan and hold more images of letter mail in digital format. The implementation of this new technology supports the overall mission of the MRC by increasing the likelihood for returning missing mail to customers and improving the customer experience.

The primary source of customer communication will be channeled through the MRCS missing mail search request application hosted on USPS.COM. Customers will have the ability to submit search requests specifically for missing letter mail, including checks. MRC operations will also be enhanced by increasing the ability to let customers know that their undeliverable check was received by the MRC, by sending them a redacted scanned image of the original check, and notifying them that the check has been shredded to preserve the confidentiality and privacy of their personal information.

III. Description of the New or Modified System of Records

Pursuant to 5 U.S.C. 552a(e)(11), interested persons are invited to submit written data, views, arguments or comments on this proposal. A report of the proposed new SOR has been sent to Congress and to the Office of Management and Budget (OMB) for their evaluations. The Postal Service does not expect this new system of records to have any adverse effect on individual privacy rights. The new USPS Customer System of Records is provided below in its entirety.

SYSTEM NAME AND NUMBER:

USPS 830.100 Mail Recovery Center Search and Inventory System Records.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Mail Recovery Center System (MRCS), located in St. Louis, MO (IT operations in St. Louis Solutions Center). Applications and database servers are located in Eagan, MN.

Customer letters and redacted images of scanned checks that are recovered in undeliverable mail are currently processed through the National Printing Center (Topeka Material Distribution Center, located in Topeka, KS), with servers located in Eagan, MN.

SYSTEM MANAGER(S):

Vice President, Supply Management United States Postal Service, 475 L'Enfant Plaza SW, Washington, DC 20260.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

39 U.S.C. 401, 403, 404, and 39 U.S.C. 406.

PURPOSE(S) OF THE SYSTEM:

1. To facilitate recovery of mailpieces and packages or mailpiece and package contents that are undeliverable as addressed or lost in the mail, by attempting to identify and provide notice to the intended recipient or sender.

2. To alert customers about the status of missing mail search requests.

3. To facilitate timely responses to customer inquiries and missing mail search requests and to foster a positive customer experience.

4. To safeguard mailpieces and packages or mailpiece and package contents that are undeliverable as addressed and items that are found loose in the mail.

5. To enable review and response services for customer inquiries related to reports of lost or missing mail pieces, packages, and their contents.

6. To support the scanning and indexing of information obtained from the outside of undeliverable mail.

7. To support the scanning and indexing of information and materials obtained from mail and package contents that are found in undeliverable mail and packages or loose in the mail.

8. To facilitate the matching of descriptions of items and mailpieces in the MRC physical inventory with descriptions of items and mailpieces from missing mail search requests.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

This system contains records relating to residential customers, business customers, and government agencies or entities that have made inquiries or submitted missing mail requests about lost and missing mail or mailpiece contents.

''Customers'' are defined as any sender or intended recipient of undeliverable as addressed mail and packages, or any items that arrive at the MRC that have been identified as loose in the mail.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. *Mailer/Sender information:* Customer name, mailing address, email address, phone and/or fax number, company name and contact information.

2. *Addressee/Sender information:* Recipient name, mail address, email address, phone and/or fax number, and company name and contact information.

3. *Product and/or service use information:* Product and/or service type, product numbers, technology specifications, quantity ordered, logon and product use dates and times, case number, pickup number, article number, ticket number, mail piece tracking/bar code number or numbers, missing mail search ID number, missing mail search request status; S10 13-character item identifier or any bilaterally agreed identifier (Customs Data).

4. *Customer preferences:* Requested mode of contact

5. *Customer search request preferences:* Individual customer preferences related to email and contact/mailing information

6. *Service inquiries and correspondence:* Contact history; nature of inquiry, dates and times, comments, status, resolution, customer notifications, missing mail search requests, and USPS personnel involved.

7. *Description of mail contents.*

8. *Scanned Images:* Electronic files containing scanned images of mail piece contents captured for mail recovery purposes; and scanned images of mail piece contents uploaded and attached to missing mail search requests or checks recovered from undeliverable as addressed mail.

9. *Mailpiece data:* Mail piece return address, destination address of mail piece; Intelligent Mail barcode (IMb); 11-digit delivery point ZIP Code; purchased service, and delivery status.

10. *Other mailing data:* Information captured from the exterior of the mailpieces and packages, including postage amount, postmark information, destination of mailing, IMb, ZIP Code information and barcode, package label, Special Services label, article number, tracking number and permit numbers.

11. *MRCS Missing Mail search request:* Sender mailing address, recipient mailing address, size and type of container or envelope used, identifying information such as the USPS Tracking number(s), the mailing date from the mailing receipt, or Click-N-Ship® label receipt, description of the contents, and pictures that could help in recognizing the item(s).

RECORD SOURCE CATEGORIES:

Residential customers, business customers, and government agencies or entities that submit Missing Mail Search Requests. USPS employees and MRC personnel that respond to inquiries and search requests, or process undeliverable as addressed mail and items found loose in the mail,

USPS employees who submit a Missing Mail Search Requests on behalf of the customer.

MRC personnel who enter items into inventory for the purposes of finding a potential match to items submitted via Missing Mail Search Requests.

Descriptions of physical items and/or mailpieces that have been entered into physical inventory by MRC personnel.

MRCS records are comprised of:

- Descriptions of items and mailpieces in physical inventory that have arrived at the MRC and meet holding criteria.
- Descriptions of items and mailpieces from missing mail search requests.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

Standard routine uses 1. through 7., 10., and 11. apply, in addition:

Records may also be disclosed to Joint Military Command contacts for the purposes of determining sender or recipients of undeliverable as addressed military mail (domestic and international).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Automated database, computer storage media, digital files, and paper files.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrievable by customer name, inquiry number, search request number, ZIP Code, and tracking numbers.

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

1. All inventory (included scanned images) and missing mail search request data is considered active until the established expiration/retention date of a mail piece in inventory PLUS an additional six months. After the additional six-month timeframe, data (inventory and missing mail search requests) will be archived for 3 years (minus attachments/images).

2. After a match is made—All inventory and search request data is considered active for six months after a match is made. After the additional six-month timeframe, data (inventory and search requests) should be archived for 3 years (minus attachments/images).

3. After the 3-year archive period, all inventory and missing mail search requests will be purged.

4. Records existing on paper are destroyed by pulping or shredding. Records existing on computer storage media are destroyed according to the applicable USPS media sanitization practice.

5. Unless otherwise specified, records are maintained indefinitely for missing mail search requests which do not have an expiration date.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to the facility is limited to authorized personnel, who must be identified with a badge. The facility is not open to the public. Access to records is limited to individuals whose official duties require such access.

Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Access is controlled by logon ID and password. Online data transmissions are protected by encryption.

MRC (On-site System Access and Facility Access)—Paper records, computers, and computer storage media are located in controlled-access areas under supervision of program personnel. Access to records is limited to individuals whose official duties require such access. Contractors and licensees are subject to contract controls and unannounced on-site audits and inspections. Computers are protected by mechanical locks, card key systems, or other physical access control methods. The use of computer systems is regulated with installed security software, computer logon identifications, and operating system controls including access controls, terminal and transaction logging, and file management software. Online data transmissions are protected by encryption.

Access to the MRC facility is limited to authorized personnel, who must be identified with a badge. The facility is not open to the public.

Status of Missing Mail Search Requests are viewable by any USPS employee via the MRCS application. The information displayed contains no personally identifiable information and is limited to Missing Mail Search ID number, mailpiece tracking or barcode number, status of Missing Mail Search Request, date entered, date modified, submission method, Missing Mail Search Request expiration date, email notification history, and an indicator that a photo is or is not included in the search request (but the actual photo is not viewable).

Missing Mail Search Requests submitted by USPS personnel on behalf of a customer via MRCS are accessible only by MRC employees.

Records maintained in Mail Recovery Center System (MRCS) are only retrievable and viewable by MRC employees who need the information to perform their jobs.

Missing Mail Search Requests submitted by customers via the Missing Mail Application at *www.usps.com* are accessible only by the customer who submitted the Missing Mail Search Request and MRC employees. This also includes Missing Mail Search Requests that have not yet been submitted (draft form), have been closed, or have not yet been fulfilled.

Any internal USPS requests for a specific Missing Mail Search Request must be accompanied by the customer's expressed consent.

RECORD ACCESS PROCEDURES:

Requests for access must be made in accordance with the Notification Procedure above and USPS Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.5.

CONTESTING RECORD ACCESS PROCEDURES:

See Notification Procedure and Record Access Procedures.

NOTIFICATION PROCEDURES:

Customers wanting to know if information about them is maintained in this system of records must address inquiries to the system manager in writing. Inquiries should include name, address, email address and other identifying information that confirms the requestor's identity.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

None.

Ruth Stevenson,

Chief Counsel, Federal Compliance.

[FR Doc. 2021–00530 Filed 1–12–21; 8:45 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90865; File No. SR–NYSE–2020–108]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Its Waiver of the Application of Certain of the Shareholder Approval Requirements in Section 312.03 of the NYSE Listed Company Manual Through March 31, 2021 Subject to Certain Conditions

January 7, 2021.

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 December 28, 2020, New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 extend through and including March 31, 2021 its waiver, subject to certain conditions, of the application of certain of the shareholder approval requirements set forth in Section 312.03 of the NYSE Listed Company Manual (''Manual''). 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.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Pursuant to an earlier proposed rule change,[4] the Exchange waived through and including June 30, 2020, subject to certain conditions, certain of the shareholder approval requirements set forth in Section 312.03 of the Manual (the ''Waiver''). Subsequently, the Exchange extended the Waiver for the period through and including September 30, 2020 [5] and, thereafter, the

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities Exchange Act Release No. 34–88572 (April 6, 2020); 85 FR 20323 (April 10, 2020) (SR–NYSE–2020–30).

[5] *See* Securities Exchange Act Release No. 89219 (July 2, 2020; 85 FR 41640 (July 10, 2020) (SR–NYSE–2020–58) (extending the Waiver through June 30, 2020); *see also* Securities Exchange Act Release No. 90020 (September 28, 2020; 85 FR

period through and including December 31, 2020. The Exchange now proposes to extend the Waiver through and including March 31. 2021.

It is important to note that the Waiver as it has been applied (and will continue to be applied pursuant to the proposed extension) does not apply to any sales of a listed company's securities where the use of proceeds is to fund an acquisition. As such, regardless of whether an issuance would otherwise meet all of the requirements for the Waiver, any issuance for which the intended use of proceeds is to fund one or more acquisitions remains subject to the shareholder approval requirements of Sections 312.03(b) and 312.03(c) and is ineligible for the benefits of the Waiver.

The U.S. and global economies have experienced unprecedented disruption as a result of the ongoing spread of COVID–19, including severe limitations on companies' ability to operate their businesses and periods of volatility in the U.S. and global equity markets. The Exchange implemented the Waiver because it believed that it was likely that many listed companies would have urgent liquidity needs during this crisis period due to lost revenues and maturing debt obligations. In those circumstances, the Exchange believed that listed companies would need to access additional capital that might not be available in the public equity or credit markets.

Since the implementation of the Waiver a number of listed companies have completed capital raising transactions that would not have been possible without the flexibility provided by the Waiver. While equity indices have recovered from the decline initially associated with the COVID–19 crisis, ongoing economic disruption and uncertainty associated with the pandemic have caused many listed companies to continue to face circumstances in which their businesses and revenues are severely curtailed. Such companies continue to experience difficulty in accessing liquidity from the public markets. In addition, there is continued uncertainty as to the course the COVID–19 pandemic may take in the coming months and the possibility of further disruption related to COVID–19 exists. Consequently, the Exchange believes it is appropriate to extend the application of the Waiver for an additional period through and including March 31, 2021, to provide more flexibility to listed companies that need to access capital in the current unusual economic conditions.

Section 312.03 of the Manual, which requires listed companies to acquire shareholder approval prior to certain kinds of equity issuances, imposes significant limitations on the ability of a listed company to engage in the sort of large private placement transaction described above. The most important limitations are as follows:

- *Issuance to a Related Party.* Subject to an exception for early stage companies set forth therein, Section 312.03(b) of the Manual requires shareholder approval of any issuance to a director, officer or substantial security holder[6] of the company (each a ''Related Party'') or to an affiliate of a Related Party[7] if the number of shares of common stock to be issued, or if the number of shares of common stock into which the securities may be convertible or exercisable, exceeds either 1% of the number of shares of common stock or 1% of the voting power outstanding before the issuance. A limited exception permits cash sales to Related Parties and their affiliates that meet a market price test set forth in the rule (the ''Minimum Price'')[8] and that relate to no more than 5% of the company's outstanding common stock. However, this exception may only be used if the Related Party in question has Related Party status solely because it is a substantial security holder of the company.
- *Transactions of 20% of More.* Section 312.03(c) of the Manual requires shareholder approval of any transaction relating to 20% or more of the company's outstanding common stock or 20% of the voting power outstanding before such issuance other than a public offering for cash. Section 312.03(c) includes an exception for transactions involving a cash sale of the company's securities that comply with the Minimum Price requirement and also meet the following definition of a ''bona fide private financing,'' as set forth in Section 312.04(g):

''Bona fide private financing'' refers to a sale in which either:

○ A registered broker-dealer purchases the securities from the issuer with a view to the private sale of such securities to one or more purchasers; or

○ the issuer sells the securities to multiple purchasers, and no one such purchaser, or group of related purchasers, acquires, or has the right to acquire upon exercise or conversion of the securities, more than five percent of the shares of the issuer's common stock or more than five percent of the issuer's voting power before the sale.''

The Exchange expects that it will continue to be the case that certain companies during the course of the ongoing unusual economic conditions will urgently need to obtain new capital by selling equity securities in private placements.

In many cases, such transactions may involve sales to existing investors in the company or their affiliates that would exceed the applicable 1% and 5% limits of Section 312.03(b). Given the ongoing economic disruption associated with the COVID–19 pandemic, the Exchange proposes to continue its partial waiver of the application of Section 312.03(b) for the period as of the date of this filing through and including March 31, 2021, with the Waiver specifically limited to transactions that involve the sale of the company's securities for cash at a price that meets the Minimum Price requirement as set forth in Section 312.04.[9] In addition, to qualify for the Waiver, a transaction must be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors.

This Waiver will continue to not be applicable to any transaction involving the stock or assets of another company where any director, officer or substantial security holder of the company has a 5% or greater interest (or such persons collectively have a 10% or greater interest), directly or indirectly, in the company or assets to be acquired or in the consideration to be paid in the

62357 (October 2, 2020) (SR–NYSE–2020–79) (extending the Waiver through December 31, 2020).

[6] For purposes of Section 312.03(b), Section 312.04(e) provides that: ''An interest consisting of less than either five percent of the number of shares of common stock or five percent of the voting power outstanding of a company or entity shall not be considered a substantial interest or cause the holder of such an interest to be regarded as a substantial security holder.''

[7] Under Section 312.03 of the Manual, a ''Related Party'' includes ''(1) a director, officer or substantial security holder of the company (each a ''Related Party''); (2) a subsidiary, affiliate or other closely-related person of a Related Party; or (3) any company or entity in which a Related Party has a substantial direct or indirect interest;''

[8] Section 312.04(i) defines the ''Minimum Price'' as follows: ''Minimum Price'' means a price that is the lower of: (i) The Official Closing Price immediately preceding the signing of the binding agreement; or (ii) the average Official Closing Price for the five trading days immediately preceding the signing of the binding agreement.

Section 312.04(j) defines ''Official Closing Price'' as follows: ''Official Closing Price'' of the issuer's common stock means the official closing price on the Exchange as reported to the Consolidated Tape immediately preceding the signing of a binding agreement to issue the securities. For example, if the transaction is signed after the close of the regular session at 4:00 p.m. Eastern Standard Time on a Tuesday, then Tuesday's official closing price is used. If the transaction is signed at any time between the close of the regular session on Monday and the close if the regular session on Tuesday, then Monday's official closing price is used.

[9] *See* supra note 8.

transaction or series of related transactions and the present or potential issuance of common stock, or securities convertible into or exercisable for common stock, could result in an increase in outstanding common shares or voting power of 5% or more (*i.e.,* a transaction which would require shareholder approval under NASDAQ Marketplace Rule 5635(a)). Specifically, the Waiver will continue to not be applicable to a sale of securities by a listed company to any person subject to the provisions of Section 312.03(b) in a transaction, or series of transactions, whose proceeds will be used to fund an acquisition of stock or assets of another company where such person has a direct or indirect interest in the company or assets to be acquired or in the consideration to be paid for such acquisition.

The effect of the extension of the Waiver would be to allow companies to sell their securities to Related Parties and other persons subject to Section 312.03(b) [10] without complying with the numerical limitations of that rule, as long as the sale is in a cash transaction that meets the Minimum Price requirement and also meets the other requirements noted above. As provided by Section 312.03(a), any transaction benefitting from the proposed waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d).

Existing large investors are often the only willing providers of much-needed capital to companies undergoing difficulties and the Exchange believes that it is appropriate to increase companies' flexibility to access this source of capital for an additional limited period. The Exchange notes that, as a result of the extension of the Waiver, the Exchange's application of Section 312.03(b) will be consistent with the application of NASDAQ Marketplace Rule 5635(a) [11] to sales of a listed company's securities to related parties during the Waiver period.

Many private placement transactions under the current market conditions may also exceed the 20% threshold established by Section 312.03(c). Therefore, given the ongoing economic disruption associated with the COIVD–19 pandemic, the Exchange also proposes to continue for the period through and including March 31, 2021, for purposes of the bona fide financing exception to the 20% requirement, its waiver of the 5% limitation for any sale to an individual investor in a bona fide private financing pursuant to Section 312.03(c) and to permit companies to undertake a bona fide private financing during that period in which there is only a single purchaser. As provided by Section 312.03(a), any transaction benefitting from the Waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d). Any transaction benefitting from the Waiver must be a sale of the company's securities for cash at a price that meets the Minimum Price requirement.

The effect of the proposed extension of the Waiver would be that a listed company would be exempt from the shareholder approval requirement of Section 312.03(c) in relation to a private placement transaction regardless of its size or the number of participating investors or the amount of securities purchased by any single investor, provided that the transaction is a sale of the company's securities for cash at a price that meets the Minimum Price requirement. If any purchaser in a transaction benefiting from this waiver is a Related Party or other person subject to Section 312.03(b), such transaction must be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors. The Exchange notes that, as a result of the proposed extension of the Waiver, the Exchange's application of Section 312.03(c) will continue to be consistent during the Waiver period with the application of NASDAQ Marketplace Rule 5635(d) with respect to private placements relating to 20% or more of a company's common stock or voting power outstanding before such transaction.[12]

The Exchange notes that these temporary emergency waivers would simply continue to provide NYSE listed companies with the flexibility on a temporary emergency basis to consummate transactions without shareholder approval that would not require shareholder approval under the rules of the NASDAQ Stock Market, as the specific limitations the Exchange is proposing to waive do not exist in the applicable NASDAQ rules.[13]

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Section 6(b)(5) of the Act,[15] in particular, in that it is 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 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 the public interest and the interests of investors, and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As a result of the economic disruption related to the ongoing spread of the COVID–19 virus, certain listed companies may experience urgent liquidity needs that they are unable to meet by raising funds in the public equity or credit markets. The proposed rule change is designed to provide temporary relief from certain of the NYSE's shareholder approval requirements in relation to stock issuances to provide companies with additional flexibility to raise funds by selling equity in private placement transactions during the current unusual economic conditions provided such transactions meet certain conditions, such as the Minimum Price as defined in Section 312.04(i). The proposed waivers are consistent with the protection of investors because any transaction benefiting from the waivers will not, in the Exchange's view, be dilutive to the company's existing shareholders as it will be subject to a minimum market price requirement and because the audit committee or a comparable committee comprised solely of independent directors will review and approve any transaction benefitting from a waiver that involves a Related Party or affiliates of a Related Party. In addition, as provided by Section 312.03(a), any transaction benefitting from the proposed waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 and the change of control requirements of

[10] *See* supra note 6.

[11] If a company is raising capital through a transaction, or series of transaction, via the waiver, they cannot use such capital to fund an acquisition.

[12] *See* supra note 11 which also applies to the waivers available under Section 312.03(c).

[13] *See* NASDAQ Marketplace Rule 5635, including specifically subsections (a) and (d) thereof.

[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(5).

Section 312.03(d). All companies listed on the Exchange would be eligible to take advantage of the proposed temporary waivers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not designed to address any competitive issues but rather is designed to provide temporary relief from certain of the NYSE's shareholder approval requirements in relation to stock issuances to provide companies with additional flexibility to raise funds by selling equity in private placement transactions during the current unusual economic conditions. In addition, the proposed waivers will simply temporarily conform the treatment of transactions benefitting from the waivers to their treatment under the comparable NASDAQ rules.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act [16] and Rule 19b–4(f)(6) thereunder.[17] Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act [18] and Rule 19b-4(f)(6)(iii) thereunder.[19]

A proposed rule change filed under Rule 19b–4(f)(6) [20] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b–4(f)(6)(iii),[21] 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 believes that the Waiver of the operative delay would be consistent with the protection of investors and the public interest because, in the Exchange's view, the economic disruption caused by the global spread of the COVID–19 virus may give rise to companies experiencing urgent liquidity needs which they may need to meet by undertaking transactions that would benefit from the proposed relief. In support of its request to waive the 30-day operative delay, the Exchange stated, among other things, its belief that the proposed Waiver does not give rise to any novel investor protection concerns, as the proposed rule change conforms the NYSE's shareholder approval requirements temporarily to those of NASDAQ and would not permit any transactions without shareholder approval that are not permitted on another exchange. In addition, the Exchange stated that all transactions utilizing the Waiver would have to satisfy the Minimum Price requirement contained in the rule and be reviewed and approved by the issuer's audit committee or comparable committee of the board comprised entirely of independent directors if any transactions benefitting from the Waiver involve a Related Party or affiliates of a Related Party, as described above.[22] Furthermore, the Exchange has stated that, as provided by Section 312.04(a) of the Manual, any transaction benefitting from the proposed Waiver will still be subject to shareholder approval if required under any other applicable rule, including the equity compensation requirements of Section 303A.08 of the Manual and the change of control requirements of Section 312.03(d) of the Manual. The Exchange also noted that the proposed Waiver is temporary in nature and will only be applied through and including March 31, 2021.

The Commission notes that the proposed rule change would provide a temporary waiver of certain shareholder approval requirements under certain conditions in light of current economic conditions due to COVID–19. As noted by NYSE, the Waiver is consistent with NASDAQ's shareholder approval rules and would not permit any transactions without shareholder approval that is not permitted on another exchange.[23] In addition, all transactions utilizing the Waiver would have to satisfy the Minimum Price requirement which is a market related price, as defined above.[24] Further, all transactions subject to the Waiver that involve Related Parties or affiliates of Related Parties would have to be approved by the listed company's audit committee or comparable committee of the board comprised entirely of independent directors. In addition, the Commission notes that the Waiver of the shareholder approval provisions only applies to the specific provisions in Sections 312.03(b) and (d) of the Manual discussed above and any transaction utilizing the Waiver would still be subject to all other shareholder approval requirements including, for example, the equity compensation requirements of Section 303A.08 and the change of control requirements of Section 312.03(d). The Commission also notes that the proposal is a temporary measure designed to allow companies to raise necessary capital at market related prices without shareholder approval under the limited conditions discussed above in response to current, unusual economic conditions. For these reasons, the Commission believes that waiver of the 30-day operative delay is consistent with the protections of investors and the public interest. According, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[25]

At any time within 60 days of the filing of such 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

[16] 15 U.S.C. 78s(b)(3)(A)(iii).

[17] 17 CFR 240.19b–4(f)(6).

[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 complied with this requirement.

[20] 17 CFR 240.19b–4(f)(6).

[21] 17 CFR 240.19b–4(f)(6)(iii).

[22] The Commission notes that, as described in the purpose section above, all transactions utilizing the Waiver for purposes of Section 312.03(b) would be subject to review and approval by an audit committee or comparable body of independent directors. As to transactions utilizing the temporary Waiver under Section 312.03(c) all transactions involving Related Parties or other persons subject to Section 312.03(b), as described above, must be reviewed and approved by the company's audit committee or a comparable committee comprised solely of independent directors.

[23] In addition, as noted above, if a company is raising capital through a transaction, or series of transactions, via the Waiver, they cannot use such capital to fund an acquisition.

[24] *See supra* note 8.

[25] For purposed only of waiving the 30-day operative delay, the Commission has 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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[26] of the Act 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–NYSE–2020–108 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–NYSE–2020–108. 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–NYSE–2020–108, and should be submitted on or before February 3, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00465 Filed 1–12–21; 8:45 am]

BILLING CODE 8011–01–P

[26] 15 U.S.C. 78s(b)(2)(B).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release Nos. 33–10918; 34–90874; IA–5664; IC–34166]

Adjustments to Civil Monetary Penalty Amounts

AGENCY: Securities and Exchange Commission.

ACTION: Annual inflation adjustment of civil monetary penalties.

SUMMARY: The Securities and Exchange Commission (the ''Commission'') is publishing this notice (the ''Notice'') pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the ''2015 Act''). This Act requires all agencies to annually adjust for inflation the civil monetary penalties that can be imposed under the statutes administered by the agency and publish the adjusted amounts in the **Federal Register**. This Notice sets forth the annual inflation adjustment of the maximum amount of civil monetary penalties (''CMPs'') administered by the Commission under the Securities Act of 1933, the Securities Exchange Act of 1934 (the ''Exchange Act''), the Investment Company Act of 1940, the Investment Advisers Act of 1940, and certain penalties under the Sarbanes-Oxley Act of 2002. These amounts are effective beginning on January 15, 2021, and will apply to all penalties imposed after that date for violations of the aforementioned statutes that occurred after November 2, 2015.

FOR FURTHER INFORMATION CONTACT: Stephen M. Ng, Senior Special Counsel, Office of the General Counsel, at (202) 551–7957, or Hannah W. Riedel, Senior Counsel, Office of the General Counsel, at (202) 551–7918.

SUPPLEMENTARY INFORMATION:

I. Background

This Notice is being published pursuant to the 2015 Act,[1] which amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (the ''Inflation Adjustment Act'').[2] The Inflation Adjustment Act previously had been amended by the Debt Collection Improvement Act of 1996 (the ''DCIA'')[3] to require that each federal agency adopt regulations at least once every four years that adjust for inflation the CMPs that can be imposed under the statutes administered by the agency. Pursuant to this requirement, the Commission previously adopted regulations in 1996, 2001, 2005, 2009, and 2013 to adjust the maximum amount of the CMPs that could be imposed under the statutes the Commission administers.[4]

The 2015 Act replaces the inflation adjustment formula prescribed in the DCIA with a new formula for calculating the inflation-adjusted amount of CMPs. The 2015 Act requires that agencies use this new formula to re-calculate the inflation-adjusted amounts of the penalties they administer on an annual basis and publish these new amounts in the **Federal Register** by January 15 of each year.[5] The Commission previously published the first annual adjustment required by the 2015 Act on January 6, 2017 (the ''2017 Adjustment'').[6] As part of the 2017 Adjustment, the Commission promulgated 17 CFR 201.1001(a) and Table I to Subsection 1001, which lists the penalty amounts for all violations that occurred on or before November 2, 2015. For violations occurring after November 2, 2015, Subsection 1001(b) provides that the applicable penalty amounts will be adjusted annually based on the formula set forth in the 2015 Act. Subsection 1001(b) further provides that these adjusted amounts will be published in

[1] Public Law 114–74 Sec. 701, 129 Stat. 599–601 (Nov. 2, 2015), codified at 28 U.S.C. 2461 note.

[2] Public Law 101–410, 104 Stat. 890–892 (1990), codified at 28 U.S.C. 2461 note.

[3] Public Law 104–134, Title III, § 31001(s)(1), 110 Stat. 1321–373 (1996), codified at 28 U.S.C. 2461 note.

[4] *See* Release Nos. 33–7361, 34–37912, IA–1596, IC–22310, dated November 1, 1996 (effective December 9, 1996), previously found at 17 CFR 201.1001 and Table I to Subpart E of Part 201; Release Nos. 33–7946, 34–43897, IA–1921, IC–24846, dated January 31, 2001 (effective February 2, 2001), previously found at 17 CFR 201.1002 and Table II to Subpart E of Part 201; Release Nos. 33–8530, 34–51136, IA–2348, IC–26748, dated February 9, 2005 (effective February 14, 2005), previously found at 17 CFR 201.1003 and Table III to Subpart E of Part 201; Release Nos. 33–9009, 34–59449, IA–2845, IC–28635, dated February 25, 2009 (effective March 3, 2009), previously found at 17 CFR 201.1004 and Table IV to Subpart E of Part 201; and Release Nos. 33–9387, 34–68994, IA–3557, IC–30408, dated February 27, 2013 (effective March 5, 2013), previously found at 17 CFR 201.1005 and Table V to Subpart E of Part 201. The penalty amounts contained in these releases have now been consolidated into Table I to 17 CFR 201.1001.

[5] 28 U.S.C. 2461 note Sec. 4.

[6] Release Nos. 33–10276; 34–79749; IA–4599; IC–32414 (effective Jan. 18, 2017).

the **Federal Register** and on the Commission's website. The Commission subsequently published annual adjustments on January 8, 2018 (the ''2018 Adjustment''),[7] February 20, 2019 (''2019 Adjustment''),[8] and January 8, 2020 (the ''2020 Adjustment'').[9]

A CMP is defined in relevant part as any penalty, fine, or other sanction that: (1) Is for a specific amount, or has a maximum amount, as provided by federal law; and (2) is assessed or enforced by an agency in an administrative proceeding or by a federal court pursuant to federal law.[10] This definition applies to the monetary penalty provisions contained in four statutes administered by the Commission: The Securities Act, the Exchange Act, the Investment Company Act, and the Investment Advisers Act. In addition, the Sarbanes-Oxley Act provides the Public Company Accounting Oversight Board (the ''PCAOB'') authority to levy civil monetary penalties in its disciplinary proceedings pursuant to 15 U.S.C. 7215(c)(4)(D).[11] The definition of a CMP in the Inflation Adjustment Act encompasses such civil monetary penalties.[12]

II. Adjusting the Commission's Penalty Amounts for Inflation

This Notice sets forth the annual inflation adjustment required by the 2015 Act for all CMPs under the Securities Act, the Exchange Act, the Investment Company Act, and the Investment Advisers Act, and certain civil monetary penalties under the Sarbanes-Oxley Act.

Pursuant to the 2015 Act, the penalty amounts in the 2020 Adjustment are adjusted for inflation by increasing them by the percentage change between the Consumer Price Index for all Urban Consumers (''CPI–U'') for October 2019 and the October 2020 CPI–U.[13] OMB has provided its calculation of this multiplier (the ''CPI–U Multiplier'') to agencies.[14] The new penalty amounts are determined by multiplying the amounts in the 2020 Adjustment by the CPI–U Multiplier and then rounding to the nearest dollar.

For example, the CMP for certain insider trading violations by controlling persons under Exchange Act Section 21A(a)(3)[15] was readjusted for inflation as part of the 2020 Adjustment to $2,140,973. To determine the new CMP under this provision, the Commission multiplies this amount by the CPI–U Multiplier of 1.01182, and rounds to the nearest dollar. Thus, the new CMP for Exchange Act Section 21A(a)(3) is $2,166,279.

Below is the Commission's calculation of the new penalty amounts for the penalties it administers:

U.S. code citation	Civil monetary penalty description	2020 adjustment penalty amounts	CPI–U multiplier	2021 adjusted penalty amounts
15 U.S.C. 77h–1(g) (Securities Act Sec. 8A(g)).	For natural person	$8,824	1.01182	$8,928
	For any other person	88,248	1.01182	89,291
	For natural person/fraud	88,248	1.01182	89,291
	For any other person/fraud	441,240	1.01182	446,455
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	176,496	1.01182	178,582
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	853,062	1.01182	863,145
15 U.S.C. 77t(d) (Securities Act Sec. 20(d)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others.	963,837	1.01182	975,230
15 U.S.C. 78u(d)(3) (Exchange Act Sec. 21(d)(3)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	963,837	1.01182	975,230
15 U.S.C. 78u–1(a)(3) (Exchange Act Sec. 21A(a)(3)).	Insider Trading—controlling person	2,140,973	1.01182	2,166,279
15 U.S.C. 78u–2 (Exchange Act Sec. 21B).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616

[7] Release Nos. 33–10451; 34–82455; IA–4842; IC–32963 (effective Jan. 15, 2018).

[8] Release Nos. 33–10604; 34–85118; IA–5111; IC–33373 (effective Jan. 15, 2019). The publication of the 2019 Adjustment in the **Federal Register** was delayed due to operation of the Antideficiency Act during the absence of an appropriations bill to fund federal government programs between December 22, 2018 and January 25, 2019.

[9] Release Nos. 33–10740; 34–87905; IA–5428; IC–33740 (effective Jan. 15, 2020).

[10] 28 U.S.C. 2461 note Sec. 3(2).

[11] 15 U.S.C. 7215(c)(4)(D).

[12] The Commission may by order affirm, modify, remand, or set aside sanctions, including civil monetary penalties, imposed by the PCAOB. *See* Section 107(c) of the Sarbanes-Oxley Act of 2002, 15 U.S.C. 7217. The Commission may enforce such orders in federal district court pursuant to Section 21(e) of the Exchange Act. As a result, penalties assessed by the PCAOB in its disciplinary proceedings are penalties ''enforced'' by the Commission for purposes of the Inflation Adjustment Act. *See Adjustments to Civil Monetary Penalty Amounts,* Release No. 33–8530 (Feb. 4, 2005) [70 FR 7606 (Feb. 14, 2005)].

[13] 28 U.S.C. 2461 note Sec. 5.

[14] Office of Management and Budget, *Implementation of Penalty Inflation Adjustments for 2021, Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015* (December 23, 2020), available at *https://www.whitehouse.gov/wp-content/uploads/2020/12/M-21-10.pdf.* This multiplier represents the percentage increase between the October 2019 CPI–U and the October 2020 CPI–U, plus 1.

[15] 15 U.S.C. 78u–1(a)(3).

U.S. code citation	Civil monetary penalty description	2020 adjustment penalty amounts	CPI–U multiplier	2021 adjusted penalty amounts
	For natural person/fraud/substantial losses or risk of losses to others.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others.	963,837	1.01182	975,230
15 U.S.C. 78ff(b) (Exchange Act Sec. 32(b)).	Exchange Act/failure to file information documents, reports.	569	1.01182	576
15 U.S.C. 78ff(c)(1)(B) (Exchange Act Sec. 32(c)(1)(B)).	Foreign Corrupt Practices—any issuer	21,410	1.01182	21,663
15 U.S.C. 78ff(c)(2)(B) (Exchange Act Sec. 32(c)(2)(B)).	Foreign Corrupt Practices—any agent or stockholder acting on behalf of issuer.	21,410	1.01182	21,663
15 U.S.C. 80a–9(d) (Investment Company Act Sec. 9(d)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	963,837	1.01182	975,230
15 U.S.C. 80a–41(e) (Investment Company Act Sec. 42(e)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others.	963,837	1.01182	975,230
15 U.S.C. 80b–3(i) (Investment Advisers Act Sec. 203(i)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others or gains to self.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others or gain to self.	963,837	1.01182	975,230
15 U.S.C. 80b–9(e) (Investment Advisers Act Sec. 209(e)).	For natural person	9,639	1.01182	9,753
	For any other person	96,384	1.01182	97,523
	For natural person/fraud	96,384	1.01182	97,523
	For any other person/fraud	481,920	1.01182	487,616
	For natural person/fraud/substantial losses or risk of losses to others.	192,768	1.01182	195,047
	For any other person/fraud/substantial losses or risk of losses to others.	963,837	1.01182	975,230
15 U.S.C. 7215(c)(4)(D)(i) (Sarbanes-Oxley Act Sec. 105(c)(4)(D)(i)).	For natural person	141,943	1.01182	143,621
	For any other person	2,838,885	1.01182	2,872,441
15 U.S.C. 7215(c)(4)(D)(ii) (Sarbanes-Oxley Act Sec. 105(c)(4)(D)(ii)).	For natural person	1,064,582	1.01182	1,077,165
	For any other person	21,291,632	1.01182	21,543,299

Pursuant to the 2015 Act and 17 CFR 201.1001, the adjusted penalty amounts in this Notice (and all penalty adjustments performed pursuant to the 2015 Act) apply to penalties imposed after the date the adjustment is effective for violations that occurred after November 2, 2015, the 2015 Act's enactment date. These penalty amounts supersede the amounts in the 2020 Adjustment.[16] For violations that occurred on or before November 2, 2015, the penalty amounts in Table I to 17 CFR 201.1001 continue to apply.[17]

By the Commission.

Dated: January 8, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021–00528 Filed 1–12–21; 8:45 am]

BILLING CODE 8011–01–P

[16] The penalty amounts in this Notice are being published in the **Federal Register** and will not be added to the Code of Federal Regulations in accordance with the 2015 Act and 17 CFR 201.1001(b). *See* 28 U.S.C. 2461 note Sec. 4(a)(2); 17 CFR 201.1001(b). In addition to being published in the **Federal Register**, the penalty amounts in this Notice will be made available on the Commission's website at *https://www.sec.gov/enforce/civil-penalties-inflation-adjustments.htm,* as detailed in 17 CFR 201.1001(b). This website also lists the penalty amounts for violations that occurred on or before November 2, 2015.

[17] 17 CFR 201.1001(a).

DEPARTMENT OF STATE

[Public Notice 11289]

Secretary of State's Determinations under the International Religious Freedom Act of 1998 and Frank R. Wolf International Religious Freedom Act of 2016

The Secretary Of State's Designation Of ''Countries Of Particular Concern'' And ''Special watch list'' countries for religious freedom violations pursuant to Section 408(a) of the International Religious Freedom Act of 1998 (Pub. L. 105–292), as amended (the Act), notice is hereby given that, on December 2, 2020, the Secretary of State, under authority delegated by the President, has designated each of the following as

a ''country of particular concern'' (CPC) under Section 402(b) of the Act, for having engaged in or tolerated particularly severe violations of religious freedom: Burma, China, the Democratic People's Republic of Korea, Eritrea, Iran, Nigeria, Pakistan, Saudi Arabia, Tajikistan, and Turkmenistan. The Secretary simultaneously designated the following Presidential Actions for these CPCs:

For Burma, the existing ongoing restrictions referenced in 22 CFR 126.1, pursuant to section 402(c)(5) of the Act;

For China, the existing ongoing restriction on exports to China of crime control or detection instruments or equipment, under the Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Pub. L. 101–246), pursuant to section 402(c)(5) of the Act;

For the Democratic People's Republic of Korea, the existing ongoing restrictions to which the Democratic People's Republic of Korea is subject, pursuant to sections 402 and 409 of the Trade Act of 1974 (the Jackson-Vanik Amendment), and pursuant to section 402(c)(5) of the Act;

For Eritrea, the existing ongoing restrictions referenced in 22 CFR 126.1, pursuant to section 402(c)(5) of the Act;

For Iran, the existing ongoing travel restrictions in section 221(c) of the Iran Threat Reduction and Syria Human Rights Act of 2012 (TRA) for individuals identified under section 221(a)(1)(C) of the TRA in connection with the commission of serious human rights abuses, pursuant to section 402(c)(5) of the Act;

For Nigeria, a waiver as required in the ''important national interest of the United States,'' pursuant to section 407 of the Act;

For Pakistan, a waiver as required in the ''important national interest of the United States,'' pursuant to section 407 of the Act;

For Saudi Arabia, a waiver as required in the ''important national interest of the United States,'' pursuant to section 407 of the Act;

For Tajikistan, a waiver as required in the ''important national interest of the United States,'' pursuant to section 407 of the Act; and

For Turkmenistan, a waiver as required in the ''important national interest of the United States,'' pursuant to section 407 of the Act.

In addition, the Secretary of State has designated the following countries as ''special watch list'' countries for engaging in or tolerating severe violations of religious freedom: Comoros, Cuba, Nicaragua, and Russia.

The Secretary of State's designation of ''entities of particular concern'' for religious freedom violations. Pursuant to Section 408(a) of the Act, notice is hereby given that, on December 2, 2020, the Secretary of State, under authority delegated by the President, has designated each of the following as an ''entity of particular concern'' under section 301 of the Frank R. Wolf International Religious Freedom Act of 2016 (Pub. L. 114–281), for having engaged in particularly severe violations of religious freedom: Al-Shabaab, al-Qa'ida, Boko Haram, Hayat Tahrir al-Sham, the Houthis, ISIS, ISIS-Greater Sahara, ISIS-West Africa, Jamaat Nasr al-Islam wal Muslimin, and the Taliban.

FOR FURTHER INFORMATION CONTACT: Peter Burns, Office of International Religious Freedom, U.S. Department of State, (phone: 202–647–3865 or email: *BurnsPI@state.gov*).

Zachary A. Parker,

Director, Office of Directives Management, Department of State.

[FR Doc. 2021–00556 Filed 1–12–21; 8:45 am]

BILLING CODE 4710–18–P

DEPARTMENT OF STATE

[Public Notice: 11257]

60-Day Notice of Proposed Information Collection: Foreign Diplomatic Services Applications (FDSA)

ACTION: Notice of request for public comment.

SUMMARY: The Department of State is seeking Office of Management and Budget (OMB) approval for the information collection described below. In accordance with the Paperwork Reduction Act of 1995, we are requesting comments on this collection from all interested individuals and organizations. The purpose of this notice is to allow 60 days for public comment preceding submission of the collection to OMB.

DATES: The Department will accept comments from the public up to March 15, 2021.

ADDRESSES: You may submit comments by any of the following methods:

- *Web:* Persons with access to the internet may comment on this notice by going to *www.Regulations.gov.* You can search for the document by entering ''Docket Number: DOS–2020–0049'' in the Search field. Then click the ''Comment Now'' button and complete the comment form.
- *Email: OFMinfo@state.gov.*
- *Regular Mail:* Send written comments to 2201 C St. NW, Washington, DC 20520; 3507 International Place NW, Washington, DC 20008.

You must include the DS form number (if applicable), information collection title, and the OMB control number in any correspondence.

FOR FURTHER INFORMATION CONTACT: Direct requests for additional information regarding the collection listed in this notice, including requests for copies of the proposed collection instrument and supporting documents, to Timothy R. Johnson at 3507 International Place NW, Washington, DC 20008, who may be reached on 202–895–3556 or at *JohnsonTR@state.gov.*

SUPPLEMENTARY INFORMATION:

- *Title of Information Collection:* Foreign Diplomatic Services Applications (FDSA).
- *OMB Control Number:* 1405–0105.
- *Type of Request:* Revision of a Currently Approved Collection.
- *Originating Office:* M/OFM.
- *Form Number:* DS–98, DS–99, DS–100, DS–101, DS–102, DS–104, DS–1504, DS–1972D, DS–1972T, DS–2003, DS–2004, DS–2005, DS–2006, DS–2008, DS- 4139, DS–4140, DS–4284, DS–4285, DS–4298, DS–4299, DS–7675.
- *Respondents:* Foreign Mission Community.
- *Estimated Number of Respondents:* 79,095.
- *Estimated Number of Responses:* 79,095.
- *Average Time per Response:* 13 minutes.
- *Total Estimated Burden Time:* 18,200 hours annually.
- *Frequency:* For each specific event; annually.
- *Obligation to Respond:* Mandatory and/or Required to Obtain or Retain a Benefit.

We are soliciting public comments to permit the Department to:

- Evaluate whether the proposed information collection is necessary for the proper functions of the Department.
- Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used.
- Enhance the quality, utility, and clarity of the information to be collected.
- Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Please note that comments submitted in response to this Notice are public record. Before including any detailed personal information, you should be aware that your comments as submitted,

including your personal information, will be available for public review.

Abstract of Proposed Collection

Collection information instruments dealing with information collection from the foreign mission community, to include the electronic data compilation (e-Gov), have been combined under one information collection request, collectively referred to as the ''Foreign Diplomatic Services Applications''. These information collection instruments provide the Office of Foreign Missions and the Office of the Chief of Protocol with the information necessary to provide and administer an effective and efficient benefits, privileges, and immunities program by which foreign missions and eligible applicants may apply for benefits from the U.S. Department of State, to which they are entitled pursuant to the Foreign Missions Act.

Methodology

Information may be received via Email or electronic submission through eGov at *https://egov.ofm.state.gov/.*

Kevin E. Bryant,

Deputy Director, Office of Directives Management, Department of State.

[FR Doc. 2021–00474 Filed 1–12–21; 8:45 am]

BILLING CODE 4710–43–P

SURFACE TRANSPORTATION BOARD

[Docket No. EP 526 (Sub-No. 14)]

Notice of Railroad-Shipper Transportation Advisory Council Vacancies; Solicitation of Nominations

AGENCY: Surface Transportation Board (Board).

ACTION: Notice.

SUMMARY: The Board hereby gives notice of vacancies on RSTAC for two small railroad representatives. The Board seeks suggestions for candidates to fill these vacancies.

DATES: Nominations are due on February 12, 2021.

ADDRESSES: Suggestions may be submitted via e-filing on the Board's website at *http://www.stb.gov.* Submissions will be posted to the Board's website under Docket No. EP 526 (Sub-No. 14).

FOR FURTHER INFORMATION CONTACT: Coral Torres at (202) 245–0286. Assistance for the hearing impaired is available through the Federal Relay Service at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board, created in 1996 to take over many of the functions previously performed by the Interstate Commerce Commission, exercises broad authority over transportation by rail carriers, including regulation of railroad rates and service (49 U.S.C. 10701–47, 11101–24), the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. 10901–07), as well as railroad line sales, consolidations, mergers, and common control arrangements (49 U.S.C. 10902, 11323–27).

The ICC Termination Act of 1995 (ICCTA), enacted on December 29, 1995, established RSTAC to advise the Board's Chairman, the Secretary of Transportation, the Committee on Commerce, Science, and Transportation of the Senate, and the Committee on Transportation and Infrastructure of the House of Representatives with respect to rail transportation policy issues RSTAC considers significant. RSTAC focuses on issues of importance to small shippers and small railroads, including car supply, rates, competition, and procedures for addressing claims. ICCTA instructs RSTAC to endeavor to develop private-sector mechanisms to prevent, or identify and address, obstacles to the most effective and efficient transportation system practicable. The members of RSTAC also prepare an annual report concerning RSTAC's activities. RSTAC is not subject to the Federal Advisory Committee Act.

RSTAC's 15 appointed members consist of representatives of small and large shippers, and small and large railroads. In addition, members of the Board and the Secretary of Transportation serve as ex officio members. Of the 15 appointed members, nine are voting members and are appointed from senior executive officers of organizations engaged in the railroad and rail shipping industries. At least four of the voting members must be representatives of small shippers as determined by the Chairman, and at least four of the voting members must be representatives of Class II or III railroads. The remaining six members to be appointed—three representing Class I railroads and three representing large shipper organizations—serve in a nonvoting, advisory capacity, but may participate in RSTAC deliberations.

Meetings of RSTAC are required by statute to be held at least semi-annually. RSTAC typically holds meetings quarterly at the Board's headquarters in Washington, DC, although some meetings are held in other locations. During the coronavirus pandemic, RSTAC has been holding virtual meetings weekly and now bi-weekly with the Board Members and the Federal Railroad Administration Administrator to report on the status of rail service and operations.

The members of RSTAC receive no compensation for their services and are required to provide for the expenses incidental to their service, including travel expenses. Currently, RSTAC members have elected to submit annual dues to pay for RSTAC expenses.

RSTAC members must be citizens of the United States and represent as broadly as practicable the various segments of the railroad and rail shipper industries. They may not be full-time employees of the United States. According to revised guidance issued by the Office of Management and Budget, it is permissible for federally registered lobbyists to serve on advisory committees, such as RSTAC, as long as they do so in a representative capacity, rather than an individual capacity. *See Revised Guidance on Appointment of Lobbyists to Fed. Advisory Comms., Bds., & Comm'ns,* 79 FR 47,482 (Aug. 13, 2014). Members of RSTAC are appointed to serve in a representative capacity.

Each RSTAC member is appointed for a term of three years. A member may serve after the expiration of his or her term until a successor has taken office. No member will be eligible to serve in excess of two consecutive terms.

Due to the expiration of two small railroad representatives' second terms, the Board is seeking to fill those RSTAC positions. Suggestions for candidates to fill the vacancies should be submitted in letter form, identifying the name of the candidate, providing a summary of why the candidate is qualified to serve on RSTAC, and containing a representation that the candidate is willing to serve as an RSTAC member effective immediately upon appointment. RSTAC candidate suggestions should be filed with the Board by February 12, 2021. Members selected to serve on RSTAC are chosen at the discretion of the Board Chairman. Please note that submissions will be posted on the Board's website under Docket No. EP 526 (Sub-No. 14) and can also be obtained by contacting the Office of Public Assistance, Governmental Affairs, and Compliance at *RCPA@stb.gov* or (202) 245–0238.

(Authority: 49 U.S.C. 1325)

Decided: January 8, 2021.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Regena Smith-Bernard,

Clearance Clerk.

[FR Doc. 2021–00550 Filed 1–12–21; 8:45 am]

BILLING CODE 4915–01–P

SURFACE TRANSPORTATION BOARD

[Docket No. FD 36377 (Sub-No. 2)]

BNSF Railway Company—Trackage Rights Exemption—Union Pacific Railroad Company

BNSF Railway Company (BNSF), a Class I rail carrier, has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) for its acquisition of restricted, local, trackage rights over two rail lines owned by Union Pacific Railroad Company (UP) between: (1) UP milepost 93.2 at Stockton, Cal., on UP's Oakland Subdivision, and UP milepost 219.4 at Elsey, Cal., on UP's Canyon Subdivision, a distance of 126.2 miles; and (2) UP milepost 219.4 at Elsey, and UP milepost 280.7 at Keddie, Cal., on UP's Canyon Subdivision, a distance of 61.3 miles (collectively, the Lines).

Pursuant to a written temporary trackage rights agreement, UP has agreed to grant restricted trackage rights to BNSF over the Lines. The purpose of this transaction is to permit BNSF to move empty and loaded unit ballast trains to and from the ballast pit at Elsey, which is adjacent to the Lines. The agreement provides that the trackage rights are temporary in nature and are scheduled to expire on December 31, 2021.[1]

The transaction may be consummated on or after January 27, 2021, the effective date of the exemption (30 days after the verified notice was filed).

As a condition to this exemption, any employees affected by the acquisition of the trackage rights will be protected by the conditions imposed in *Norfolk & Western Railway—Trackage Rights—Burlington Northern, Inc.,* 354 I.C.C. 605 (1978), as modified in *Mendocino Coast Railway—Lease & Operate—California Western Railroad,* 360 I.C.C. 653 (1980).

If the notice contains false or misleading information, the exemption is void ab initio. Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the effectiveness of the exemption. Petitions for stay must be filed no later than January 19, 2021 (at least seven days before the exemption becomes effective).

All pleadings, referring to Docket No. FD 36377 (Sub-No. 2), should be filed with the Surface Transportation Board via e-filing on the Board's website. In addition, a copy of each pleading must be served on BNSF's representative, Peter W. Denton, Steptoe & Johnson LLP, 1330 Connecticut Avenue NW, Washington, DC 20036.

According to BNSF, this action is categorically excluded from environmental review under 49 CFR 1105.6(c)(3) and from historic preservation reporting requirements under 49 CFR 1105.8(b)(3).

Board decisions and notices are available at *www.stb.gov.*

Decided: January 7, 2021.

By the Board, Allison C. Davis, Director, Office of Proceedings.

Eden Besera,

Clearance Clerk.

[FR Doc. 2021–00478 Filed 1–12–21; 8:45 am]

BILLING CODE 4915–01–P

[1] BNSF states that, because the trackage rights are for local rather than overhead traffic, it has not filed under the Board's class exemption for temporary overhead trackage rights under 49 CFR 1180.2(d)(8). Instead, BNSF has filed under the trackage rights class exemption at 1180.2(d)(7). BNSF concurrently filed a petition for partial revocation of this exemption to permit these proposed trackage rights to expire at midnight on December 31, 2021, as provided in the agreement. The petition for partial revocation will be addressed in a subsequent decision.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–1158]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: License Requirements for Operation of a Launch Site

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The information to be collected includes data required for performing launch site location analysis. The launch site license is valid for a period of 5 years. Respondents are licensees authorized to operate sites.

DATES: Written comments should be submitted by March 15, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Charles Huet, 800 Independence Avenue SW, Room 331, Washington, DC 20591.

By fax: 202–267–5463.

FOR FURTHER INFORMATION CONTACT: Charles Huet by email at: *Charles.huet@faa.gov;* phone: 202–267–7427.

SUPPLEMENTARY INFORMATION: *Public Comments Invited:* You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for 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: 2120–0644.

Title: License Requirements for Operation of a Launch Site.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The data requested for a license application to operate a commercial launch site are required by 49 U.S.C. Subtitle IX, 701—Commercial Space Launch Activities, 49 U.S.C. 70101–70119 (1994). The information is needed in order to demonstrate to the FAA Office of Commercial Space Transportation (FAA/AST) that the proposed activity meets applicable public safety, national security, and foreign policy interest of the United States.

Respondents: Approximately 2 applicants.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 2,322 hours.

Estimated Total Annual Burden: 4,644 hours.

Issued in Washington, DC.

Kelvin Coleman,

Deputy Associate Administrator, Commercial Space Transportation, Federal Aviation Administration.

[FR Doc. 2021–00482 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–1157]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Commercial Space Transportation Licensing Regulations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The information will determine if applicant proposals for conducting commercial space launches can be accomplished according to regulations issued by the Office of the Associate Administrator for Commercial Space Transportation.

DATES: Written comments should be submitted by March 15, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Charles Huet, 800 Independence Avenue SW, Room 331, Washington, DC, 20591.

By fax: 202–267–5463.

FOR FURTHER INFORMATION CONTACT: Charles Huet by email at: *Charles.huet@faa.gov;* phone: 202–267–7427.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for 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: 2120–0608.

Title: Commercial Space Transportation Licensing Regulations.

Form Numbers: FAA Form 8800–1.

Type of Review: Renewal of an information collection.

Background: The Commercial Space Launch Act of 1984, 49 U.S.C. App. §§ 2601–2623, as recodified at 49 U.S.C. Subtitle IX, Ch. 701—Commercial Space Launch Activities, 49 U.S.C. 70101–70119 (1994), requires certain data be provided in applying for a license to conduct commercial space launch activities. These data are required to demonstrate to the Federal Aviation Administration (FAA), Associate Administrator for Commercial Space Transportation (AST), that a license applicant's proposed activities meet applicable public safety, national security, and foreign policy interests of the United States.

Respondents: Approximately 17 space launch applicants renewing applications.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 163 hours.

Estimated Total Annual Burden: 2,779 hours.

Issued in Washington, DC.

Kelvin Coleman,

Deputy Associate Administrator, Commercial Space Transportation, Federal Aviation Administration.

[FR Doc. 2021–00480 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2021–0037]

Overview of FAA Aircraft Noise Policy and Research Efforts: Request for Input on Research Activities To Inform Aircraft Noise Policy

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Notice of research programs and request for comments.

SUMMARY: The FAA is releasing a summary to the public of the research programs it sponsors on civil aircraft noise that could potentially inform future aircraft noise policy. The FAA invites public comment on the scope and applicability of these research initiatives to address aircraft noise.

The FAA will not make any determinations based on the findings of these research programs for the FAA's noise policies, including any potential revised use of the Day-Night Average Sound Level (DNL) noise metric, until it has carefully considered public and other stakeholder input along with any additional research needed to improve the understanding of the effects of aircraft noise exposure on communities.

DATES: Comments on this notice must identify the docket number and be received on or before March 15, 2021.

ADDRESSES: Send comments identified by docket number FAA–2021–0037 using any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for sending your comments electronically.
- *Mail:* Send comments to Docket Operations, M–30; U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, West Building Ground Floor, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* Take comments to Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.
- *Fax:* Fax comments to Docket Operations at (202) 493–2251.

Privacy: The FAA will post all comments it receives, without change, to *http://www.regulations.gov,* including any personal information the commenter provides. Using the search function of the docket website, anyone can find and read the electronic form of all comments received into any FAA docket, including the name of the individual sending the comment (or signing the comment for an association, business, labor union, etc.). DOT's complete Privacy Act Statement can be found in the **Federal Register** published on April 11, 2000 (65 FR 19477–19478), as well as at *http://DocketsInfo.dot.gov.*

Docket: Background documents or comments received may be read at *http://www.regulations.gov* at any time. Follow the online instructions for accessing the docket or go to the Docket Operations in Room W12–140 of the West Building Ground Floor at 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Donald Scata, Office of Environment and Energy (AEE–100), Federal Aviation Administration, 800 Independence Ave. SW, Washington, DC 20591. Telephone: (202) 267–0606. Email address: *NoiseResearchFRN@faa.gov.*

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Comments Invited

Background Information

Since the mid-1970s, the number of people living in areas exposed to significant levels of aircraft noise [1] in the United States has declined from roughly 7 million to just over 400,000 today. At the same time, the number of commercial enplanements has increased from approximately 200 million in 1975 to approximately 930 million in 2018. The single most influential factor in that decline was the phased transition to quieter aircraft, which effectively reduced the size of the areas around airports experiencing significant noise levels. That transition was the result of the development of new technology by aircraft and engine manufacturers; establishment of increasingly stringent noise standards for civil subsonic aircraft,[2] investments by U.S. airlines in newer, quieter aircraft; and requirements by the FAA and the United States Congress to phase out operations by older, noisier aircraft.

A second factor has been cooperative efforts by airports, airlines and other aircraft operators, State and local governments, and communities to reduce the number of people living in areas near airports exposed to significant levels of aircraft noise. Under the FAA's Airport Noise Compatibility Planning Program,[3] airports may voluntarily initiate a collaborative process to consider measures that reduce existing noncompatible land uses and prevent new noncompatible land uses in areas exposed to significant levels of aircraft noise. Since 1983, more than 250 airports have used this process to consider changes to local land use planning and zoning, sound insulation, acquisition of homes and other noise-sensitive property, aircraft noise abatement routes and procedures, and other measures. Over $6 billion in funding has been provided for airports to undertake noise compatibility programs and implement noise mitigation measures. The FAA encourages the process by providing financial and technical assistance to airport sponsors to develop Noise Exposure Maps and Noise Compatibility Programs, and implement eligible noise-related mitigation measures recommended in the program, depending upon the availability of funding.

In addition to noise compatibility planning, the FAA also issues grants to airport operators and units of local government to fund mitigation projects, most notably to sound-insulate homes, schools, and other noise-sensitive facilities. While sound insulation reduces indoor noise levels, it does not address concerns about noise interfering with the enjoyment of the outdoors. Moreover, there are limits to the effectiveness of sound insulation. In some areas with elevated noise levels, sound insulation may not sufficiently reduce interior noise levels to meet established interior noise standards.[4] Conversely, in areas where overall noise levels are lower, interior noise standards may already be met without additional sound insulation treatments.[5]

Today's civilian aircraft are quieter than at any time in the history of jet-powered flight. The FAA, aircraft manufacturers, and airlines continue to work toward further reducing aircraft noise at the source.[6] As an example, the noise produced by one Boeing 707–200 flight, typical in the 1970s, is equivalent in noise to 30 Boeing 737–800 flights that are typical today.[7] As a result, for many years there was a steady decline in the number of people exposed to significant noise in communities located near airports. In recent years, however, as aviation industry growth has led to an increase in operations in many areas, the number of people and the size of the areas experiencing significant aircraft noise has started to show a gradual expansion. The introduction of Performance Based Navigation (PBN) procedures, as needed to safely and efficiently modernize the national air transportation system,[8] has also provided noise benefits for many by allowing for new and more efficient flight paths, but has in some places resulted in community concerns, particularly related to increased concentration of flights. In 2016, the FAA released an update to the FAA Community Involvement Manual to reaffirm the FAA's commitment to inform and involve the public, and to give meaningful consideration to community concerns and views as the FAA makes aviation decisions that affect community interests. The FAA has since developed and begun implementing a comprehensive and strategic approach to transform and enhance FAA community involvement practices, including working through airport community roundtables, to equitably discuss opportunities to shift or, when possible, reduce aircraft noise exposure.

Overview of FAA Research on Aircraft Noise

Recognizing that aircraft noise remains a primary concern of many stakeholders, the FAA is actively working to understand, manage, and reduce the environmental impacts of global aviation through research, technological innovation, policy, and outreach to benefit the public.

With the vision of removing environmental constraints on aviation growth by achieving quieter, cleaner, and more efficient air transportation, the FAA has worked closely with a number of industry, academic, and governmental stakeholders to assemble a comprehensive portfolio of research activities (including leveraging research undertaken by others) aimed at guiding investments in scientific studies, analytical tools, and innovative technologies to better understand and manage aircraft noise. However, due to the complex nature of aircraft noise and the varied priorities and concerns of stakeholders, no single set of findings can completely guide decision making. A broad understanding of aircraft noise and any potential impacts, from many different perspectives, is therefore needed. Summaries of the FAA's key

[1] Under longstanding FAA policy, the threshold of significant aircraft noise exposure in residential areas is a Day-Night Average Sound Level of 65 decibels (dB). See the ''Aviation Noise Abatement Policy,'' issued by the Secretary of Transportation and the FAA Administrator in 1976. This document is available on the FAA website at *https://www.faa.gov/regulations_policies/policy_guidance/envir_policy/*.

[2] Consistent with International Civil Aviation Organization standards, FAA has set increasingly more stringent aircraft certification noise standards, such as the Stage 5 noise certification standard. 82 FR 46123 (October 4, 2017).

[3] This process is outlined under 49 U.S.C. 47501 *et seq.,* as implemented by 14 CFR part 150.

[4] FAA Order 5100.38D, Appendix R.

[5] P.J. Wolfe et al., 2016 Costs and benefits of US aviation noise land-use policies Transportation Research Part D 44 (2016) 147–156, *http://dx.doi.org/10.1016/j.trd.2016.02.010.*

[6] See, for example, information on the FAA's ''Continuous Lower Energy, Emissions, and Noise'' (CLEEN) Program at: *https://www.faa.gov/about/office_org/headquarters_offices/apl/research/aircraft_technology/cleen/*.

[7] Based on an average of approach and takeoff certificated noise levels as defined in 14 CFR part 36.

[8] See Section 213, ''Acceleration of NextGen Technologies,'' of the FAA Modernization and Reform Act of 2012, Public Law 112–95, 213, 126 Stat. 11, 46–50 (2012), 49 U.S.C. 40101 note (PBN implementation required at key airports by statutory deadline).

research, tools, and technology programs designed to potentially inform aircraft noise policy are provided below.

(1) Effects of Aircraft Noise on Individuals and Communities

Speech Interference and Children's Learning

Much of our current understanding on speech interference due to noise was established by the Environmental Protection Agency (EPA) in the 1970s.[9] The findings from these early research assessments are still relevant for today's considerations on the impacts from aircraft noise. However, the FAA is also investigating whether there are related considerations warranting more detailed studies. One area in particular is the potential effects of aviation noise on reading comprehension and learning motivation in children. Initial research in this area has shown there are challenges in designing effective studies, and this continues to be an area of interest to better inform noise mitigation and abatement strategies for schools and other noise-sensitive facilities. While additional research in this area is still being explored, the FAA has invested more than $440 million in sound insulation treatments at schools around the country [10] in order to mitigate any potential issues related to aircraft noise.

Health and Human Impacts Research

While community annoyance due to aircraft noise exposure provides a useful summary measure that captures public perceptions of noise, a full understanding of the impact of noise on communities requires a careful consideration of the potential physiological impacts as well. Knowledge of physiological impacts could also help the FAA develop targeted measures to address aircraft noise. Emerging research capabilities are providing new opportunities to examine specific impacts of noise on humans. When these are examined in a holistic manner with research on community annoyance, they could further inform aircraft noise policy considerations. The FAA is conducting research on the potential impacts of aircraft noise on cardiovascular health and sleep disturbance, as described below.

Impacts to Cardiovascular Health

In partnership with academic researchers that are being led by the Boston University School of Public Health, the FAA is working to understand the relationship between aircraft noise exposure and cardiovascular health. The researchers are doing this by leveraging existing national longitudinal health cohorts wherein statistically large numbers of people provide data about their health on a periodic basis over the course of many years. These studies are typically used to understand the relative risk of different factors like diet on different health outcomes like heart disease. The Boston University team is expanding the list of factors to include aircraft noise exposure such that it can be placed in context with other factors that could increase one's risk of cardiovascular disease. The team is leveraging existing collaborations with well-recognized and respected health cohorts including the Nurses' Health Studies and the Health Professionals Follow-Up Study, as well as a complementary study at Boston University that is examining the Women' Heath Initiative cohort through funding from the National Institutes of Health.

Sleep Disturbance

The FAA is working with a team led by the University of Pennsylvania School of Medicine to conduct a national sleep study that will quantify the impact of aircraft noise exposure on sleep. The study will collect nationally representative information on the probability of being awoken by aircraft noise exposure. The study will start with input being requested from approximately 25,000 respondents through a mail survey. These surveys will be used to determine the eligibility of respondents for a detailed field study that will involve roughly 400 volunteers. The volunteers in the detailed field study will use equipment provided by the research team to collect both noise and electrocardiography data in their homes while they sleep. The electrocardiography data combined with information on the level of aircraft noise exposure will advance our understanding of the physiological effects of aircraft noise on sleep.

Economic Impacts

In addition to the aforementioned community and physiological impacts, the FAA is also working with researchers at Massachusetts Institute of Technology (MIT) to conduct an empirical assessment of the economic impacts to businesses located underneath aircraft flight paths. This assessment will take into account the economic benefits from aviation activities, as well as potential environmental and health impacts that might reduce economic productivity. The FAA is also in the developmental stage of a research project that would build on existing work done by MIT that has used housing value data to reveal the willingness of people to pay to avoid aircraft noise exposure. This research is intended to serve as a follow on to the Neighborhood Environmental Survey (described in the next section), to determine whether the findings of that survey on residents' sensitivity to aviation noise is also reflected in their ''revealed preferences'' when making housing location decisions.

Neighborhood Environmental Survey

To review and improve the agency's understanding of community response to aircraft noise, the FAA initiated the *Neighborhood Environmental Survey* (NES) to help inform ongoing research and policy priorities on aviation noise. Section 187 of the FAA Reauthorization Act of 2018 [11] requires the Administrator of the FAA to ''*conclude the Administrator's ongoing review of the relationship between aircraft noise exposure and its effects on communities around airports . . . [and] submit to Congress a report containing the results of the review.*''

Due to the interest from Congress and other stakeholders in the findings of this research, an expanded summary is provided in this notice below. The full text of the NES report, including a detailed description of the methodology and findings, as well as additional background material to help inform readers, is available on the FAA's website at: *www.faa.gov/go/aviationnoise.*

Overview of the Survey

Working with statisticians and noise experts,[12] the FAA worked with other Federal agencies that have statutory, regulatory, or other policy interests in aviation noise, to conduct a nationwide survey to update the scientific evidence on the relationship between aircraft noise exposure and its annoyance effects on communities around airports, based on today's aircraft fleet and operations. The NES included a range of questions on a variety of environmental concerns, including aviation noise exposure.

The team of expert consultants, under direction from the FAA, surveyed residents living around representative U.S. airports, drawing upon well-established research methods in order to

[9] EPA, 1973, Public Health and Welfare Criteria For Noise, *https://nepis.epa.gov/.*

[10] Provided through Airport Improvement Program funding since 1994.

[11] Public Law 115–254.

[12] The FAA contracted with Westat, a leading statistics firm, and HMMH, a leading noise consultancy, to conduct the survey.

ensure scientific integrity and historical continuity with prior studies, while also employing advancements in techniques for noise modeling and social surveys. The NES consisted of over 10,000 mail responses from residents in communities around 20 statistically representative airports across the Nation, making it the single largest survey of this type undertaken at one time. In addition to the mail responses, the consultants also conducted a follow-up phone survey, which included over 2,000 responses to a series of more detailed questions. The FAA is now considering the full NES results, in conjunction with additional research findings as they become available, to determine how they may inform its noise policy considerations.

Overview of Community Response to Noise

Historically, two of the main types of information considered by the FAA and other Federal agencies in relating noise exposure to community response have been: (1) Case studies analyzing individual and group actions (*e.g.,* complaints or legal action) taken by residents of communities in response to noise; and (2) social surveys (such as the NES) that elicit information from community residents regarding their level of noise-induced annoyance. Annoyance is defined as a ''summary measure of the general adverse reaction of people to noise that causes interference with speech, sleep, the desire for a tranquil environment, and the ability to use the telephone, radio, or television satisfactorily.'' [13] The results of social surveys of noise-induced annoyance are typically plotted as ''dose-response curves'' on a graph showing the relationship between the level of DNL [14] cumulative noise exposure and the percentage of the population that is ''highly annoyed.''

Current FAA noise policy is informed by a dose-response curve initially created in the 1970s known as the *Schultz Curve.*[15] This dose-response curve is generally accepted as a representation of noise impacts and has been revalidated by subsequent analyses over the years.[16] The dose-response relationship it depicts has provided the best tool available to predict noise-induced annoyance for several decades. In 1992, the Federal Interagency Committee on Noise (FICON) reviewed the use of the *Schultz Curve,* and created an updated version of the curve using additional social survey data.[17] The updated dose response curve was found to agree within one to two percent of the original curve, leading FICON to conclude that ''the updated *Schultz Curve* remains the best available source of empirical dosage-effect to predict community response to transportation noise.'' [18] According to the 1992 FICON Report, the DNL-annoyance relationship depicted on the *Schultz Curve* ''is an invaluable aid in assessing community response as it relates the response to increases in both sound intensity and frequency of occurrence.'' Although the predicted annoyance, in terms of absolute levels, may vary among different communities, the *Schultz Curve* can reliably indicate changes in the level of annoyance for defined ranges of sound exposure for any given community.[19] While the validity of the dose-response methodology used to create the *Schultz Curve* remains well supported, its underlying social survey data, including the additional data used by FICON to update the curve, is now on average more than 40 years old and warrants an update. The NES was conducted to create a new nationally representative dose-response curve to understand how community response to aircraft noise may have changed.

The NES's collection of a nationally representative dataset on community annoyance in response to aircraft noise provides a contemporary update to the *Schultz Curve,* including technical refinements to improve its reliability. As with the *Schultz Curve,* the NES describes community annoyance in terms of the percentage of people who are ''highly annoyed'' and describes aircraft noise exposure in terms of the DNL noise metric. Based on the 1992 FICON Report, discussed previously, both the percentage of population highly annoyed and the DNL noise metric have continued to be recognized for this purpose including by FICON's successor, the Federal Interagency Committee on Aviation Noise in its 2018 report.[20]

NES Results

Compared with the *Schultz Curve* representing transportation noise, the NES results show a substantially higher percentage of people highly annoyed over the entire range of aircraft noise levels (*i.e.,* from DNL 50 to 75 dB) at which the NES was conducted. This includes an increase in annoyance at lower noise levels. The NES results also show proportionally less change in annoyance from the lower noise levels to the higher noise levels.

Comparing the percent of population highly annoyed due to noise exposure between the updated *Schultz Curve* for transportation noise in the 1992 FICON Report and the NES:

- At a noise exposure level of DNL 65 dB, the updated *Schultz Curve* from the 1992 FICON Report indicated that 12.3 percent of people were highly annoyed, compared to between 60.1 percent and 70.9 percent within a 95 percent confidence limit from the NES.
- At a noise exposure level of DNL 60 dB, the updated Schultz Curve from the 1992 FICON Report indicated that 6.5 percent of people were highly annoyed, compared to between 43.8 percent and 53.7 percent within a 95 percent confidence limit from the NES.
- At a noise exposure level of DNL 55 dB, the updated Schultz Curve from the 1992 FICON Report indicated that 3.3 percent of people were highly annoyed, compared to between 27.8 percent and 36.8 percent within a 95 percent confidence limit from the NES.
- At a noise exposure level of DNL 50 dB, the updated Schultz Curve from the 1992 FICON Report indicated that 1.7 percent of people were highly annoyed, compared to between 15.4 percent and 23.4 percent within a 95 percent confidence limit from the NES.

Graphics comparing the updated *Schultz Curve* from the 1992 FICON Report and the curve from the NES are provided on the FAA website at *www.faa.gov/go/aviationnoise.*

[13] Federal Agency Review of Selected Airport Noise Analysis Issues (FICON), 1992.

[14] The Day-Night Average Sound Level (DNL or Ldn) is the 24-hour average sound level, in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for the periods between midnight and 7 a.m., and between 10 p.m., and midnight, local time. See 14 CFR 150.7.

[15] See Schultz, T.J. 1978, ''Synthesis of Social Surveys on Noise Annoyance,'' *Journal of the Acoustical Society of America* 64(2): 377–405.

[16] See Fidell, S., D. Barber, ''Updating a Dosage-Effect Relationship for the Prevalence of Annoyance Due to General Transportation Noise,'' *Journal of the Acoustical Society of America,* 89, January 1991, pp. 221–233; also see Finegold, L.S., C.S. Harris, and H.E. von Gierke, 1992, Applied Acoustical Report: Criteria for Assessment of Noise Impacts on People, *Journal of the Acoustical Society of America,* June 1992; also see Finegold, L.S., C.S. Harris, and H.E. von Gierke, 1994, Community Annoyance and Sleep Disturbance: Updated Criteria for Assessing the Impacts of General Transportation Noise on People, Noise Control Engineering Journal, Volume 42, Number 1, January–February 1994, pp. 25–30.

[17] The FICON 1992 analysis added to the Schultz Curve's original database of 161 survey data points and calculated an updated dose-response curve using the same methodology but with a total of 400 survey data points.

[18] FICON, 1992.

[19] Ibid., vol. 1, p. 2–6.

[20] Federal Interagency Committee on Aviation Noise Research Review of Selected Aviation Noise Issues (FICAN), 2018.

Advancements in Survey Methodology

Earlier work to understand community response to noise, including Schultz's dose-response analysis, was based on the premise that the annoyance from any source of noise would be the same for a given DNL noise level. However, more recent work has shown that aircraft noise often results in higher levels of annoyance compared to the same level of noise from ground transportation sources.[21] There have been relatively few surveys of communities in the United States about aircraft noise undertaken over the last four decades. However, other countries around the world have conducted aircraft noise surveys during this time considering aircraft noise separately from noise from other modes of transportation. The results of these surveys, as reflected in a dose-response relationship published by the International Organization for Standardization,[22] have consistently shown higher levels of annoyance than exhibited by the *Schultz Curve.* Informed by these results, the national dose-response curve in the NES report reflects only responses to the question about aircraft noise exposure.

Other Factors

In addition to enhancements in survey techniques and changes to the way aircraft operate, there are likely other factors contributing to a change in the way communities respond to aircraft noise. Future work is needed to fully understand the specific drivers behind these reasons, but several possibilities include:

- Changes to where people are choosing to live, including societal migration to increasingly urban environments.[23] Additionally, growth and changes to the makeup of suburban communities and their proximity to urban hubs may also be influencing factors on community expectations for aircraft noise exposure.
- How people work and live, including influencing factors such as increased in-home business and teleworking in today's economy.[24] Changes in expectations for spending time outdoors versus indoors and the associated aircraft noise exposure may also be a factor.
- The rise of social media, the internet, and other national and global information sources, leading to an increased awareness and perception of local and national noise issues.
- Overall societal response to noise due to a combination of these or other factors.

In addition to the NES, which focuses on annoyance, the FAA is also engaged in a range of research initiatives aimed at providing information on other impacts of aircraft noise, including effects on children's learning, sleep disturbance, and potential health effects. Each of these research initiatives focuses on a distinct type of potential adverse effect associated with aviation noise exposure. The potential adverse effects explored by these initiatives may also be factors influencing the annoyance reported by the NES. However, research in these areas is still ongoing and therefore was not specifically addressed by the NES. Additional details on these research programs is provided below.

(2) Noise Modeling, Noise Metrics, and Environmental Data Visualization

As a core component of FAA's work to address aircraft noise, as well as a requirement of its environmental regulatory commitments, the FAA must maintain the ability to accurately quantify aircraft noise exposure around airports and throughout the National Airspace System. High-fidelity modeling is the only practical method to accomplish this objective, as aircraft noise needs to be quantified over relatively large scales in an efficient and consistent manner. For more than four decades, the FAA has worked closely with industry, academic, and governmental stakeholders to advance research and development in aircraft noise modeling. This effort advances the analytical tools, metrics, data, and standards required to provide high quality results to inform the public and other stakeholders about noise exposure levels. The FAA has also been actively exploring ways to use emerging technologies to visualize environmental data including noise exposure.

Aviation Environmental Design Tool

The Aviation Environmental Design Tool (AEDT) is the FAA's required noise and environmental modeling application for all U.S. domestic regulatory analyses requiring FAA review. The AEDT also provides analysis support for the International Civil Aviation Organization—Committee on Aviation Environmental Protection, and is used as a research and assessment tool by other Federal agencies, universities, and industry stakeholders.

Through collaborations with government, university, and industry partners, the FAA actively manages AEDT to ensure that features and capabilities are developed to meet expanding environmental analysis needs, and to ensure that as new data and technologies become available they are incorporated in order to enhance modeling accuracy and efficiency. The AEDT builds on a legacy of noise modeling development, and is based on detailed aircraft-specific noise measurements and internationally accepted aircraft performance models and standards. A dynamic development process is used to create new versions of AEDT. This process allows for new features and capabilities to be added as needed, for example, when required by policy updates or informed by emerging research findings.

Noise Screening

Building from the high-fidelity noise modeling capabilities available through AEDT, the FAA is also working to develop an updated noise screening tool. This updated noise screening tool will use a simplified noise modeling process to facilitate an expedited review of proposed Federal actions where significant noise impacts are not expected. Such an approach is beneficial where a proposed Federal Action is limited in scope and could qualify for a categorical exclusion under the FAA's procedures for implementing the National Environmental Policy Act (NEPA).[25] The primary goal of updating the noise screening tool is to decrease the amount of time that an analyst will need to conduct an assessment while also ensuring a fully validated result that is readily understandable by the public. While the output from a noise screening tool cannot provide the same level of detail as a comprehensive modeling tool, the simplified process provides for an expedited initial view of

[21] See, for example: Janssen, S., &, Vos, H. (2011). Dose-Response Relationship between DNL and Aircraft Noise Annoyance: Contribution of TNO. Retrieved from TNO Report TNO–060–UT–2011–00207.

[22] International Organization for Standardization. (2016, March 1, 2016). International Standard 1996–1, Acoustics—Description Measurement and Assessment of Environmental Noise—Part 1: Basic Quantities and Assessment Procedures, 3rd edition.

[23] The U.S. Census Bureau indicates that the percentage of the population living in urban areas has increased from 73.6 percent in 1970 to 80.7 percent in 2010, an increase of 7.1 percent.

[24] Work to explore changes to how population distribution throughout the day are related to aircraft noise exposure is planned under Airport Cooperative Research Project (ACRP) 02–84 [Anticipated] *http://apps.trb.org/cmsfeed/TRBNetProjectDisplay.asp?ProjectID=4421.*

[25] See FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures,* Chapter 5 (''Categorical Exclusions'').

any potential changes in aircraft noise exposure.

Environmental Data Visualization

The FAA has been developing ways to utilize geospatial data to improve the agency's ability to communicate environmental data to the public. For example, the FAA has designed an Environmental Visualization Tool to take advantage of the availability of high quality geospatial data to deliver an agency-wide resource using a consistent, common visual language. Once fully implemented, this common visualization platform will serve the needs of multiple environmental programs within the FAA, including those presenting aircraft noise data to the public.

Supplemental Noise Metrics

The FAA's primary noise metric, DNL, was developed and validated to identify significant aviation noise exposure for land use and mitigation planning as well as for determining significant change in noise exposure under NEPA review. In some cases, however, it can be useful to supplement DNL with the use of other noise metrics. While other noise metrics may not provide as complete an understanding of the cumulative noise exposure from activity around an airport and its associated airspace, they often can provide opportunities to communicate the specific characteristics of noise changes due to the unique aspects of a proposed action. The FAA's NEPA procedures address the use of supplemental noise metrics.[26] To assist the public in understanding noise impacts, and to better facilitate communication among communities interested in systematic departure flight track dispersion, the FAA is working to assess the use of potential supplemental metrics. For a supplemental metric to be effective in evaluating potential means of achieving flight track dispersion, and to ensure that communities understand the impacts of dispersion (*i.e.,* that dispersion does not eliminate noise but rather it may move noise to other neighborhoods), the supplemental metric will need to effectively communicate the changes in noise exposure that will occur in all of the communities affected by the change, both those that would be exposed to less noise and those that would be exposed to more noise.[27]

(3) Reduction, Abatement, and Mitigation of Aviation Noise

To directly address noise concerns, the FAA sponsors multiple research programs to explore different concepts for aircraft noise reduction. As aircraft noise is a complex issue, no single concept is capable of providing a universal solution. However, by conducting research across different areas, the FAA is developing solutions to reduce noise at its source, abate noise through operations, and mitigate the effects of noise on communities. The intent of this approach is to have a variety of options to reduce the noise being experienced by those living near airports around the country and to have options that could be tailored to specific airports.

Aircraft Source Noise Reduction

As noted previously, the single most influential factor in the historical decline in noise exposure was the phased transition to quieter aircraft. Through the public-private partnership of the Continuous Lower Energy, Emissions, and Noise (CLEEN) Program, the FAA and industry are working together to develop technologies that will enable manufacturers to create aircraft and engines with lower noise and emissions as well as improved fuel efficiency.[28] The technologies being accelerated by the CLEEN Program have relatively large technological risk. Government resources help mitigate this risk and incentivize aviation manufacturers to invest and develop these technologies. By cost-sharing the development with the FAA, industry is willing to accept the greater risk and can better support the business case for this technological development. Once entered into service, the CLEEN technologies will provide societal benefits in terms of reduced noise, fuel burn, and emissions throughout the fleet for years to come. In addition to the benefits provided by technologies developed under the CLEEN, the program leads to advances in the analysis and design tools that are used on every aircraft or engine product being made by these companies; this extends the benefits of the CLEEN Program well beyond the individual technologies being matured.

As new aircraft and engine technologies lead to quieter aircraft over time, the FAA works to establish aircraft certification standards based on noise stringency requirements. These standards are a requirement of the airworthiness process and are described in 14 CFR part 36. These requirements do not force manufactures to develop new technology. However, as new noise reduction technologies emerge they do ensure that new aircraft continue to meet increasingly quieter standards within the bounds of what is technologically feasible and economically reasonable.

Noise Abatement

The FAA is also supporting multiple efforts to identify means to abate noise through changes in how aircraft are operated in the airspace over communities. In the immediate vicinity of an airport, use of voluntary noise abatement departure procedures (NADP) has been a longstanding technique available to reduce noise. Recent research is examining the effectiveness of these procedures and identifying means of improving their use.

As the FAA works to modernize the National Airspace System, new aircraft flight procedures have been designed to take advantage of PBN technologies. To better understand both the environmental benefits and challenges posed by PBN, the FAA is working to re-examine ways to routinely consider noise during flight procedure design. This effort includes an exploration of how PBN can better control flight paths and move them away from noise-sensitive areas, how changes in aircraft performance could be safely managed to reduce noise, and how systematic departure flight track dispersion can be implemented to abate noise concerns.

In a recent partnership with the Massachusetts Port Authority (Massport) and MIT, the FAA jointly contributed to research considering how Area Navigation (RNAV) PBN procedures could be designed and implemented to reduce noise. Multiple concepts were explored that highlighted how collaborations between the FAA, airport operators, and community members can produce innovative noise abatement strategies.

A recently completed analysis of operational procedures that resulted from the Massport-MIT–FAA partnership shows that for modern aircraft on departure, changes in aircraft climb speed have minimal impact on the overall aircraft departure noise. The current best practice for NADP, using International Civil Aviation Organization distant community or

[26] See FAA Order 1050.1F, *Environmental Impacts: Policies and Procedures,* Appendix B, paragraph B–1.6; *1050.1F Desk Reference,* Section 11.4.

[27] FAA, 2020, Report to Congress: FAA Reauthorization Act of 2018 (Pub. L. 115–254) Section 188 and Sec 173, *https://www.faa.gov/about/plans_reports/congress/media/Day-Night_Average_Sound_Levels_COMPLETED_report_w_letters.pdf.*

[28] See, for example, information on the FAA's ''Continuous Lower Energy, Emissions, and Noise'' (CLEEN) Program at: *https://www.faa.gov/about/office_org/headquarters_offices/apl/research/aircraft_technology/cleen/.*

''*NADP–2*'' departure procedure, has been shown to minimize modeled noise impacts. This analysis also shows that for modern aircraft on arrival, changes in approach airspeed could have a noticeable impact (reductions of 4–8 dBA) on the overall aircraft noise at relatively large distances from touching down (between 10 and 25 nautical miles from the runway). While NADP procedures have the potential to reduce community noise, they may also have implementation challenges that will need to be overcome. Research is ongoing at MIT to address these challenges.[29]

In addition to airplane operations, the FAA is also examining the potential for helicopter noise abatement through changes in operational procedures. The FAA has partnered with the Volpe Center, the National Aeronautics and Space Administration, the Pennsylvania State University, and operator organizations to explore new ways to safely fly rotorcraft while also reducing noise through the Fly Neighborly Program.[30]

Noise Mitigation Research

Noise mitigation is the effort to take actions to reduce the impact of aircraft noise exposure that occurs. The primary mitigation strategies involve encouraging responsible land use planning in airport communities and, where appropriate, the application of sound insulation treatments to eligible homes or other noise-sensitive public buildings (*e.g.,* schools or hospitals). In extreme cases where sound insulation technologies cannot provide adequate mitigation, the acquisition of residential homes and conversion to non-residential land use is also an option.

As sound insulation treatment costs have continued to rise and new research on the human impacts from noise becomes available, the FAA is exploring the cost-benefit calculus of existing noise mitigation strategies and technologies in order to better direct where and how limited mitigation resources should be applied. Recent academic research [31] and internal assessments have raised questions about the benefits of sound insulation relative to the costs. While the relative benefits of sound insulation for noise exposures above DNL 65dB will depend on the individual home treatment costs, minimal benefit can be expected for sound insulation treatments applied for noise exposures below DNL 65dB.

Aircraft Noise Policy Background

Community response to noise has historically been a primary factor underlying the FAA's noise-related policies, including the establishment of DNL 65 dB as the threshold of ''significant'' aircraft noise exposure. The FAA has been using a DNL of 65 dB as the basis for: (1) Setting the agency's policy goal of reducing the number of people exposed to significant aircraft noise; [32] (2) the level of aircraft noise exposure below which residential land use is ''normally compatible,'' as defined in regulations implementing the Aviation Safety and Noise Abatement Act of 1979,[33] and (3) the level of aircraft noise exposure below which noise impacts of FAA actions in residential areas are not considered ''significant'' under section 102(2)(C) of the National Environmental Policy Act of 1969.[34]

Research results, as reflected in the programs and studies described in this notice, will provide new information on how aircraft noise in communities near airports may be effectively managed and will inform future decision making on the FAA's aircraft noise policies.

However, as previously stated, the FAA will not make any determinations on implications from these emerging research results for FAA noise policies until it has carefully considered public and other stakeholder input, and assesses the factors behind any increases in community impacts from aircraft noise exposure. Unless and until any changes become effective, all existing FAA regulations, orders, and policies remain in effect. The FAA is committed to informing and involving the public, and to giving meaningful consideration to community concerns and views as the FAA makes aviation decisions that affect them.

Comments Invited

The FAA recognizes that a range of factors may be driving concerns due to aircraft noise. However, as outlined in this notice, a broad understanding of aircraft noise and its potential impacts is needed in order to better manage and reduce concerns from aviation noise.

The FAA is inviting comments on these concerns to assist the agency in assessing how resources should be directed to better understand and manage the factors underlying the concern from aircraft noise exposure.

Comments that focus on the questions listed below will be most helpful. The more specific the comments, the more useful they will be in the FAA's considerations.

(1) What, if any, additional investigation, analysis, or research should be undertaken in each of the following three categories as described in this notice:

- Effects of Aircraft Noise on Individuals and Communities;
- Noise Modeling, Noise Metrics, and Environmental Data Visualization; and
- Reduction, Abatement, and Mitigation of Aviation Noise?

(2) As outlined in this notice, the FAA recognizes that a range of factors may be driving the increase in annoyance shown in the Neighborhood Environmental Survey results compared to earlier transportation noise annoyance surveys—including survey methodology, changes in how commercial aircraft operate, population distribution, how people live and work, and societal response to noise. The FAA requests input on the factors that may be contributing to the increase in annoyance shown in the survey results.

(3) What, if any, additional categories of investigation, analysis, or research should be undertaken to inform FAA noise policy?

Authority: National Environmental Policy Act (NEPA) 42 U.S.C. 4321 *et. seq.*, Aviation Safety and Noise Abatement Act (ASNA) 49 U.S.C. 47501 et. *seq.*, Federal Aviation Act, 49 U.S.C. 44715.

Issued in Washington, DC.

Kevin Welsh,

Director, Office of Environment and Energy.

[FR Doc. 2021–00564 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–13–P

[29] *https://ascent.aero/project/analytical-approach-for-quantifying-noise-from-advanced-operational-procedures/, https://ascent.aero/project/aircraft-noise-abatement-procedure-modeling-and-validation/.*

[30] *https://www.rotor.org/initiatives/fly-neighborly.*

[31] Wolfe, Malina, Barrett & Waitz 2016, Cost and benefits of US Aviation noise land-use policies, Transportation Research Part D.

[32] See ''Aviation Environmental and Energy Policy Statement,'' 77 FR 43137, 43138 (July 23, 2012), available on the FAA website at [URL]. The ''noise goal'' identified in this document includes ''[r]educ[ing] the number of people exposed to significant noise around U.S. airports.''

[33] 49 U.S.C. 47502. The regulations implementing this section are codified at 14 CFR part 150.

[34] 49 U.S.C. 4332(2)(C). See FAA Order 1050.1F, ''Environmental Impacts: Policies and Procedures'' (2015), Exhibit 4–1. The significance threshold for noise used for NEPA purposes in FAA Order 1050.1F is also used by the FAA for determining significant adverse noise effects under 49 U.S.C. 47106(c)(1)(B) for airport development projects involving the location of an airport or runway or a major runway extension. See 80 FR 44209, 44223 (July 24, 2015) (preamble to FAA Order 1050.1F).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Release Airport Property; Brooksville-Tampa Bay Regional Airport, Brooksville, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Request for public comment.

SUMMARY: The FAA hereby provides notice of intent to release approximately 17.94 acres of airport property at the Brooksville-Tampa Bay Regional Airport, Brooksville, FL, from the terms, conditions, reservations, and restrictions as contained in federal grant assurances. The release of property will allow the Hernando County Board of Commissioners to dispose of the property for other than aeronautical purposes. The property is located north of the airfield on the south side of Spring Hill Drive, Brooksville, Florida. The parcel is currently designated as aeronautical land use. The property will be released of its federal obligations for the relocation and consolidation of the Hernando County government headquarter facilities. The fair market value of the parcel has been determined to be $1,794,000.

DATES: Comments are due on or before February 12, 2021.

ADDRESSES: Documents are available for review at Brooksville-Tampa Bay Regional Airport, 15800 Flight Path Drive, Brooksville, Florida 34604; and the FAA Airports District Office, 8427 SouthPark Circle, Suite 524, Orlando, FL 32819–9058. Written comments on the Sponsor's request must be delivered or mailed to: Jenny Iglesias-Hamann, Community Planner, Orlando Airports District Office, 8427 SouthPark Circle, Suite 524, Orlando, FL 32819–9058. Documents reflecting the Sponsor's request are available for inspection by appointment only at the Brooksville-Tampa Bay Regional Airport and by contacting the FAA at the address listed above.

FOR FURTHER INFORMATION CONTACT: Jenny Iglesias-Hamann, Community Planner, Orlando Airports District Office, 8427 SouthPark Circle, Suite 524, Orlando, FL 32819–9058.

SUPPLEMENTARY INFORMATION: Section 125 of The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR–21) requires the FAA to provide an opportunity for public notice and comment prior to the ''waiver''

or ''modification'' of a sponsor's Federal obligation to use certain airport land for non-aeronautical purposes.

Issued in Orlando, Florida, on January 8, 2021.

Bartholomew Vernace,

Manager, Orlando Airports District Office, Southern Region.

[FR Doc. 2021–00497 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA–2020–1159]

Agency Information Collection Activities: Requests for Comments; Clearance of a Renewed Approval of Information Collection: Commercial Space Transportation Reusable Launch Vehicle and Reentry Licensing Regulation

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, FAA invites public comments about our intention to request the Office of Management and Budget (OMB) approval to renew an information collection. The information is used to determine if applicants satisfy requirements for renewing a launch license to protect the public from risks associated with reentry operations.

DATES: Written comments should be submitted by March 15, 2021.

ADDRESSES: Please send written comments:

By Electronic Docket: www.regulations.gov (Enter docket number into search field).

By mail: Charles Huet, 800 Independence Avenue SW, Room 331, Washington, DC 20591.

By fax: 202–267–5463.

FOR FURTHER INFORMATION CONTACT: Charles Huet by email at: *Charles.huet@faa.gov;* phone: 202–267–7427.

SUPPLEMENTARY INFORMATION:

Public Comments Invited: You are asked to comment on any aspect of this information collection, including (a) Whether the proposed collection of information is necessary for FAA's performance; (b) the accuracy of the estimated burden; (c) ways for 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: 2120–0643.

Title: Commercial Space Transportation Reusable Launch Vehicle and Reentry Licensing Regulation.

Form Numbers: There are no FAA forms associated with this collection.

Type of Review: Renewal of an information collection.

Background: The data is necessary for a U.S. citizen to apply for and obtain a reusable launch vehicle (RLV) mission license or a reentry license for activities by commercial or non-federal entities (that are not done by or for the U.S. Government) as defined and required by 49 U.S.C., Subtitle IX, Chapter 701, formerly known as the Commercial Space Launch Act of 1984, as amended. The information is needed in order to demonstrate to the FAA Office of Commercial Space Transportation (FAA/AST) that the proposed activity meets applicable public safety, national security, and foreign policy interests of the United States.

Respondents: Approximately 5 reusable launch vehicle or reentry vehicle operators.

Frequency: Information is collected on occasion.

Estimated Average Burden per Response: 1,127 hours.

Estimated Total Annual Burden: 4,507 hours.

Issued in Washington DC.

Kelvin Coleman,

Deputy Associate Administrator, Commercial Space Transportation, Federal Aviation Administration.

[FR Doc. 2021–00481 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Final Federal Agency Actions on Proposed Highway in California

AGENCY: Federal Highway Administration (FHWA), Department of Transportation (DOT).

ACTION: Notice of Limitation on Claims for Judicial Review of Actions by the California Department of Transportation (Caltrans).

SUMMARY: The FHWA, on behalf of Caltrans, is issuing this notice to announce actions taken by Caltrans that are final. The actions relate to a proposed highway project, Interstate 10 at PM R53.9/R55.5 in the City of Indio, in Riverside County, State of California. Those actions grant licenses, permits, and approvals for the project.

DATES: By this notice, the FHWA, on behalf of Caltrans, is advising the public

of final agency actions subject to 23 U.S.C. 139(l)(1). A claim seeking judicial review of the Federal agency actions on the highway project will be barred unless the claim is filed on or before June 14, 2021. If the Federal law that authorizes judicial review of a claim provides a time period of less than 150 days for filing such claim, then that shorter time period still applies.

FOR FURTHER INFORMATION CONTACT: For Caltrans: Renetta Cloud, Chief, Environmental Studies ''A'', Caltrans District 8, 464 W 4th Street, 6th Floor, MS–823, San Bernardino, CA, 92401–1400, Office Hours: 9:00 a.m. to 4:00 p.m., Office Phone: (909) 383–6323, Email: *Renetta.Cloud@dot.ca.gov.* For FHWA: David Tedrick at (916) 498–5024 or email *david.tedrick@dot.gov.*

SUPPLEMENTARY INFORMATION: Effective July 1, 2007, the FHWA assigned, and the Caltrans assumed, environmental responsibilities for this project pursuant to 23 U.S.C. 327. Notice is hereby given that the Caltrans has taken final agency actions subject to 23 U.S.C. 139(l)(1) by issuing licenses, permits, and approvals for the following highway project in the State of California: Reconstruct and widen Monroe Street at Interstate 10 (I–10) to improve the operational performance of the Monroe Street interchange. The Monroe Street interchange is on I–10 at Post Mile (PM) Revised (R) 54.7, between PM R53.9 (approximately 2 miles east of the Jefferson Street interchange) and PM R55.5 (approximately 1 mile west of the Jackson Street interchange). The project site is centrally located within the City of Indio at the crossroad of I–10, Monroe Street, and the Coachella Valley Stormwater Channel (CVSC) in Riverside County, California. The proposed project will reconstruct Monroe Street at the interchange, including the existing on- and off-ramps, the Monroe Street I–10 overcrossing, and the bridge over the CVSC. The proposed project will also add an auxiliary lane in the eastbound direction between the Monroe Street and Jackson Street interchange, acceleration/deceleration lanes at the westbound Monroe Street on- and off-ramps, and a deceleration lane at the eastbound Monroe Street off-ramp. The actions by the Federal agencies, and the laws under which such actions were taken, are described in the Final Environmental Assessment (EA)/Finding of No Significant Impact (FONSI) for the project, approved on December 18, 2020, and in other documents in the FHWA project records. The EA/FONSI, and other project records are available by contacting Caltrans at the addresses provided above.

This notice applies to all Federal agency decisions as of the issuance date of this notice and all laws under which such actions were taken, including but not limited to:

1. Council on Environmental Quality regulations;
2. National Environmental Policy Act (NEPA);
3. Moving Ahead for Progress in the 21st Century Act (MAP–21);
4. Americans with Disabilities Act;
5. Department of Transportation Act of 1966;
6. Federal Aid Highway Act of 1970;
7. Clean Air Act Amendments of 1990;
8. Noise Control Act of 1970;
9. 23 CFR part 772 FHWA Noise Standards, Policies and Procedures;
10. Department of Transportation Act of 1966, Section 4(f);
11. Clean Water Act of 1977 and 1987;
12. Safe Drinking Water Act;
13. Executive Order 12088, Federal Compliance with Pollution Control;
14. Flood Disaster Protection Act;
15. Executive Order 11988, Floodplain Management
16. Federal Endangered Species Act of 1973;
17. Migratory Bird Treaty Act;
18. Fish and Wildlife Coordination Act;
19. Executive Order 11990, Protection of Wetlands;
20. Executive Order 13112, Invasive Species;
21. Antiquities Act of 1906;
22. National Historic Preservation Act of 1966, as amended;
23. Historic Sites Act of 1935;
24. Farmland Protection Policy Act;
25. Resource Conservation and Recovery Act of 1976;
26. Comprehensive Environmental Response, Compensation and Liability Act of 1980;
27. Toxic Substances Control Act;
28. Community Environmental Response Facilitation Act of 1992;
29. Occupational Safety and Health Act;
30. Executive Order 12898, Federal Actions to Address Environmental Justice and Low-Income Populations; and
31. Title VI of the Civil Rights Act of 1964.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Authority: 23 U.S.C. 139(l)(1).

Issued on: January 7, 2021.

Rodney Whitfield,

Director, Financial Services, Federal Highway Administration, California Division.

[FR Doc. 2021–00507 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–RY–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket No. MARAD–2020–0133]

Collecting Proposals for Future Use of the Historic Vessel NS Savannah

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice and request for comments.

SUMMARY: The Maritime Administration (MARAD) plans to provide for the use or disposition of the historic vessel, the Nuclear Ship NS *Savannah,* once decommissioning of the ship's nuclear reactor is completed. Due to the vessel's historic importance and the requirements of the National Historic Preservation Act (NHPA), MARAD is publishing this notice to solicit the public's views regarding MARAD's proposed uses for the *Savannah* and provide the public the opportunity to submit any alternative uses.

DATES: Comments must be received on or before March 15, 2021. MARAD will consider comments filed after this date to the extent practicable.

ADDRESSES: You may submit comments identified by DOT Docket Number MARAD–2020–0133 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Search MARAD–2020–0133 and follow the instructions for submitting comments.
- *Email: Rulemakings.MARAD@dot.gov.* Include MARAD–2020–0133 in the subject line of the message and provide your comments in the body of the email or as an attachment.
- *Mail or Hand Delivery:* Docket Management Facility is in the West Building, Ground Floor of the U.S. Department of Transportation. The Docket Management Facility location address is: U.S. Department of Transportation, MARAD–2020–0133, 1200 New Jersey Avenue SE, West Building, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except on Federal holidays.

Note: If you mail or hand-deliver your comments, we recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your

document so that we can contact you if we have questions regarding your submission.

Instructions: All submissions received must include the agency name and specific docket number. All comments received will be posted without change to the docket at *www.regulations.gov,* including any personal information provided. For detailed instructions on submitting comments, see the section entitled Public Participation.

FOR FURTHER INFORMATION CONTACT: Erhard W. Koehler, (202) 680–2066 or via email at *marad.history@dot.gov.* Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 to contact the above individual during business hours. The FIRS is available twenty-four hours a day, seven days a week, to leave a message or question. You will receive a reply during normal business hours. You may send mail to Department of Transportation, Maritime Administration, Office of Chief Counsel, Division of Legislation and Regulations, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590–0001.

SUPPLEMENTARY INFORMATION:

Background

Built in 1959, the NS *Savannah* was the world's first nuclear-powered commercial vessel and served as a signature element of President Eisenhower's Atoms for Peace program. While in service, the *Savannah* demonstrated the peaceful use of atomic power as well as the feasibility of nuclear-powered merchant vessels. The vessel was retired from active service in 1970 and was registered as a National Historic Landmark in 1991. MARAD has already defueled the nuclear reactor of the *Savannah* and, as part of the decommissioning process for the vessel, is removing the remaining systems, structures, and components that were part of the ship's nuclear power plant. The *Savannah* is currently part of the National Defense Reserve Fleet (NDRF) in retention status; once the nuclear power plant is fully decommissioned, MARAD is anticipating future uses for the un-powered vessel pursuant to one of several options allowed by law. Disposition will be guided by all law applicable to the selection process and dispositional alternative selected.

These future uses may constitute an undertaking under Section 106 of the National Historic Preservation Act of 1966 (54 U.S.C. 300101 *et seq.*). The historic preservation review process mandated by Section 106 of the Act is outlined in 36 CFR part 800 ''Protection of Historic Properties'' issued by the Advisory Council on Historic Preservation. Pursuant to 36 CFR part 800.2(d)(2), agencies must provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. In light of this obligation, comments received will inform MARAD's review of the options described in this notice and allow commenters an opportunity to present alternatives that MARAD has not included. As such, this request for comments is narrowly focused on what MARAD should do with the *Savannah* once the nuclear power plant is fully decommissioned.

Accordingly, MARAD has identified two general categories of options: (1) Maintaining the vessel intact or (2) dismantling the vessel. MARAD has an interest in preserving the Nation's maritime history and envisions that any options keeping the *Savannah* intact would seek to promote this interest. Should the *Savannah* be maintained, the vessel could be maintained by a member of one of three broad groups. First, the vessel could be controlled by an agency of the Federal government; second, the vessel could be controlled by an entity outside of the Federal government; third, the vessel could be controlled by a public-private partnership between members inside and outside of the Federal government.

One possible outcome for retaining the *Savannah* would be for MARAD to continue its current control over the vessel but open it for presentation to the public as a museum ship in order to honor its historical importance. This option would implicate MARAD's ability to acquire proper funding to ensure the feasibility of such a project.

A similar option would be for MARAD to initiate consultation with other Federal agencies surrounding the retention of the *Savannah.* Should the *Savannah* be displayed by the Federal agency, the missions and competencies of the agency should ideally align with MARAD's goal of using the *Savannah* to preserve and showcase America's maritime and nuclear history. For that reason, and for example, MARAD has considered entering into consultation with either the Smithsonian Institution, which has a substantial history of showcasing items of important historical value to the public, or the National Park Service within the Department of the Interior, which has broad experience in preserving and managing National Historic Landmarks through its National Park Service. MARAD might also provide the *Savannah* to a Federal agency for use as a maritime training platform or for other Federal purposes consistent with preservation of the vessel. Such consultation might result in agreement involving MARAD transferring the *Savannah* to the other Federal entity, where the vessel would then become a component of a museum system or a cooperative agreement under which MARAD would negotiate a division of responsibilities over the maintenance and operation of the vessel, with the other entity providing its expertise in converting the *Savannah* to and operating it as a museum with MARAD's provision of technical advice.

If MARAD decides not to transfer the *Savannah* to another entity of the Federal government but still wishes that it be maintained due to its historical importance, MARAD may seek to transfer the vessel to a party outside of the Federal government in one of three ways.

First, MARAD might dispose of the *Savannah* by donating the vessel. MARAD has the existing statutory authority to donate the *Savannah* to a non-profit organization, State, or subdivision of a State that can demonstrate a willingness and financial capacity to operate the vessel. Should an eligible party apply and meet these requirements, MARAD would then have the discretion to donate the *Savannah* to that applicant. MARAD also has the authority to, upon request, donate suitable vessels to State maritime academies for training uses to complement primary reliance on the new class of National Security Multi-mission Vessels as training platforms. Subject to MARAD's assurance that the recipient would properly preserve the vessel, the *Savannah* could, if found suitable, be thus used for training purposes if an application is made by a State maritime academy.

Second, MARAD also has the authority to charter the *Savannah* to any party on the basis of competitive sealed bids. Parties wishing to charter the *Savannah* must comply with the applicable statutory provisions, particularly around the requirement that MARAD dismiss any bid that does not reach a minimum threshold.

Third, MARAD might attempt to manage the *Savannah* under a public-private partnership. Public-private partnerships can fall into two general categories. The first involves retention of the *Savannah* by an entity that could be created by Congress specifically to receive and maintain the vessel. Such an entity could include a trust, a government corporation, or a non-profit organization. As this option would require a future act of Congress to create

the entity in question, the entity's exact contours would need to be determined. Ideally, this entity would manage the *Savannah* in such a way as to be financially self-sufficient.

The second type of public-private partnership would involve a contractual partnership with an outside group. MARAD might attempt to enter into agreements with outside groups, where the recipient group would operate and maintain the vessel and MARAD would provide assistance.

Finally, besides maintaining the *Savannah* intact, MARAD might transfer the vessel for use in a man-made reefing project or dismantle it. First, MARAD has the authority to transfer the *Savannah* to a requesting state or a foreign country for that state or foreign country to sink and use it as an artificial reef. Should MARAD grant the state or foreign country's application, the *Savannah* would be sunk and its remnants would be used for the conservation of marine life. The other permanent disposal method that MARAD could consider is to dismantle the ship. MARAD would enter into a contract with an approved ship recycler to dismantle the ship If the contract resulted in a sale of the vessel, any proceeds would revert to statutory programs supporting the National Defense Reserve Fleet, maritime education, and maritime historic preservation and educational programs. The options of artificial-reef use or dismantlement are the least favored because the National Historic Preservation Act strongly favors the preservation of National Historic Landmarks like the *Savannah* whenever possible. This notice seeks comments to inform MARAD's choice over which of these uses or dispositions to pursue as well as provide an opportunity for the suggestion of any other options that have not been mentioned. As part of our review, MARAD is issuing this notice to engage the public and the broad spectrum of stakeholders that may be affected by a given disposition of the *Savannah.* Information received will be used to evaluate the future of the *Savannah* and help to determine which option to pursue.

Scope of Comments

MARAD is interested in learning the public's opinion regarding the future of the *Savannah* and which option presented, if any, is preferred. MARAD is also interested in hearing any unmentioned option. Commenters who seek to suggest new alternatives should note that at the highest level, MARAD's fundamental choice is to either dismantle the *Savannah* or leave it intact; however, leaving the ship intact would, by statute, require the vessel to be put to some other use. Accordingly, commentators may want to focus on the following: (1) Additional uses for the *Savannah* that MARAD has not mentioned if the ship were to be maintained; (2) potential owners or operators of the *Savannah* to carry out these additional uses; and (3) any additional uses for the remnants of the ship if the ship were to be dismantle.

Content of Comments

We are interested in information on the public's view of the presented disposal options for the *Savannah* and any other feasible alternatives. If the commenter believes that there is a viable option that MARAD has not considered, the commenter should describe that option in detail.

Under this notice, MARAD is not soliciting petitions for rulemaking.

Public Participation

How do I submit comments?

Please submit your comments, including the attachments, following the instructions provided under the above heading entitled **ADDRESSES**. Be advised that it may take a few hours or even days for your comment to be reflected on the docket. In addition, your comments must be written in English. We encourage you to provide concise comments and you may attach additional documents as necessary. There is no limit on the length of the attachments.

Please note that even after the comment period has closed, MARAD will continue to file relevant information in the Docket as it becomes available.

Where do I go to read public comments, and find supporting information?

Go to the docket online at *http://www.regulations.gov.,* keyword search MARAD–2020–0133 or visit us in person at the Docket Management Facility (see **ADDRESSES** for hours of operation). We recommend that you periodically check the Docket for new submissions and supporting material.

Will my comments be made available to the public?

Yes. Be aware that your entire comment, including your personal identifying information, will be made publicly available.

May I submit comments confidentially?

If you wish to submit comments under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information, to the Department of Transportation, Maritime Administration, Office of Legislation and Regulations, MAR–225, W24–220, 1200 New Jersey Avenue SE, Washington, DC 20590. Include a cover letter setting forth with specificity the basis for any such claim and, if possible, a summary of your submission that can be made available to the public.

Privacy Act

DOT posts comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

(Authority: 49 CFR Sections 1.92 and 1.93)

* * * * *

Dated: January 8, 2021.

By Order of the Maritime Administrator.

T. Mitchell Hudson, Jr.

Secretary, Maritime Administration.

[FR Doc. 2021–00527 Filed 1–12–21; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2020–0119]

Notice Regarding the Applicability of NHTSA FMVSS Test Procedures to Certifying Manufacturers

Correction

In notice document 2020–28107 appearing on pages 83143–83152 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83143, in the second column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–28107 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2019–0105]

Denial of Motor Vehicle Defect Petition

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Denial of petition for a defect investigation.

SUMMARY: This notice sets forth the reasons for the denial of a petition submitted on December 19, 2019, by Mr. Brian Sparks to NHTSA's Office of Defects Investigation (ODI). The petition requests that the Agency recall Tesla vehicles for an unidentified defect that allegedly causes sudden unintended acceleration (SUA). NHTSA opened Defect Petition DP20–001 to evaluate the petitioner's request. After reviewing the information provided by the petitioner and Tesla regarding the alleged defect and the subject complaints, NHTSA has concluded that there is insufficient evidence to warrant further action at this time. Accordingly, the Agency has denied the petition.

FOR FURTHER INFORMATION CONTACT: Mr. Ajit Alkondon, Vehicle Defects Division—D, Office of Defects Investigation, NHTSA, 1200 New Jersey Ave. SE, Washington, DC 20590 (telephone 202–366–3565).

SUPPLEMENTARY INFORMATION:

1.0 Introduction

Interested persons may petition NHTSA requesting that the Agency initiate an investigation to determine whether a motor vehicle or item of replacement equipment does not comply with an applicable motor vehicle safety standard or contains a defect that relates to motor vehicle safety. 49 U.S.C. 30162; 49 CFR part 552. Upon receipt of a properly filed petition the Agency conducts a technical review of the petition, material submitted with the petition, and any additional information. 49 U.S.C. 30162(c); 49 CFR 552.6. After considering the technical review and taking into account appropriate factors, which may include, among others, allocation of Agency resources, Agency priorities, and the likelihood of success in litigation that might arise from a determination of a noncompliance or a defect related to motor vehicle safety, the Agency will grant or deny the petition. 49 U.S.C. 30162(d); 49 CFR 552.8.

2.0 Petition

2.1 Petition Chronology

Mr. Brian Sparks (the petitioner) first submitted a valid petition conforming to the requirements of 49 CFR 552.4 on December 19, 2019.[1] On December 30, 2019, the petitioner submitted an addendum to his petition. This addendum references NHTSA complaint 11291423, which alleges unexpected movement of a vehicle that was parked and unoccupied.

On January 13, 2020, the Office of Defects Investigation (ODI) opened Defect Petition DP20–001 to evaluate the petitioner's request for a recall of all Tesla Model S, Model X, and Model 3 vehicles produced to date based on the information in his correspondence, petition and various addendums. On February 21, 2020, the petitioner submitted another addendum to his petition, identifying 70 new incidents of alleged SUA in NHTSA complaints (also known as Vehicle Owner Questionnaires, or VOQs) filed since DP20–001 was opened. Additional addendums updating VOQ counts were submitted on April 10, 2020, June 22, 2020, September 10, 2020 and December 1, 2020. The June 22 submission included a request to update the petition ''to include a recent analysis of Tesla's SUA defect from Dr. Ronald Belt.''

2.2 Petition Basis

Altogether, the petitioner identified a total of 232 VOQs involving unique alleged SUA incidents in his submissions, including 203 reporting crashes.[2] The petitioner also submitted a document purporting to analyze Event Data Recorder (EDR) data from the incident reported in NHTSA VOQ 11216155. The petitioner believes that ''Tesla vehicles have a structural flaw which puts their drivers and the public at risk'' and bases his request for a recall of the subject vehicles on:

1. His view that, ''The volume of complaints in the NHTSA database indicates a severe and systemic malfunction within Tesla vehicles;''

2. A third-party analysis of data from the crash reported in VOQ 11206155, which theorizes a fault condition that allegedly ''caused the brake pedal to behave like an accelerator pedal;'' and

3. A complaint (VOQ 11291423) alleging SUA while the driver was outside the vehicle, which the petitioner describes as ''the first SUA complaint involving a Tesla vehicle in which the driver cannot reasonably be accused of pressing the accelerator.''

3.0 Analysis

ODI performed the following analyses in its evaluation of the petition for a grant or deny decision:

1. Analyzed crashes identified by petitioner for connection to SUA;

2. Analyzed EDR or Tesla vehicle log data or both from 118 crash incidents;[3]

3. Reviewed the crash incident reported in VOQ 11206155;

4. Reviewed the crash incidents reported in VOQ 11291423;

5. Reviewed Tesla's system safeguards for the accelerator pedal position sensor (APPS) assembly and motor control system;

6. Reviewed two defect theories referenced in the petition;

7. Reviewed the brake system designs for the subject vehicles; and

8. Reviewed service history information for the accelerator pedal assemblies, motor control systems, and brake systems for 204 of the 232 vehicles identified in VOQs submitted by the petitioner.[4]

3.1 Crash Classification

ODI's crash analysis reviewed 217 incidents, including the 203 crashes identified by the petitioner and fourteen additional crashes reported in VOQs that were either not selected by the petitioner (eight) or were submitted after the petitioner's most recent submission (six).

Table 1 provides a breakdown of the driving environments and crash data review for the crashes analyzed by ODI. Crash data (EDR, Tesla log data, and/or video data) were reviewed for 118 of the crash incidents. Crash data were not obtained for most of the incidents received after DP20–001 was opened.

[1] The petitioner first raised concerns about SUA in Tesla vehicles in September 2019 correspondence with the Agency. NHTSA did not consider this earlier correspondence to be a validly submitted petition because the petitioner did not provide his name and address. *See* 49 CFR 552.4. The September 2019 letter cited 110 incidents of alleged SUA in complaints to NHTSA, including 102 reporting crashes. NHTSA has included the information in petitioner's September 2019 correspondence in the Agency's analysis of the petition.

[2] The petitioner identified a total of 225 VOQ in the original petition and five addendums. Six of the VOQs are duplicative of a prior VOQ.

[3] This information was not available or not obtained for the remaining crash incidents, as detailed below.

[4] ODI's information request letter for DP20–001 requested crash data and service history information for all 124 VOQs cited in the original petition and the first two addendums submitted by the petitioner. On February 10, 2020 and October 20, 2020, ODI requested certain supplemental information for a total of 83 additional VOQs alleging crashes, including 80 that were cited in addendums submitted by the petitioner.

TABLE 1—SUMMARY OF CRASH INCIDENTS REVIEWED BY ODL

Category	Crash data reviewed	Crash data not available	Crash data not obtained	Total
Parking lot	61	44	9	114
Driveway	26	16	4	46
Traffic light	11	7	2	20
Parking garage	7	5	1	12
City traffic	3	1	0	4
Stop-and-go traffic	2	2	0	4
Highway traffic	2	1	1	4
Stop sign	2	1	0	3
Charging station	1	1	1	3
Street side parking	1	1	0	2
Drive thru	1	0	1	2
School drop-off lane	1	0	0	1
Car wash	0	1	0	1
Gated exit (China incident)	0	1	0	1
Total	118	80	19	217

Six of the crashes reported by the petitioner were assessed by ODI as unrelated to SUA. These include all four of the crashes occurring in highway traffic, one crash at a traffic light and one of the driveway crashes. The highway crashes include two involving loss of lateral control due to apparent loss of rear tire grip while driving in the rain (VOQs 11297507 and 11307255), one involving late braking for the cut-in of a slower moving vehicle (VOQ 11278322), and one for which the crash data do not support the allegation and show no evidence of speed increase or failure to respond to driver inputs (VOQ 11174732). The crash at a traffic light involved unexpected movement of a vehicle operating with Traffic Aware Cruise Control enabled after the vehicle had come to a stop behind another vehicle at a red light (VOQ 11307023). The driveway crash incident will be reviewed later in this report (VOQ 11291423).

All of the remaining 211 crashes, assessed by ODI as related to SUA, occurred in locations and driving circumstances where braking is expected. Eighty-six (86) percent of these crashes occurred in parking lots, driveways or other close-quarter ''not-in-traffic'' locations. Almost all of these crashes were of short duration, with crashes occurring within three seconds of the alleged SUA event.

3.2 SUA Crash Data Analysis

ODI's analysis of EDR data, log data or both from 118 crashes did not identify any evidence of a vehicle-based cause of unintended acceleration or ineffective brake system performance in the subject vehicles. The data shows that vehicles responded as expected to driver accelerator and brake pedal inputs, accelerating when the accelerator pedal is applied, slowing when the accelerator pedal is released (generally in regenerative braking mode) and slowing more rapidly when the brake is applied. ODI did not observe any incidents with vehicle accelerations or motor torques that were not associated with accelerator pedal applications. In the few cases where the brake and accelerator pedal were applied at the same time, the brake override logic performed as designed and cut motor torque.

The data clearly point to pedal misapplication by the driver as the cause of SUA in these incidents. Analysis of log data shows that the accelerator pedal was applied to 85 percent or greater in 97 percent of the SUA crashes reviewed by ODI. Peak accelerator pedal applications were initiated within two seconds of the collisions in 97 percent of the cases. Analysis of brake data showed no braking in 90 percent of SUA crashes and late braking initiated less than one second before impact in the remaining 10 percent. The pre-crash event data and driver statements indicate that the SUA crashes have resulted from drivers mistakenly applying the accelerator pedal when they intended to apply the brake pedal. Approximately 51 percent of the crashes occurred in the first six months of the driver's use of the incident vehicle.

3.3 VOQ 11206155

3.3.1 Consumer's Description of the Event

NHTSA complaint 11206155 alleges that a 2018 Tesla Model 3 experienced an SUA event resulting in a crash in the owner's driveway on the evening of May 6, 2019. The complaint states that:

''*[The driver] turned into [the driver's] driveway and was going to pull into [her] garage to park the car, when the car accelerated suddenly and violently and crashed into the front stone wall of [the] house. The stone wall is damaged and the front right side of the Tesla has significant damages.*''

The petitioner referenced the incident reported in VOQ 11206155 in the first addendum to the petition,[5] which included a third-party analysis of EDR data from the crash. ODI requested a copy of the EDR data in the petition acknowledgement letter. In response, the petitioner provided an incomplete copy of the EDR, a copy of a letter Tesla sent to the consumer, and a document prepared by the driver that provides additional details about the SUA allegation.[6] The driver alleges that the SUA event occurred after the vehicle was ''slowed to a halt'' and while the driver was ''waiting for the garage door to fully open.''

3.3.2 Tesla Letter to the Consumer

In a July 11, 2019 letter, Tesla provided the consumer with the following summary of its analysis of log data for the crash event reported in VOQ 11206155:[7]

''*According to the vehicle's diagnostic log, immediately prior to the incident, the accelerator pedal was released, regenerative braking was engaged and slowing the vehicle, and the steering wheel was turned to the right. Then, while the vehicle was traveling at approximately 5 miles per hour and the*

[5] Email from Brian Sparks to NHTSA Acting Administrator Owens, ''Motor Vehicle Defect Petition: Recall Tesla Vehicles Due to Sudden Unintended Acceleration,'' December 19, 2019.

[6] Email from Brian Sparks to ODI, ''Re_DP20–001 Acknowledgement Letter,'' February 21, 2020, attachment titled ''My Experiences with Tesla Model 3.''

[7] Tesla service manager, letter to the consumer, July 11, 2019.

steering wheel was turned sharply to the right, the accelerator pedal was manually pressed and over about one second, increased from approximately 0% to as high as 88%. During this time, the vehicle speed appropriately increased in response to the driver's manual accelerator pedal input. In the next two seconds, the accelerator pedal was released, the brake pedal was manually pressed, which also engaged the Anti-Lock Braking System, multiple crash-related alerts and signals were triggered, and the vehicle came to a stop.''

3.3.3 ODI Analysis of the Event

ODI's analysis of the subject crash event included reviews of vehicle log data, the EDR report furnished by the petitioner, statements from the driver, and a video of the incident provided by Tesla. This analysis confirmed the sequence of events described in Tesla's letter to the consumer. Figure 1 shows pre-crash vehicle speed and driver controls over the ten seconds prior to impact.

ODI's review of the vehicle log data shows that, approximately seven seconds before the crash, the vehicle is completing a right turn as the steering angle returns from a large positive value to neutral. Over the next second, the driver releases the accelerator pedal and the vehicle begins a moderate deceleration under regenerative braking. The vehicle begins to turn right toward the owner's driveway approximately five seconds before impact. Approximately two seconds before impact, as the vehicle nears the apex of the turn into the driveway, the accelerator pedal position begins to increase. The accelerator pedal increases from 0% to 88% in about one second.

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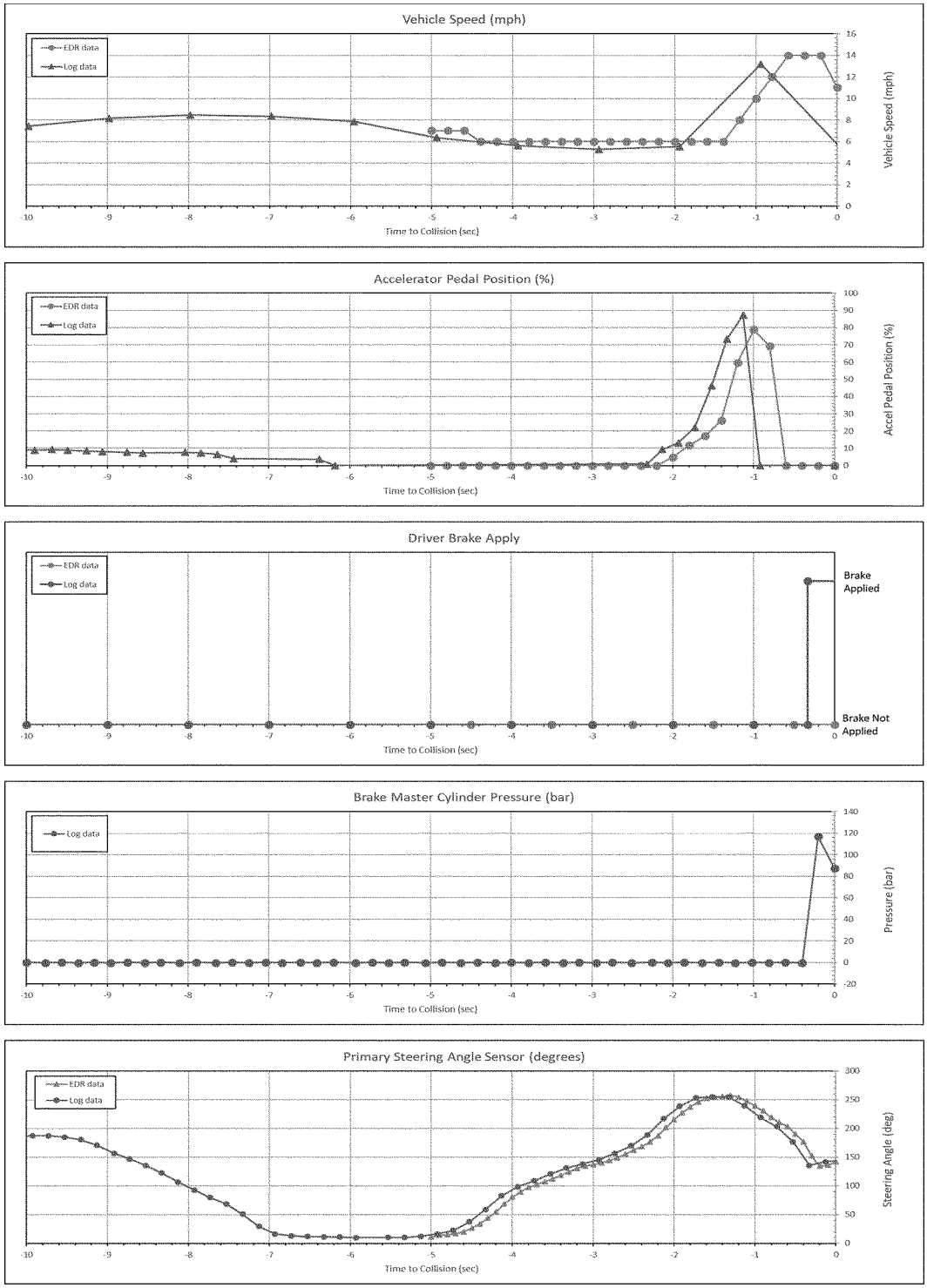

Figure 1. Pre-crash operator control data, from top-to-bottom: vehicle speed, accelerator pedal position, brake pedal application, brake master cylinder pressure, and steering angle.

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The accelerator pedal returns to 0% approximately 0.9 seconds before impact and the brake pedal is applied approximately 0.5 seconds later. The late brake application initiates ABS braking approximately 0.2 seconds before impact.

3.3.4 ODI Analysis of Event Video File

An event video file from the vehicle's front camera sensor shows the vehicle moving slowly on a residential street before beginning the right turn into a short driveway with a moderate positive grade leading to twin garage doors separated by a center pillar covered by stonework. The vehicle briefly surges forward as it nears the apex of the turn into the driveway. The vehicle never stops moving and continues to turn right until impacting the center pillar, consistent with the steering angle data

from the log and EDR data. The garage doors remain closed throughout the event.

3.3.5 ODI Analysis of EDR Data

The EDR vehicle speed, accelerator pedal position and steering angle data mirror the log data, within the range of expected variation due to differences in data resolution, sampling intervals and data latencies in the two data recording systems. For example, the vehicle speed data reported in the EDR report for the Model 3 has a resolution of 1 mph, a sampling frequency of 5 Hz, and a maximum latency of approximately 200 milliseconds, while the vehicle speed data recorded in the log data has a resolution of 0.05 mph, a logging rate of 1 Hz, and a maximum latency of approximately 10 milliseconds.

The EDR did not record the late brake application and subsequent ABS activation. The data log shows that the Restraint Control Module (RCM) echoed the brake application in the near deployment alert triggered by the impact, indicating that the EDR would be expected to show ''On'' for service brake status at impact. Tesla indicated it was unable to investigate the apparent discrepancy further without an original copy of the EDR report.[8]

ODI's reviews of EDR reports for this and several other Model 3 crash events noted that the polarity of the pre-crash longitudinal acceleration data appeared to be reversed in relation to vehicle speed data (*i.e.,* negative acceleration displayed when the vehicle speed is increasing and positive acceleration displayed when vehicle speed is decreasing).[9] Tesla confirmed that the longitudinal acceleration data polarity was reversed in Model 3 EDR reports produced using EDR reporting services of v20.2.1 or earlier. Tesla advised ODI that the error has been corrected in EDR reporting service update v20.29.1.

3.4 Analysis of Log Data for VOQ 11291423

VOQ 11291423 alleges multiple incidents of unexpected movement of a 2015 Model S after parking on an inclined driveway in Lancaster, California on December 26, 2019. The complaint states that:

''*[The] 2015 Model S 85D was reversed onto driveway then placed in park and doors were closed and locked. A few moments later the vehicle started accelerating forward towards the street and crashed into a parked car. Front wheels were receiving power while rear wheels where locked and dragging rather than wheels spinning. I reversed vehicle back onto driveway and it happened another 2 times after first incident within a 30 minute time span.*''

As previously noted, the petitioner's addendum cited this VOQ as an ''SUA complaint involving a Tesla vehicle in which the driver cannot reasonably be accused of pressing the accelerator.'' When interviewed by ODI, the owner stated that the vehicle was backed up an inclined driveway and parked. The driveway was covered with freshly fallen snow. Shortly after he shifted to ''park'' and exited the vehicle, the owner observed the vehicle move approximately two car lengths down the driveway.

The movement stopped when the vehicle reached the level surface of the street at the base of the driveway. The owner alleged the movement occurred two more times after the vehicle was backed up the driveway and parked in a similar position. The second incident involved a minor impact with a vehicle parked within a couple of feet of the Tesla, resulting in a crack in the front bumper of the second vehicle and no damage to the Tesla. The third incident was like the first, with the movement ending at the base of the inclined driveway.

ODI's review of log data from this vehicle found that the movement occurred when the vehicle was shutoff with no torque applied to the front or rear drive motors. Based on the log data and the physics of the vehicle movement from the driveway to the street, it is ODI's assessment that the unexpected movement of the parked vehicle was most likely caused by insufficient traction of the rear tires on the low-friction surface of the snow-covered driveway, which resulted in the vehicle sliding down the driveway. ODI has excluded this incident from its analysis of SUA crashes.

3.5 System Safeguards

The APPS system used in the subject Tesla vehicles has numerous design features to detect, and respond to, single point electrical faults, including: Redundant position sensors, contactless inductive sensing technology, independent power and ground connections to the sensors, and sensor voltage curves that differ by a fixed ratio.[10] All subject vehicles are equipped with accelerator pedal assemblies with two independent inductive sensors that convert the angular position of the pedal to voltage signals. The pedal position can only be changed in response to an external force being applied, such as the driver's foot.

The Drive Inverter main processor controls motor torque based on accelerator pedal voltage. A separate processor (Pedal Monitor) acts as a safety monitor, continually checking both APPS signals for faults and independently calculating motor torque. Any malfunction or deviation in the APPS system results in a fault mode, cutting torque to zero for driver pedal applications or regenerative braking. In addition, the Pedal Monitor can shut off the Drive Inverter if driver's commanded motor torque and actual motor torque do not match.

The APPS voltage signals pass through A/D (Analog/Digital) converters in the drive unit, which then reports the data to the Controller Area Network (CAN) communication bus.[11] The CAN data are time stamped and stored at specified intervals by the data log. The RCM receives the data from the drive unit via the CAN bus. The data is buffered in the RCM random access memory (RAM) and then written to the RCM Electrically Erasable Programmable Read-Only Memory (EEPROM)[12] in the event of a non-deploy or deployment event.

3.6 ODI Review of SUA Theories

As part of its evaluation of DP20–001, ODI reviewed two defect theories alleging vehicle-based causes of SUA in the subject vehicles. Both theories were developed by Dr. Ronald Belt, the first in 2018 and the second in 2020. A paper describing the most recent theory was submitted to NHTSA by the petitioner and is based upon Dr. Belt's review of EDR data from the crash reported in VOQ 11206155. The other theory was referenced by the consumer who submitted VOQ 11206155 and is based upon Dr. Belt's third-hand reconstruction of log data from an unknown SUA event. Both papers are based upon incorrect event data, incorrect reconstructions of event dynamics, and false assumptions regarding vehicle design factors.

3.6.1 2020 Theory (VOQ 11206155 SUA Event)

In an addendum to the petition submitted on June 22, 2020, the petitioner requested that NHTSA include a recent paper by Dr. Ronald

[8] This is the only event reviewed by ODI in this petition evaluation where the data log showed the brake was applied at T0 and the EDR did not.

[9] Acceleration (a) is the change in velocity (v) per unit time (t), or $a(T) = dv/dt$. When vehicle speed is increasing over a given time interval, the acceleration is positive in that interval.

[10] Second channel output voltage curve is half the slope of the first channel.

[11] The APPS data refresh rate is 10 milliseconds.

[12] The EEPROM is a non-volatile memory device that retains stored data after cycling power.

Belt in his petition.[13] The paper, dated June 1, 2020, claims to explain how a ''faulty brake light switch [caused] the brake pedal to behave like an accelerator pedal'' in the crash event reported in VOQ 11206155 that was reviewed earlier in this report (see section 3.3 VOQ 11206155). The same analysis alleges that the proposed theory ''is believed to be the cause of sudden acceleration in over 70% of Tesla vehicles.''

The SUA theory proposed by Dr. Belt in the June 2020 paper appears to have originated from his reliance on the pre-crash longitudinal acceleration data in the EDR report with the polarity issue recently corrected by Tesla (see section 3.3.5 ODI Analysis of EDR Data). Rather than recognizing the conflicts between the longitudinal acceleration data and other pre-crash data in the EDR report (*e.g.,* vehicle speed, rear motor speed and accelerator pedal position all increasing over the same time interval as the reported deceleration), Dr. Belt develops his reconstruction of the crash event using the inverted longitudinal acceleration data and posits a theory to explain how a faulty brake light switch can cause the brake pedal to function like an accelerator pedal. The theory relies upon numerous assumptions, including: A defective brake switch, a large positive torque request from the electronic stability control (ESC) system, an alternate explanation for the large accelerator pedal position increase shown in the pre-crash data, and an alleged veer to the left caused by the presumed ESC activation.

ODI does not believe that Dr. Belt's June 2020 paper provides a valid theory of an SUA defect in the subject incident or any other crash. The theory is based upon inaccurate event data and several false assumptions regarding component defects, vehicle dynamics, and motor control system design and operation. For example, ODI notes the following factual errors and mistaken assumptions contained the subject paper:

- The vehicle acceleration data used by Dr. Belt in his analysis was reported with the polarity reversed. In other words, the data shows the vehicle decelerating when it was accelerating and accelerating when it was decelerating. As shown in Figure 1, the vehicle first accelerates in response to a large accelerator pedal application, then decelerates in response to the late brake application that triggered ABS braking just prior to impact.[14]
- The evidence shows that the brake light switch functioned as designed in the event analyzed by Dr. Belt (see Figure 1).
- The ESC and Traction Control systems cannot request positive torque in the subject vehicles.
- The APPS data recorded in the EDR report and data log show the physical position of the accelerator pedal (see section 3.5 System Safeguards). There is no other source for the accelerator pedal data.
- The vehicle does not veer to the left at any point during the crash event (see Figure 1 and section 3.3.4 ODI Analysis of Event Video File).

3.6.2 2018 Theory (Unknown SUA Event)

ODI also reviewed an earlier paper by Dr. Belt suggesting a different theory for a vehicle-based cause of SUA in Tesla vehicles.[15] This paper, dated May 1, 2018, was referenced in a supplemental submission from the consumer who submitted VOQ 11206155.[16] The SUA theory proposed by Dr. Belt in the May 2018 paper originated from his reconstruction of accelerator position log data from an unknown SUA incident that was described to him over the phone.[17] Based on this reconstruction, Dr. Belt concluded that the APPS signal could not have been produced by the driver's application of the accelerator pedal, as summarized below from the paper's abstract:[18]

''*Examination of the data shows that the accelerator pedal sensor output increased to cause the sudden acceleration. But the increase in the accelerator pedal sensor output could not have been caused by the driver. Instead, the increase in the accelerator pedal sensor output appears to have been caused by a fault in the motor speed sensor, with which it shares a common +5V power and ground.*''

Like his June 2020 paper, the theory proposed by Dr. Belt in the May 2018 paper is based upon inaccurate event data and false assumptions about system design. The APPS data is not recorded in Tesla's log data in the manner claimed in the paper (see section 3.3.5 ODI Analysis of EDR Data).[19] In addition, circuit design information provided to ODI by Tesla shows that Dr. Belt's assumption that ''[t]he two accelerator pedal sensors and the motor speed sensor share the same +5V regulator and ground,'' is incorrect. Tesla uses two distinct regulators with different voltage outputs to supply power to the APPS and motor speed sensors. Thus, the May 2018 paper does not provide a valid explanation for a fault-based cause of SUA in the subject vehicles. Based upon the reported increase in accelerator pedal position to 97 percent shortly before collision, the most likely cause of the incident described in the May 2018 Belt paper is pedal misapplication by the driver.

3.7 Brake System

The subject vehicles are all equipped with pedal-actuated hydraulic brake systems that are completely independent of the motor control system. No common fault has been identified or postulated that would cause simultaneous malfunctions of the brake and motor control systems in the subject vehicles. Power assist is provided either electro-mechanically or from a dedicated vacuum pump. In addition, all subject vehicles have Tesla's brake override logic that will cut motor torque if the brake and accelerator are applied at the same time. If the accelerator pedal is pressed before the brake pedal (or within 100 milliseconds of brake pedal), motor torque is reduced to zero. If the brake pedal is pressed and then the accelerator pedal, motor torque is limited to 250 Nm and motor power is limited to 50 kW. In the latter condition, the driver should be able to hold the vehicle stationary regardless of accelerator pedal position with 85 to 170 N (19 to 38 lbf) of brake pedal force, depending on the platform.

Finally, the subject vehicles also contain Tesla's Pedal Misapplication Mitigation (PMM) software which uses vehicle sensor data to identify potential pedal misapplications and cut motor torque to prevent or mitigate SUA

[13] Belt, Ronald. ''Tesla Regen, Brakes and Sudden Acceleration.'' Center for Auto Safety, June 1, 2020. *https://www.autosafety.org/wp-content/uploads/2015/03/Tesla-Regen-Brakes-and-Sudden-Acceleration.pdf.*

[14] ODI estimates that the vehicle was within approximately five feet of the stone wall when ABS braking began.

[15] Belt, Ronald. ''Tesla's Sudden Acceleration Log Data—What It Shows.'' Center for Auto Safety, May 1, 2018. *https://www.autosafety.org/wp-content/uploads/2015/03/Teslas-Sudden-Acceleration-Log-Data-What-It-Shows.pdf.*

[16] ''My Experiences with Tesla Model 3,'' p 10.

[17] The paper provides the following explanation of how the accelerator pedal position data was reconstructed: ''In this paper, the author has obtained the complete accelerator pedal sensor log data for a sudden acceleration incident from a driver who got the log data from Tesla during a telephone conversation. The Tesla engineer gave a detailed description of the log data to the driver, who then provided it to the author. The author then plotted this data to create the figure used in this study.''

[18] Dr. Belt's reconstruction imagines the APPS log data as a square wave, which he asserts could not have been produced by a physical application of the accelerator pedal.

[19] ODI does not believe that Dr. Belt's reconstruction of the log data is accurate. The data log is not capable of recording a square wave with 1 Hz sampling of the APPS data.

crashes. ODI's analysis found evidence of PMM activation in approximately 13 percent of crashes where log data was reviewed for SUA crashes. The effectiveness of the PMM activations have been limited by the fact that the original PMM implementation is designed for conditions where the vehicle is traveling straight forward or rearward toward the collision obstacle. Most SUA crashes reviewed in this petition evaluation involved dynamic steering inputs (*i.e.,* vehicles with steering angles of 180 degrees or greater when the SUA occurs) which the original implementation of PPM was not designed to address.

3.8 Complaint Vehicle Service History Review

ODI requested service histories for the accelerator pedal assemblies, motor control systems and brake systems for 204 of the vehicles cited by the petitioner. Only two vehicles had faults diagnosed in those components: One motor fault resulting in a vehicle stall allegation and the other an APPS fault that appears to have resulted from damage incurred by the force of the driver's foot on the pedal during the crash event.

One of the VOQs identified by the petitioner reported feeling a jerk forward when approaching a stop sign, then a complete loss of power (VOQ 11164094). The data logs from the vehicle show no increase in speed and the system cutting motor torque to zero in response to a drive inverter fault. ODI does not consider this incident a valid example of SUA.

Another vehicle had an accelerator pedal assembly replaced to repair a crash induced fault in one of the pedal tracks (VOQ 11180431). The data log shows increased drive motor torque in response to manual application of the accelerator pedal to 88.4 percent. After the fault in the pedal assembly was detected, motor torque was cut to zero within 0.04 seconds.

The service history analysis indicates that component faults are not a factor in the SUA incidents reported to NHTSA. The data logs for the two incidents that did involve component faults demonstrated that system failsafe torque cut logic worked as designed.

5.0 Conclusion

After reviewing the available data, ODI has not identified evidence that would support opening a defect investigation into SUA in the subject vehicles. The evidence shows that SUA crashes in the complaints cited by the petitioner have been caused by pedal misapplication. There is no evidence of any fault in the accelerator pedal assemblies, motor control systems, or brake systems that has contributed to any of the cited incidents. There is also no evidence of a design factor contributing to increased likelihood of pedal misapplication.

NHTSA is authorized to issue an order requiring notification and remedy of a defect if the Agency's investigation shows a defect in design, construction, or performance of a motor vehicle that presents an unreasonable risk to safety. 49 U.S.C. 30102(a)(9), 30118. Given the fact that the event data do not provide evidence that the subject SUA was caused by a vehicle-based defect, it is unlikely that an order concerning the notification and remedy of a safety-related defect would be issued due to any investigation opened upon grant of this petition. Therefore, and upon full consideration of the information presented in the petition and the potential risks to safety, the petition is denied. The denial of this petition does not foreclose the Agency from taking further action if warranted or the potential for a future finding that a safety-related defect exists based upon additional information the Agency may receive.

Authority: 49 U.S.C. 30162(d); delegations of authority at CFR 1.95 and 501.8.

Jeffrey Mark Giuseppe,

Associate Administrator for Enforcement.

[FR Doc. 2021–00501 Filed 1–12–21; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

[Docket Number: DOT–OST–2020–0254]

Request for Information for the Inclusive Design Reference Hub

Correction

In notice document 2020–27994 appearing on pages 83152–83154 in the issue of Monday, December 21, 2020, make the following correction:

(1) On page 83152, in the first column, in the **DATES** section, change ''January 20, 2021'' to read ''January 21, 2021.''

[FR Doc. C1–2020–27994 Filed 1–12–21; 8:45 am]

BILLING CODE 1301–00–D

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Request for Comment; Uniform Interagency Transfer Agent Registration and Deregistration Forms

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on a continuing information collection as required by the Paperwork Reduction Act of 1995 (PRA). An agency may not conduct or sponsor, and a respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment on the renewal of its collection titled ''Uniform Interagency Transfer Agent Registration and Deregistration Forms.''

DATES: Comments must be submitted on or before March 15, 2021.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0124, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 465–4326.

Instructions: You must include ''OCC'' as the agency name and ''1557–0124'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

You may review comments and other related materials that pertain to this information collection beginning on the

date of publication of the second notice for this collection [1] by the following method:

• *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Click on the ''Information Collection Review'' tab. Underneath the ''Currently under Review'' section heading, from the drop-down menu select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching by OMB control number ''1557–0124'' or ''Uniform Interagency Transfer Agent Registration and Deregistration Forms.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.

• For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, OCC Clearance Officer, 202–649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501–3520), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of title 44 requires Federal agencies to provide a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or revision of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, the OCC is publishing notice of the revision of the collection of information set forth in this document.

Report Title: Uniform Interagency Transfer Agent Registration and Deregistration Forms.

Form Numbers: Form TA–1 & TA–W.

Frequency of Response: On occasion.

Affected Public: National banks and their subsidiaries, Federal savings associations and their subsidiaries.

OMB Control No.: 1557–0124.

Form TA–1

Estimated Number of Respondents: Registrations: 1; Amendments: 10.

Estimated Average Time per Response: Registrations: 1.25 hours; Amendments: 10 minutes.

Estimated Total Annual Burden: 3 hours.

Form TA–W

Estimated Number of Respondents: Deregistrations: 2.

Estimated Average Time per Response: Deregistrations: 30 minutes.

Estimated Total Annual Burden: 1 hour.

Section 17A(c) of the Securities Exchange Act of 1934 (the Act) requires all transfer agents for qualifying securities registered under section 12 of the Act, as well as for securities that would be required to be registered except for the exemption from registration provided by section 12(g)(2)(B) or section 12(g)(2)(G), to file with the appropriate regulatory agency an application for registration in such form and containing such information and documents as such appropriate regulatory agency may prescribe as necessary or appropriate in furtherance of the purposes of this section.[2] In general, an entity performing transfer agent functions for a qualifying security is required to register with its appropriate regulatory agency (''ARA''). The OCC's regulations at 12 CFR 9.20 implement these provisions of the Act.

To accomplish the registration of transfer agents, Form TA–1 was developed in 1975 as an interagency effort by the Securities and Exchange Commission (SEC) and the Federal banking agencies (the OCC, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation). The agencies primarily use the data collected on Form TA–1 to determine whether an application for registration should be approved, denied, accelerated, or postponed, and they use the data in connection with their supervisory responsibilities. In addition, when a national bank or Federal savings association no longer acts as a transfer agent for covered corporate securities or when the national bank or Federal savings association is no longer supervised by the OCC, *i.e.,* liquidates or converts to another form of financial institution, the national bank or Federal savings association must file Form TA–W with the OCC, requesting withdrawal from registration as a transfer agent.

Forms TA–1 and TA–W are mandatory and their collection is authorized by sections 17A(c), 17(a)(3), and 23(a)(1) of the Act, as amended (15 U.S.C. 78q–1(c), 78q(a)(3), and 78w(a)(1)). Additionally, section 3(a)(34)(B)(i) of the Act (15 U.S.C. 78c(a)(34)(B)(i)) provides that the OCC is the ARA in the case of a national banks and Federal savings associations and subsidiaries of such institutions. The registrations are public filings and are not considered confidential.

The OCC needs the information contained in this collection to fulfill its statutory responsibilities. Section 17A(c)(2) of the Act (15 U.S.C. 78q–1(c)(2)), as amended, provides that all those authorized to transfer securities registered under section 12 of the Act (transfer agents) shall register by filing with the appropriate regulatory agency an application for registration in such form and containing such information and documents as such appropriate regulatory agency may prescribe to be necessary or appropriate in furtherance of the purposes of this section.

Request for Comment

Comments submitted in response to this notice will be summarized and included in the submission to OMB. Comments are requested on:

(a) Whether the information collections are necessary for the proper performance of the OCC's functions, including whether the information has practical utility;

(b) The accuracy of the OCC's estimates of the burden of the information collections, including the validity of the methodology and assumptions used;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of information collections 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.

Bao Nguyen,

Principal Deputy Chief Counsel, Office of the Comptroller of the Currency.

[FR Doc. 2021–00453 Filed 1–12–21; 8:45 am]

BILLING CODE 4810–33–P

[1] Following the close of this notice's 60-day comment period, the OCC will publish a second notice with a 30-day comment period.

[2] 15 U.S.C. 78q–1(c).

DEPARTMENT OF THE TREASURY

Departmental Offices; Debt Management Advisory Committee Meeting

Notice is hereby given, pursuant to 5 U.S.C. App. 2, 10(a)(2), that a meeting

will take place via conference call on February 2, 2021 at 9 a.m. of the following debt management advisory .committee: Treasury Borrowing Advisory Committee of The Securities Industry and Financial Markets Association.

At this meeting, the Treasury is seeking advice from the Committee on topics related to the economy, financial markets, Treasury financing, and debt management. Following the working session, the Committee will present a written report of its recommendations. The meeting will be closed to the public, pursuant to 5 U.S.C. App. 2, 10(d) and Public Law 103–202, 202(c)(1)(B)(31 U.S.C. 3121 note).

This notice shall constitute my determination, pursuant to the authority placed in heads of agencies by 5 U.S.C. App. 2, 10(d) and vested in me by Treasury Department Order No. 101–05, that the meeting will consist of discussions and debates of the issues presented to the Committee by the Secretary of the Treasury and the making of recommendations of the Committee to the Secretary, pursuant to Public Law 103–202, § 202(c)(1)(B). Thus, this information is exempt from disclosure under that provision and 5 U.S.C. 552b(c)(3)(B). In addition, the meeting is concerned with information that is exempt from disclosure under 5 U.S.C. 552b(c)(9)(A). The public interest requires that such meetings be closed to the public because the Treasury Department requires frank and full advice from representatives of the financial community prior to making its final decisions on major financing operations. Historically, this advice has been offered by debt management advisory committees established by the several major segments of the financial community. When so utilized, such a committee is recognized to be an advisory committee under 5 U.S.C. App. 2, 3.

Although the Treasury's final announcement of financing plans may not reflect the recommendations provided in reports of the Committee, premature disclosure of the Committee's deliberations and reports would be likely to lead to significant financial speculation in the securities market. Thus, this meeting falls within the exemption covered by 5 U.S.C. 552b(c)(9)(A).

The Office of Debt Management is responsible for maintaining records of debt management advisory committee meetings and for providing annual reports setting forth a summary of Committee activities and such other matters as may be informative to the public consistent with the policy of 5 U.S.C. 552(b). The Designated Federal Officer or other responsible agency official who may be contacted for additional information is Fred Pietrangeli, Director for Office of Debt Management (202) 622–1876.

Dated: January 8, 2021.

Frederick E. Pietrangeli,

Director, Office of Debt Management.

[FR Doc. 2021–00563 Filed 1–12–21; 8:45 am]

BILLING CODE 4810–25–P

U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION

Notice of Open Public Hearing

AGENCY: U.S.-China Economic and Security Review Commission.

ACTION: Notice of open public hearing.

SUMMARY: Notice is hereby given of the following hearing of the U.S.-China Economic and Security Review Commission.

The Commission is mandated by Congress to investigate, assess, and report to Congress annually on ''the national security implications of the economic relationship between the United States and the People's Republic of China.'' Pursuant to this mandate, the Commission will hold a public hearing in Washington, DC on January 28, 2021 on ''U.S.-China Relations at the Chinese Communist Party's Centennial.''

DATES: The hearing is scheduled for Thursday, January 28, 2021, 10:30 a.m.

ADDRESSES: This hearing will be held with panelists and Commissioners participating in-person or online via videoconference. Members of the audience will be able to view a live webcast via the Commission's website at *www.uscc.gov.* Also, please check the Commission's website for possible changes to the hearing schedule. *Reservations are not required to attend the hearing.*

FOR FURTHER INFORMATION CONTACT: Any member of the public seeking further information concerning the hearing should contact Jameson Cunningham, 444 North Capitol Street NW, Suite 602, Washington, DC 20001; via email at *jcunningham@uscc.gov. Reservations are not required to attend the hearing.*

ADA Accessibility: For questions about the accessibility of the event or to request an accommodation, please contact Jameson Cunningham via email at *jcunningham@uscc.gov.* Requests for an accommodation should be made as soon as possible, and at least five business days prior to the event.

SUPPLEMENTARY INFORMATION:

Background: This is the first public hearing the Commission will hold during its 2021 report cycle. The hearing will evaluate the state of the U.S.-China relationship, the Chinese Communist Party's goals in the year of its centennial, and the implications for the United States. The first panel will offer a net assessment of the current state of U.S.-China political, economic, and security relations heading into 2021. The second panel will examine key takeaways from the Fifth Plenum and other recent high-level CCP conferences and statements. The third panel will consider the implications for the United Sates of the trend lines in China's politics, economy, security policy, and foreign affairs.

The hearing will be co-chaired by Chairman Carolyn Bartholomew and Commissioner Roy Kamphausen. Any interested party may file a written statement by January 28, 2021 by transmitting to the contact above. A portion the hearing will include a question and answer period between the Commissioners and the witnesses.

Authority: Congress created the U.S.-China Economic and Security Review Commission in 2000 in the National Defense Authorization Act (Pub. L. 106–398), as amended by Division P of the Consolidated Appropriations Resolution, 2003 (Pub. L. 108–7), as amended by Public Law 109–108 (November 22, 2005), as amended by Public Law 113–291 (December 19, 2014).

Dated: January 7, 2021.

Daniel W. Peck,

Executive Director, U.S.-China Economic and Security Review Commission.

[FR Doc. 2021–00519 Filed 1–12–21; 8:45 am]

BILLING CODE 1137–00–P

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Part II

Department of Defense

Department of the Army, Corps of Engineers

33 CFR Chapter II

Reissuance and Modification of Nationwide Permits; Final Rule

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Chapter II

[Docket Number: COE–2020–0002]

RIN 0710–AA84

Reissuance and Modification of Nationwide Permits

AGENCY: Army Corps of Engineers, DoD.

ACTION: Final rule.

SUMMARY: Nationwide Permits (NWPs) authorize certain activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The NWPs help protect the aquatic environment and the public interest by providing incentives to reduce impacts on jurisdictional waters and wetlands while effectively authorizing activities that have no more than minimal individual and cumulative adverse environmental effects. In this final rule, the Corps is reissuing and modifying 12 existing NWPs and issuing four new NWPs. For these 16 NWPs, the Corps is also reissuing and modifying the NWP general conditions and definitions. The Corps is not reissuing or modifying the remaining 40 existing NWPs or finalizing proposed new NWP E at this time. Those 40 remaining NWPs continue to be in effect under the January 6, 2017, final rule and the existing general conditions and definitions in the 2017 final rule continue to apply to those permits.

DATES: These 16 NWPs, the 32 general conditions, and the associated definitions will go into effect on March 15, 2021.

ADDRESSES: U.S. Army Corps of Engineers, Attn: CECW–CO–R, 441 G Street NW, Washington, DC 20314–1000.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202–761–4922 or access the U.S. Army Corps of Engineers Regulatory Home Page at *https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/.*

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List of Acronyms

BMP Best Management Practice
CEQ Council on Environmental Quality
CWA Clean Water Act
DA Department of the Army
EFH Essential Fish Habitat
ESA Endangered Species Act
FWS U.S. Fish and Wildlife Service
GC General Condition
NEPA National Environmental Policy Act
NHPA National Historic Preservation Act
NMFS National Marine Fisheries Service
NPDES National Pollutant Discharge Elimination System
NWP Nationwide Permit
PCN Pre-construction Notification

List of Nationwide Permits Included in This Rule and General Conditions

Nationwide Permits (NWPs)

12. Oil or Natural Gas Pipeline Activities
21. Surface Coal Mining Activities
29. Residential Developments
39. Commercial and Institutional Developments
40. Agricultural Activities
42. Recreational Facilities
43. Stormwater Management Facilities
44. Mining Activities
48. Commercial Shellfish Mariculture Activities
50. Underground Coal Mining Activities
51. Land-Based Renewable Energy Generation Facilities
52. Water-Based Renewable Energy Generation Pilot Projects
55. Seaweed Mariculture Activities
56. Finfish Mariculture Activities
57. Electric Utility Line and Telecommunications Activities
58. Utility Line Activities for Water and Other Substances

Nationwide Permit General Conditions

1. Navigation
2. Aquatic Life Movements
3. Spawning Areas
4. Migratory Bird Breeding Areas
5. Shellfish Beds
6. Suitable Material
7. Water Supply Intakes
8. Adverse Effects from Impoundments
9. Management of Water Flows
10. Fills Within 100-Year Floodplains
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12. Soil Erosion and Sediment Controls
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I. Background

A. General

The U.S. Army Corps of Engineers (Corps) issues nationwide permits (NWPs) to authorize activities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, where those activities will result in no more than minimal individual and cumulative adverse

environmental effects. NWPs were first issued by the Corps in 1977 (42 FR 37122) to authorize categories of activities that have minimal adverse effects on the aquatic environment, for the purpose of streamlining the authorization process for those minor activities. After 1977, NWPs have been issued or reissued in 1982 (47 FR 31794), 1984 (49 FR 39478), 1986 (51 FR 41206), 1991 (56 FR 59110), 1995 (60 FR 38650), 1996 (61 FR 65874), 2000 (65 FR 12818), 2002 (67 FR 2020), 2007 (72 FR 11092), 2012 (77 FR 10184), and 2017 (82 FR 1860).

Section 404(e) of the Clean Water Act provides the statutory authority for the Secretary of the Army, after notice and opportunity for public hearing, to issue general permits on a nationwide basis for any category of activities involving discharges of dredged or fill material into waters of the United States for a period of no more than five years after the date of issuance (33 U.S.C. 1344(e)). The Secretary's authority to issue permits has been delegated to the Chief of Engineers and his or her designated representatives. Nationwide permits are a type of general permit issued by the Chief of Engineers and are designed to regulate with little, if any, delay or paperwork certain activities in federally jurisdictional waters and wetlands, where those activities would have no more than minimal adverse environmental impacts (see 33 CFR 330.1(b)). The categories of activities authorized by NWPs must be similar in nature, cause only minimal adverse environmental effects when performed separately, and have only minimal cumulative adverse effect on the environment (see 33 U.S.C. 1344(e)(1)). NWPs can be issued for a period of no more than 5 years (33 U.S.C. 1344(e)(2)), and the Corps has the authority to modify or revoke the NWPs before they expire. Nationwide permits can also be issued to authorize activities pursuant to Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(f)). The NWP program is designed to provide timely authorizations for the regulated public while protecting the Nation's aquatic resources.

The phrase ''minimal adverse environmental effects when performed separately'' refers to the direct and indirect adverse environmental effects caused by a specific activity authorized by an NWP. The phrase ''minimal cumulative adverse effect on the environment'' refers to the collective direct and indirect adverse environmental effects caused by all the activities authorized by a particular NWP during the time period when the NWP is in effect (a period of no more than 5 years) in a specific geographic region. These concepts are defined in paragraph 2 of section D, ''District Engineer's Decision.'' The appropriate geographic area for assessing cumulative effects is determined by the decision-making authority for the general permit (generally, the district engineer).

Some NWPs include pre-construction notification (PCN) requirements. PCNs give the Corps the opportunity to evaluate certain proposed NWP activities on a case-by-case basis to ensure that they will cause no more than minimal adverse environmental effects, individually and cumulatively. Except for activities conducted by non-Federal permittees that require PCNs under paragraph (c) of the ''Endangered Species'' and ''Historic Properties'' general conditions (general conditions 18 and 20, respectively), if the Corps district does not respond to the PCN within 45 days of a receipt of a complete PCN, the activity is deemed authorized by the NWP (see 33 CFR 330.1(e)(1)).

In fiscal year 2018, the average processing time for an NWP PCN was 45 days and the average processing time for a standard individual permit was 264 days. This difference in burden can incentivize project proponents to reduce the adverse effects of their planned activities that would otherwise require an individual permit under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, in order to qualify for NWP authorization. This reduction in adverse effects can therefore reduce a project's impact on the Nation's aquatic resources.

There are 38 Corps district offices and 8 Corps division offices. The district offices administer the NWP program on a day-to-day basis by reviewing PCNs for proposed NWP activities. The division offices oversee district offices and are managed by division engineers. Division engineers have the authority, after public notice and comment, to modify, suspend, or revoke NWP authorizations on a regional basis to take into account regional differences among aquatic resources and to ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects in a region (see 33 CFR 330.5(c)). When a Corps district receives a PCN, the district engineer reviews the PCN and determines whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, consistent with the criteria in paragraph 2 of section D, ''District Engineer's Decision.'' At this point, the district engineer may add conditions to the NWP authorization to ensure that the verified NWP activity results in no more than minimal individual and cumulative adverse environmental effects, consistent with processes and requirements set out in 33 CFR 330.5(d). See Section II.G for more information on regional conditions for the NWPs.

For some NWPs, when submitting a PCN, an applicant may request a waiver for a particular limit specified in the NWP's terms and conditions. If the applicant requests a waiver of an NWP limit and the district engineer determines, after coordinating with the resource agencies under paragraph (d) of NWP general condition 32, that the proposed NWP activity will result in no more than minimal adverse environmental effects, the district engineer may grant such a waiver. Following the conclusion of the district engineer's review of a PCN, he/she prepares an official, publicly-available decision document. This document discusses the district engineer's findings as to whether a proposed NWP activity qualifies for NWP authorization, including compliance with all applicable terms and conditions, and the rationale for any waivers granted, and activity-specific conditions needed to ensure that the activity being authorized by the NWP will have no more than minimal individual and cumulative adverse environmental effects and will not be contrary to the public interest (see § 330.6(a)(3)(i)).

The case-by-case review of PCNs often results in district engineers adding activity-specific conditions to NWP authorizations to ensure that the adverse environmental effects are no more than minimal. These can include permit conditions such as time-of-year restrictions and/or use of best management practices and/or compensatory mitigation requirements to offset authorized losses of jurisdictional waters and wetlands so that the net adverse environmental effects caused by the authorized activity are no more than minimal. Any compensatory mitigation required for NWP activities must comply with the Corps' compensatory mitigation regulations at 33 CFR part 332. Review of a PCN may also result in the district engineer asserting discretionary authority to require an individual permit from the Corps for the proposed activity, if he or she determines, based on the information provided in the PCN and other available information, that the adverse environmental effects will be more than minimal, or otherwise determines that ''sufficient concerns for the environment or any other factor of

the public interest so requires'' consistent with 33 CFR 330.4(e)(2).

During the review of PCNs, district engineers assess cumulative adverse environmental effects at an appropriate regional scale. Cumulative effects are the result of the accumulation of direct and indirect effects caused by multiple activities that persist over time in a particular geographic area (MacDonald 2000), such as a watershed or ecoregion (Gosselink and Lee 1989). Therefore, the geographic and temporal scales for cumulative effects analysis are larger than the analysis of the direct and indirect adverse environmental effects caused by specific activities. For purposes of the NWP program, cumulative effects are the result of the combined effects of activities authorized by NWPs during the period the NWPs are in effect. The cumulative effects are assessed against the current environmental setting to determine whether the cumulative adverse environmental effects are more than minimal. The district engineer uses his or her discretion to determine the appropriate regional scale for evaluating cumulative effects.

For the NWPs, the appropriate regional scale for evaluating cumulative effects may be a waterbody, watershed, county, state, or a Corps district, as appropriate. The appropriate regional scale is dependent, in part, on where the NWP activities are occurring. For example, for NWPs that authorizes structures and/or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899, the appropriate geographic region for assessing cumulative effects may be a specific navigable waterbody. For NWPs that authorize discharges of dredged or fill material into non-tidal jurisdictional wetlands and streams, the appropriate geographic region for assessing cumulative effects may be a watershed, county, state, or Corps district. The direct individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the project footprint, and the indirect individual adverse environmental effects caused by activities authorized by NWPs are evaluated within the geographic area to which those indirect effects extend.

When the district engineer reviews a PCN and determines that the proposed activity qualifies for NWP authorization, he or she will issue a written NWP verification to the permittee (see 33 CFR 330.6(a)(3)). If an NWP verification includes multiple authorizations using a single NWP (*e.g.,* linear projects with crossings of separate and distant waters of the United States authorized by NWPs 12 or 14) or non-linear projects authorized with two or more different NWPs (*e.g.,* an NWP 28 for reconfiguring an existing marina plus an NWP 19 for minor dredging within that marina), the district engineer will evaluate the cumulative effects of the applicable NWP authorizations within the geographic area that she or he determines is appropriate for assessing cumulative effects caused by activities authorized by that NWP. As discussed above, the geographic area may be a waterbody, watershed, county, state, Corps district, or other geographic area.

Further, the Corps' public interest review regulations at 33 CFR 320.4(a)(1) require consideration of cumulative impacts for the issuance of DA permits. Since the required public interest review and 404(b)(1) Guidelines cumulative effects analyses are conducted by Corps Headquarters in its decision documents for the issuance of the NWPs, district engineers do not need to do comprehensive cumulative effects analyses for NWP verifications. For an NWP verification, the district engineer needs only to include a statement in the administrative record stating whether the proposed activity to be authorized by an NWP, plus any required mitigation, will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines, after considering mitigation, that a proposed NWP activity will result in more than minimal cumulative adverse environmental effects, she or he will exercise discretionary authority and require an application for an individual permit.

There may be activities authorized by NWPs that cross more than one Corps district or more than a single state. On May 15, 2018, the Director of Civil Works at Corps Headquarters issued a Director's Policy Memorandum titled: ''Designation of a Lead USACE District for Permitting of Non-USACE Projects Crossing Multiple Districts or States.'' [1] This Director's Policy Memorandum identified lead districts for states that have more than one Corps district and established a policy for designating a lead district for activities that require Department of the Army permits that cross district or state boundaries. Under this policy, when the Corps receives an NWP PCN or individual permit application for such activities, a lead Corps district will be designated by the applicable Corps division office(s) using the criteria in the 2018 Director's Policy Memorandum, and that district will be responsible for serving as a single point of contact for each permit applicant, forming a Project Delivery Team comprising representatives of each of the affected districts, ensuring consistent reviews by the affected districts, and taking responsibility for identifying and resolving inconsistencies that may arise during the review. The list of lead districts for states is also used during the regional conditioning process for the NWPs. For that process the lead district is responsible for coordinating the development of the regional conditions and preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii). The Corps requests comments on whether there are efficiencies that can be adopted to improve the coordination and regional conditioning processes.

B. Overview of Proposed Rule

On September 15, 2020, the Corps published in the **Federal Register** (85 FR 57298) a proposed regulation to reissue with modification the existing NWPs and associated general conditions and definitions and to create five new NWPs (2020 Proposal). The Corps provided a 60-day public comment period which closed on November 16, 2020. Among other things, the Corps proposed the following: (1) To create two new NWPs to authorize certain categories of mariculture activities (*i.e.,* seaweed and finfish mariculture) that are not currently authorized by NWP 48; (2) to divide the NWP that authorizes utility line activities (NWP 12) into three separate NWPs that address the differences in how different utility line projects are constructed, the substances they convey, and the different standards and best management practices that help ensure those NWPs authorize only those activities that have no more than minimal adverse environmental effects; (3) a new NWP which would authorize discharges of dredged or fill material into jurisdictional waters for the construction, expansion, and maintenance of water reuse and reclamation facilities; and (4) to remove the 300 linear foot limit for losses of stream bed from 10 NWPs (NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52). The Corps requested comment on these and all other aspects of the proposal.

C. Overview of This Final Rule

This final rule replaces 12 of the existing NWPs that were published in the January 6, 2017, final rule (82 FR 1860), specifically: NWP 12 (oil or natural gas pipeline activities; NWP 21 (surface coal mining activities); NWP 29

[1] This document is available at: *https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2757/* (accessed 3/12/2020).

(residential developments); NWP 39 (commercial and institutional developments); NWP 40 (agricultural activities); NWP 42 (recreational facilities); NWP 43 (stormwater management facilities); NWP 44 (mining activities); NWP 48 (commercial shellfish mariculture activities); NWP 50 (underground coal mining activities); NWP 51 (land-based renewable energy generation facilities); and NWP 52 (water-based renewable energy generation pilot projects). This final rule issues four new NWPs: NWP 55 (seaweed mariculture activities); NWP 56 (finfish mariculture activities); NWP 57 (electric utility line and telecommunications activities); and NWP 58 (utility line activities for water and other substances).

For the 16 NWPs included in this final rule, the Corps is also reissuing the general conditions and definitions, with some changes. The Corps is not reissuing or modifying the remaining 40 NWPs included in the 2020 Proposal or taking any action on the proposed new NWP E at this time. The general conditions and definitions published in the January 6, 2017, final rule (82 FR 1860) continue to apply to the 40 existing 2017 NWPs that continue to remain in effect after the final rule for the 16 reissued and new NWPs goes into effect on March 15, 2021.

The 16 permits being finalized in this rule include permits proposed partly in response to E.O. 13783, Promoting Energy Independence and Economic Growth, and E.O. 13921, Promoting American Seafood Competitiveness and Economic Growth. The Corps is also reissuing NWPs 12 and 48 partly to address issues raised in two federal district court decisions: United States District Court for the District of Montana Great Falls Division's decision in *Northern Plains Resource Council, et al.,* v. *U.S. Army Corps of Engineers, et al.,* (Case No. CV 19–44–GF–BMM) and the United States District Court, Western District of Washington at Seattle's decision in the *Coalition to Protect Puget Sound Habitat* v. *U.S. Army Corps of Engineers et al.* (Case No. C16–0950RSL) and *Center for Food Safety* v. *U.S. Army Corps of Engineers et al.* (Case No. C17–1209RSL).

D. Status of Existing Permits

When the Corps modifies existing NWPs, the modified NWPs replace the prior versions of those NWPs so that there are not two sets of NWPs in effect at the same time. Having two sets of NWPs in effect at the same time creates regulatory uncertainty if each set of those NWPs has different limits, requirements, and conditions because permittees may be unclear as to which limits, requirements, and conditions apply to their authorized activities. In addition, differences in NWP limits, requirements, and conditions between two sets of NWPs can create challenges for district engineers in terms of enforcement and compliance efforts.

The Corps is modifying the expiration date for the 12 existing NWPs (*i.e.,* NWPs 12, 21, 29, 39, 40, 42, 43, 44, 48, 50, 51, 52) that are issued in this final rule to March 15, 2021. The expiration date for the 12 existing NWPs and the 4 new NWPs issued in this final rule is five years after the date those NWPs go into effect. Activities authorized by the 2017 NWPs currently remain authorized by those NWPs until March 18, 2022. Under 33 CFR 330.6(a)(3)(ii), if the NWP is reissued without modification or the activity complies with any subsequent modification of the NWP authorization, the NWP verification letter (*i.e.,* the written confirmation from the district engineer that the proposed activity is authorized by an NWP) should include a statement that the verification will remain valid for a period of time specified in the verification letter. The specified period of time is usually the expiration date of the NWP. In other words, for the 2017 NWPs, if the previously verified activity continues to qualify for NWP authorization under any of the 12 NWPs issued in this final rule, that verification letter continues to be in effect until March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter. For most activities authorized by the 2017 NWPs, where the district engineer issued an NWP verification letter, the verification letter identified March 18, 2022, as the expiration date. As long as the verified NWP activities continue to comply with the terms and conditions of the 12 existing NWPs issued in this final rule, those activities continue to be authorized by the applicable NWP(s) until March 18, 2022, unless a district engineer modifies, suspends, or revokes a specific NWP authorization.

Under 33 CFR 330.6(b), Corps Headquarters may modify, reissue, or revoke the NWPs at any time. Activities that were authorized by the 2017 NWPs, but no longer qualify for authorization under any of the 12 existing NWPs that are reissued in this final rule, continue to be authorized by the 2017 NWP(s) for 12 months as long as those activities have commenced (*i.e.,* are under construction) or are under contract to commence in reliance upon an NWP prior to the date on which the NWP expires. That authorization is contingent on the activity being completed within twelve months of the date of an NWP's expiration, modification, or revocation, unless discretionary authority has been exercised by a division or district engineer on a case-by-case basis to modify, suspend, or revoke the authorization in accordance with 33 CFR 330.4(e) and 33 CFR 330.5(c) or (d). This provision applies to activities that were previously verified by the district engineer as qualifying for NWP authorization, but no longer qualify for NWP authorization under the modified or reissued NWP.

The 16 NWPs issued in this final rule go into effect on March 15, 2021. The 2017 versions of the 12 NWPs reissued in this final rule expire on March 15, 2021. The 12 existing NWPs and 4 new NWPs issued in this final rule expire five years after March 15, 2021.

E. Nationwide Permit Verifications

Certain NWPs require the permittee to submit a PCN, and thus request confirmation from the district engineer prior to commencing the proposed NWP activity, to ensure that the NWP activity complies with the terms and conditions of the NWP. The requirement to submit a PCN is identified in the NWP text, as well as certain general conditions. General condition 18 requires non-federal permittees to submit PCNs for any proposed activity that might affect ESA-listed species or designated critical habitat, if listed species or designated critical habitat are in the vicinity of the proposed activity, or if the proposed activity is located in critical habitat. General condition 20 requires non-federal permittees to submit PCNs for any proposed activity that may have the potential to cause effects to any historic properties listed in, determined to be eligible for listing in, or potentially eligible for listing in, the National Register of Historic Places.

In the PCN, the project proponent must specify which NWP or NWPs he or she wants to use to provide the required Department of Army (DA) authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. For voluntary NWP verification requests (where a PCN is not required), the request should also identify the NWP(s) the project proponent wants to use. The district engineer should verify the activity under the NWP(s) requested by the project proponent, as long as the proposed activity complies with all applicable terms and conditions, including any applicable regional conditions imposed by the division engineer. All NWPs have the same general requirements: That the authorized activities may only cause no

more than minimal individual and cumulative adverse environmental effects. Therefore, if the proposed activity complies with the terms and all applicable conditions of the NWP the applicant wants to use, then the district engineer should issue the NWP verification unless he or she exercises discretionary authority and requires an individual permit. If the proposed activity does not meet the terms and conditions of the NWP identified by the applicant in his or her PCN, and that activity meets the terms and conditions of another NWP identified by the district engineer, the district engineer will process the PCN under the NWP identified by the district engineer. If the district engineer exercises discretionary authority, he or she should explain to the applicant why the proposed activity is not authorized by an NWP.

Pre-construction notification requirements may be added to NWPs by division engineers through regional conditions to require PCNs for additional activities. For an activity where a PCN is not required, a project proponent may submit a PCN voluntarily, if he or she wants written confirmation that the activity is authorized by an NWP. Some project proponents submit permit applications without specifying the type of authorization they are seeking. In such cases, the district engineer will review those applications and determine if the proposed activity qualifies for NWP authorization or another form of DA authorization, such as a regional general permit (see 33 CFR 330.1(f)).

In response to a PCN or a voluntary NWP verification request, the district engineer reviews the information submitted by the prospective permittee. If the district engineer determines that the activity complies with the terms and conditions of the NWP, he or she will notify the permittee. Activity-specific conditions, such as compensatory mitigation requirements, may be added to an NWP authorization to ensure that the activity to be authorized under the NWP will result in no more than minimal individual and cumulative adverse environmental effects. The activity-specific conditions are incorporated into the NWP verification, along with the NWP text and the NWP general conditions. In general, NWP verification letters will expire on the date the NWP expires (see 33 CFR 330.6(a)(3)(ii)), although district engineers have the authority to issue NWP verification letters that will expire before the NWP expires, if it is in the public interest to do so.

If the district engineer reviews the PCN or voluntary NWP verification request and determines that the proposed activity does not comply with the terms and conditions of an NWP, he or she will notify the project proponent and provide instructions for applying for authorization under a regional general permit or an individual permit. District engineers will respond to NWP verification requests, submitted voluntarily or as required through PCNs, within 45 days of receiving a complete PCN. Except for NWP 49, and for proposed NWP activities that require Endangered Species Act section 7 consultation and/or National Historic Preservation Act section 106 consultation, if the project proponent has not received a reply from the Corps within 45 days, he or she may assume that the project is authorized, consistent with the information provided in the PCN. For NWP 49, and for proposed NWP activities that require ESA Section 7 consultation and/or NHPA Section 106 consultation, the project proponent may not begin work before receiving a written NWP verification. If the project proponent requested a waiver of a limit in an NWP, the waiver is not granted unless the district engineer makes a written determination that the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects, and issues an NWP verification.

F. Executive Order 13783, Promoting Energy Independence and Economic Growth

Section 2(a) of E.O. 13783 requires federal agencies to review their existing regulations that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear resources. For the Corps, the NWPs authorize activities associated with the development or use of domestically produced energy resources. In response to E.O. 13783, Office of the Assistant Secretary of the Army (Civil Works) issued a report that reviewed 12 NWPs that authorize activities associated with the development or use of domestically produced energy resources. That report included recommendations for changes that could be made to nine NWPs to support the objectives of E.O. 13783.

The Office of the Assistant Secretary of the Army (Civil Works) issued its report on October 25, 2017, and the November 28, 2017, issue of the **Federal Register** (82 FR 56192) published a notice of availability for that report. Section 2(g) of E.O. 13783 states that agencies should, as soon as practicable and as appropriate and consistent with law, publish for notice and comment proposed rules that would implement the recommendations in their reports. Section 2(g) further states that agencies shall endeavor to coordinate the regulatory reforms identified in their reports with their activities undertaken in compliance with E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs.''

G. Executive Order 13777, Enforcing the Regulatory Reform Agenda

On February 24, 2017, the President signed E.O. 13777, ''Enforcing the Regulatory Reform Agenda,'' which required agencies to evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law. The E.O. specified that agencies must attempt to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; or meet other criteria identified in that Executive Order. Pursuant to this E.O., in the July 20, 2017, issue of the **Federal Register** (82 FR 33470) the Corps published a notice seeking public input from state, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations on its existing regulations that may be appropriate for repeal, replacement, or modification. Some of the changes to the NWPs in this proposal are intended to address some of the comments received in response to the July 20, 2017, **Federal Register** notice. Comments received in response to the July 20, 2017, **Federal Register** notice can be viewed at *www.regulations.gov* in docket number COE–2017–0004.

H. Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

On May 7, 2020, the President signed Executive Order 13921 on Promoting American Seafood Competitiveness and Economic Growth. Section 6(b) of the E.O., ''Removing Barriers to Aquaculture Permitting,'' requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to ''develop and propose for public comment, as appropriate and consistent with applicable law,'' NWPs authorizing finfish aquaculture activities and seaweed aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States.

Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to ''develop and propose for public comment, as appropriate and consistent with applicable law,'' a proposed NWP authorizing multi-species aquaculture activities in marine and coastal waters, including ocean waters beyond the territorial sea within the exclusive economic zone of the United States. Section 6(b) of the E.O. also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works to ''assess whether to develop'' NWPs for finfish aquaculture activities and seaweed aquaculture activities in other waters of the United States. Section 6(b) also requires the Secretary of the Army, acting through the Assistant Secretary of the Army for Civil Works, to assess whether to develop a United States Army Corps of Engineers NWP authorizing multi-species aquaculture activities in other waters of the United States.

Instead of proposing a new, separate NWP for authorizing structures in coastal waters and federal waters on the outer continental shelf for multi-species aquaculture activities, the Corps proposed to include provisions allowing additional species to be cultivated with seaweed mariculture activities authorized under proposed new NWP A and finfish mariculture activities authorized under proposed new NWP B. In addition, the Corps invited public comment on whether a separate NWP should be issued to authorize structures or work regulated by the Corps for multi-species mariculture activities.

As required by the Executive Order, the Corps proposed to issue two new NWPs: NWP A to authorize seaweed mariculture activities in navigable waters of the United States, including federal waters on the outer continental shelf, and NWP B to authorize finfish mariculture activities in these waters. Based on the reasons set out in the final rule, the Corps has decided to issue these two permits. These new NWPs authorize structures and work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. These new NWPs also authorize seaweed and finfish mariculture structures attached to the seabed on the outer continental shelf. Section 4(f) of the Outer Continental Shelf Lands Act of 1953 as amended (43 U.S.C. 1333(e)), extended the Corps' Rivers and Harbors Act of 1899 section 10 permitting authority to artificial islands, installations, and other devices located on the seabed, to the seaward limit of the outer continental shelf (see 33 CFR 320.2(b)). On the outer continental shelf, the seaweed and finfish mariculture structures may be anchored to the seabed, and thus require section 10 authorization as devices located on the seabed. Each of these NWPs includes a provision on multi-trophic species mariculture activities in marine and coastal waters, including federal waters on the outer continental shelf. This provision for multi-trophic species mariculture gives flexibility to these NWPs to allow mariculture operators to propagate additional species, such as mussels, on their seaweed or finfish mariculture structures. Including this provision was an alternative to developing a separate NWP for multi-trophic species mariculture activities, and provides NWP authorization that is responsive to the E.O. The Corps recognizes that some mariculture operators may choose to produce seaweeds or finfish exclusively. As discussed in this final rule, the Corps issued proposed new NWP A as NWP 55 and issued proposed new NWP B as NWP 56.

I. 2018 Legislative Outline for Rebuilding Infrastructure in America

On February 12, 2018, the Administration issued its ''Legislative Outline for Rebuilding Infrastructure in America.'' In Part 3 (Infrastructure Permitting Improvement), Principle I.C.1 recommends reforms for eliminating redundancy, duplication, and inconsistency in the application of clean water provisions. One of the recommended reforms was to make statutory changes to authorize Federal agencies to select and use NWPs without additional review by the Corps. Principle I.C.1 recommends allowing Federal agencies to move forward on NWP projects without submitting PCNs to the Corps. That principle also states that removing PCN requirements for Federal agencies would allow the Corps to focus on projects that do not qualify for NWPs, such as activities that require individual permits that have greater environmental impacts.

Consistent with the recommendation included in the Legislative Outline, in the 2020 Proposal the Corps invited comment on whether it can use its existing authority to create specific procedures or conditions by which Federal agencies that want to use NWPs for regulated activities would not need to submit PCNs, consistent with applicable law. The Corps specified that, under such a mechanism, the Corps would retain under its authority for district engineers to modify, suspend, or revoke NWP authorizations (see 33 CFR 330.5(d)), and the right to take action to address situations where the Federal agency incorrectly determined that the NWP terms and conditions were met.

The Corps sought public comment on whether to exempt federal agencies from PCN requirements under the theory that federal agencies may employ staff who are environmental experts and who already review these projects before submitting PCNs to the Corps to determine whether they meet the criteria for the applicable NWP. These environmental staff are responsible for ensuring that the agencies' proposed activities comply with applicable federal laws, regulations, and policies, as well as relevant Executive Orders. In the proposed rule the Corps stated that it understands that non-federal permittees that want to use the NWPs often hire consultants to help them secure NWP authorization in compliance with applicable federal laws, regulations, and policies and that these consultants may have similar expertise to staff at federal agencies. These consultants may provide general services to assist in securing NWP authorizations on behalf of their clients, or they may specialize in complying with specific laws and regulations, such as Section 7 of the Endangered Species Act, Section 106 of the National Historic Preservation Act, and the Essential Fish Habitat provisions of the Magnuson-Stevens Act. Non-federal permittees are not bound to comply with Executive Orders.

Consistent with this legislative principle, the Corps requested comment on whether to modify the NWPs that require PCNs to limit the PCN requirement to non-federal permittees. The Corps requested that commenters provide their views on whether they support or oppose having different PCN requirements for Federal and non-Federal permittees, with supporting information to explain their views. After reviewing and considering public comments on this proposal, the Corps has determined not to finalize any change to PCN requirements for federal permittees.

II. Discussion of Public Comments

A. Overview

In response to the 2020 Proposal, the Corps received more than 22,700 comment letters, of which approximately 22,330 were form letters pertaining to the proposed removal of the 300 linear foot limit for losses of stream bed, the proposed changes to NWPs 21, 49, and 50, or the proposed reissuance of NWP 12. In addition to the various form letters, the Corps received

a few hundred individual comment letters. Those individual comment letters, as well as examples of the various form letters, are posted in the *www.regulations.gov* docket (COE–2020–0002) for this rulemaking action. The Corps reviewed and fully considered all comments received in response to the 2020 Proposal.

B. Responses to General Comments

Many commenters expressed general support for the proposed rule, as well as the NWP program as a whole, and many commenters stated opposition to the proposed changes to the NWPs or the use of NWPs to authorize certain activities. Many commenters said that the NWP program should be discontinued. Many commenters objected to reissuing the NWPs ahead of schedule, stating that early reissuance of the NWPs presents an unnecessary burden and cost to the agency and the public. Many commenters stated that the proposed NWPs do not comply with the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Magnuson Stevens Act, and other federal laws. Many commenters said that the NWP program is pushing species closer to extinction.

The NWP program is an important component of the Corps Regulatory Program because it provides an efficient means of authorizing activities that result in no more than minimal individual and cumulative adverse environmental effects so that the Corps can devote more of its resources for evaluating proposed activities that require Department of the Army (DA) authorization that have the potential to cause more substantial adverse environmental effects. The grandfathering provisions in the Corps' NWP regulations at 33 CFR 330.6(a)(3)(ii) and 330.6(b) and as described in Section I.D, Status of Existing Permits, provide mechanisms to reduce regulatory burdens when the Corps modifies or reissues the NWPs to replace existing NWPs. The NWPs are issued in compliance with the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the National Historic Preservation Act, the Magnuson Stevens Act, and other applicable federal laws.

Several commenters said that the proposal is not compliant with the regulations that govern NWPs. Several commenters stated that every NWP authorization should be announced through a public notice. Several commenters said that the Corps does not have the authority to enforce state conditions. One commenter stated that each NWP should include a state-level review prior to verification. One commenter asserted that the proposal violates the authority of individual states to resolve noncompliance with water quality standard permits. One commenter stated that the Corps should ensure compliance with Safe Water Drinking Act when verifying NWP eligibility. One commenter said that the proposed rule conflicts with efforts to update state general permits.

The 16 NWPs issued in this final rule comply with the Corps' NWP regulations at 33 CFR part 330. The NWPs authorize only those activities that have no more than minimal individual and cumulative adverse environmental effects, so it is not necessary to issue public notices to announce the tens of thousands of NWP verification letters Corps districts issue each year. The Corps acknowledges that it does not have the authority to enforce conditions provided by states, except for those conditions added to the NWPs by water quality certifications by certifying authorities and Coastal Zone Management Act consistency concurrences issued by states, that are within the Corps' legal authority to enforce. States can take actions to enforce their own water quality requirements, including permits issued under Section 402 of the Clean Water Act. The Corps does not have the legal authority to enforce the Safe Water Drinking Act. The issuance or reissuance of the NWPs is independent of the issuance of general permits by states, or the issuance of state programmatic general permits by Corps districts.

Several commenters said that the proposed rule did not allow sufficient time for adequate review by states and tribes. Several commenters requested additional time to review the proposed NWPs. One commenter said that the comment period should be extended by 180 days. One commenter stated that Corps divisions and districts should not solicit comments on proposed regional conditions concurrently with the public comment period of the NWP reissuance. Many commenters said that the Corps should have a lead district for every state.

For the 2020 Proposal, the Corps provided a 60-day comment period, which is same duration the Corps has used for past rulemaking actions involving the issuance, reissuance, and/or modification of the NWPs. The Corps sent response letters to entities that made timely requests for extensions of the comment period for the 2020 Proposal. In the 2020 Proposal, the Corps did not propose a large number or substantial changes to the NWPs. Soliciting public comment on proposed regional conditions concurrently with the proposed issuance or reissuance of the NWPs is consistent with the Corps' NWP regulations at 33 CFR 330.5(b)(2)(ii). The Corps has a designated a lead district for each state; these districts have been identified since 2004. As discussed in Section I.A., the Corps issued a Director's Policy Memorandum on May 15, 2018, that further clarified its policy for designating a lead district for activities that require Department of the Army permits that cross district or state boundaries.

One commenter stated that the Corps is required under Section 404(e) of the Clean Water Act to hold a public hearing, which it cannot meaningfully accomplish given the pandemic. One commenter said the NWPs should not allow losses of up to ½-acre of waters of the United States in areas that have already been heavily impacted and should not be used in areas where critical and essential habitat exists for species that are federally threatened or endangered species.

The Corps declined to hold a public hearing on the proposed NWPs because it determined that a public hearing was unlikely to provide additional information that would inform the Corps' decision on whether to issue these NWPs. Under the Corps' regulations at 33 CFR 327.4(b), requests for public hearing under this paragraph shall be granted, unless the Corps determines that the issues raised are insubstantial or there is otherwise no valid interest to be served by holding a public hearing. The Corps received approximately 22,700 comments on the proposed rule, and it is unlikely that any statements provided during a public hearing would raise issues that are different that the issues or concerns discussed in the written comments received in response to the 2020 Proposal.

The NWPs can be used in any area of the United States, except where the NWPs have been revoked by division engineers on a regional basis (*e.g.,* to use a programmatic general permit instead of the NWPs) or suspended or revoked by district engineers on a case-by-case basis. The NWPs can be used in a variety of areas ranging from environmental settings that have been heavily impacted by human activities to environmental settings that have been shaped by fewer or less severe impacts caused by human activities. For those NWPs with a ½-acre limit for losses of waters of the United States (*e.g.,* NWPs

21, 29, 39, 40, 42, 43, 44, 50, 51, and 52), PCNs are required for all proposed activities (except for maintenance activities under NWP 43 and losses of less than 1/10-acre of waters of the United States for NWP 51), which gives district engineers the opportunity to review proposed activities in their current environmental setting and determine whether those activities will result in no more than minimal individual and cumulative adverse environmental effects.

The ability for division and district engineers to modify, suspend, or revoke NWPs on a regional or case-by-case basis is a key tool for ensuring that the NWPs only authorize activities that cause no more than minimal individual and cumulative adverse environmental effects. There is substantial variation in aquatic resource types across the country, as well as a large amount of variability among geographic regions in the quantity of those resources. Those regional differences require division and district engineers to have the authority to tailor the NWPs to address regional and site-specific concerns. The NWPs can only be issued for a period of 5 years because of the statutory language in section 404(e) of the Clean Water Act, as well as the Corps' regulations at 33 CFR 330.6(b). Section 330.6(b) states that if ''an NWP is not modified or reissued within five years of its effective date it automatically expires and becomes null and void.'' The 5-year cycle for reissuing the NWPs provides sufficient time to make necessary changes to the NWPs to ensure that the NWPs only authorize those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters objected to the proposed NWPs, stating that they authorize activities that result in more than minimal individual and cumulative adverse environmental effects and that they do not authorize categories of activities that are similar in nature. Many commenters said that the Corps has not done any meaningful analysis of the cumulative effects from NWPs. A few commenters said that since the Corps does not require pre-construction notifications (PCNs) for all NWP activities, it could not ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects. One commenter said that Corps districts should improve their tracking of cumulative impacts. A number of commenters opposed the NWPs, stating that they authorize activities associated with larger projects that have substantial environmental impacts. Several commenters said that the NWPs should either not authorize activities that impact streams and rivers occupied by anadromous salmon, or compensatory mitigation should always be required for those activities. One commenter stated that the NWPs should not be used in areas with substantial cumulative impacts, such as essential fish habitat and areas inhabited by ESA-listed species. Many commenters said that Corps should fund an independent evaluation of its methodology for assessing cumulative impacts. One commenter said that the proposal should be based on peer-reviewed scientific analysis. One commenter stated that the proposal should include a scientific support document. One commenter said that NWPs should only authorize activities with predictable environmental effects and outcomes.

The NWP activities that do not require PCNs are those activities that have characteristics that do not result in more than minimal adverse environmental effects, such as small structures in navigable waters subject to section 10 of the Rivers and Harbors Act of 1899 or minor fills in waters of the United States associated with maintenance activities or temporary impacts.

For the issuance or reissuance of these NWPs, the Corps has conducted the required cumulative effects analyses. In the national decision document for each NWP issued or reissued in this final rule, the Corps evaluated the cumulative impacts that are anticipated to occur during the 5-year period the NWPs are expected to be in effect. The cumulative impacts are evaluated against the current environmental setting or baseline, in accordance with typical practices for conducting environmental impact analyses. The Corps' public interest review regulations at 33 CFR 320.4(a)(1) and the Corps' general permit regulations at 33 CFR 322.2(f) and 323.2(h) require consideration of cumulative effects for the issuance of permits.

For those NWPs that authorize discharges of dredged or fill material into waters of the United States, the Corps complies with the U.S. EPA's regulations at 40 CFR 230.7(b)(3) for assessing cumulative impacts for the issuance of general permits. Section 230.7(b)(3) requires the permitting authority (*e.g.,* the Corps) to predict cumulative effects by evaluating the number of individual discharge activities likely to be regulated under a general permit until its expiration, including repetitions of individual discharge activities at a single location. In its cumulative effects analyses for the issuance or reissuance of an NWP, the Corps goes further than estimating the number of times an NWP may be used to authorize activities during the 5-year period it is expected to be in effect by estimating the acreage of impacts and the acreage of compensatory mitigation required by district engineers during that 5-year period. In its analysis of the effects or impacts of the proposed issuance or reissuance of the NWPs under the Council of Environmental Quality's current NEPA regulations at 40 CFR 1508.1(g), the Corps also estimates the impacts that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action during the 5-year period the NWP is expected to be in effect.

These analyses of effects and their associated estimates of authorized activities, authorized impacts to jurisdictional waters and wetlands, and compensatory mitigation required by district engineers, include NWP activities that require PCNs and NWP activities that do not require PCNs. The Corps disagrees that an independent evaluation of these approaches to cumulative effects is necessary, or that a peer-reviewed scientific analysis or a scientific support document should be prepared. The Corps follows existing federal regulations for assessing cumulative effects. In its evaluations of individual and cumulative adverse environmental effects of activities authorized by NWPs, the Corps considers reasonably foreseeable effects or impacts, especially those effects or impacts that are directly or indirectly caused by the activity authorized under the Corps' permitting authorities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act.

The NWP program provides a three-tiered approach to ensure compliance with Section 404(e) of the Clean Water Act. Those three tiers are: (1) the terms and conditions of the NWPs issued by Corps Headquarters; (2) the authority of division engineers to modify, suspend, or revoke NWPs on a regional basis; and (3) the authority of district engineers to modify, suspend, or revoke NWPs on a case-by-case basis. Section 404(e) of the Clean Water Act does not specify how broad or narrow a category of activity must be in order to be covered by a general permit. Therefore, that section of the Clean Water Act gives the Corps the discretion to identify categories of activities for the issuance of NWPs. The Corps interprets broadly the requirement for general permits to authorize categories of activities that are similar in nature, to provide program

efficiency, to keep the number of NWPs manageable, and to facilitate implementation by the Corps and project proponents that need to obtain Department of the Army (DA) authorization for activities that have no more than minimal adverse environmental effects.

While the Corps recognizes that many NWP activities may be components of larger overall projects, the Corps' authorities under the NWP program are limited to discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act, and structures and work in navigable waters that are regulated under Section 10 of the Rivers and Harbors Act of 1899. The Corps does not regulate other components of those larger overall projects, such as activities that occur in upland areas. In many cases, the NWPs are authorizing minor features that may be part of those larger overall projects but that still does not bring those larger upland features into the Corps' jurisdiction.

Division engineers can impose regional conditions on the NWPs to protect rivers and streams inhabited by anadromous fish, including salmon. For those salmonids that are listed as endangered or threatened under the Endangered Species Act (ESA), general condition 18 requires PCNs for all NWP activities proposed to be undertaken by non-federal permittees that might affect those listed species or their designated critical habitat (or proposed species or proposed critical habitat), or that occur in their designated or proposed critical habitat. If a proposed NWP activity may adversely affect essential fish habitat, the district engineer will conduct essential fish habitat consultation with the NMFS. District engineers have the discretion to require compensatory mitigation to offset stream losses caused by NWP activities. After conducting ESA section 7 consultation or essential fish habitat consultation, the district engineer may determine that stream compensatory mitigation is necessary to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects. A division engineer has the authority to modify, suspend, or revoke one or more NWPs in a geographic region if he or she determines that the use of that NWP or NWPs will result in more than minimal cumulative adverse environmental effects.

One commenter said the NWPs should not authorize activities that result in adverse environmental impacts. One commenter stated that the terms and conditions of the NWPs should not be changed to be less protective of the environment. Several commenters said that public notices should be issued for NWP PCNs to disclose proposed NWP activities and increase public participation. A number of commenters suggested that NWPs should require no net loss of aquatic resources. A number of commenters asked why the proposed NWPs use the term ''no more than minimal adverse environmental effects'' instead of ''no more than minimal adverse effects on the aquatic environment.''

Section 404(e) of the Clean Water Act recognizes that activities authorized by general permits, including NWPs, will result in adverse environmental impacts, but limits those adverse impacts so that they can only be no more than minimal. The Corps has adopted terms and conditions for the NWPs to be sufficiently protective of the aquatic environment while allowing activities that result in no more than minimal adverse environmental effects to be conducted.

Requiring public notices for PCNs would be contrary to the purpose of the general permit program established through section 404(e) of the Clean Water Act, for a streamlined authorization process for activities that result in no more than minimal individual and cumulative adverse environmental effects. In addition, it is unlikely that there would be any meaningful public comment submitted to Corps districts in response to public notices for the minor activities authorized by these NWPs that would warrant the reduction in permitting efficiency providing such a comment period would cause. Compensatory mitigation can only be required by the district engineer after he or she reviews the PCN and determines that compensatory mitigation is necessary to comply with the ''no more than minimal adverse environmental effects'' requirement for NWPs (see 33 CFR 330.1(e)(3)). There is no federal statute or regulation that requires ''no net loss'' of aquatic resources. The ''no overall net loss'' goal for wetlands articulated in the 1990 U.S. EPA-Army Memorandum of Agreement for mitigation for Clean Water Act section 404 permits states that the section 404 permit program will contribute to that national goal. The 1990 Memorandum of Agreement only applies to standard individual permits, not to general permits.

The NWP program provides valuable protection to the Nation's aquatic resources by establishing incentives to avoid and minimize losses of jurisdictional waters and wetlands in order to qualify for the streamlined NWP authorizations. A large majority of fills in jurisdictional waters and wetlands authorized by general permits and individual permits are less than 1/10-acre (see Figure 5.1 in the Regulatory Impact Analysis for this final rule, which is available in the *www.regulations.gov* docket (COE–2020–0002)). The 16 NWPs use the term ''no more than minimal adverse environmental effects'' to be consistent with the text of Section 404(e) of the Clean Water Act and 33 CFR 322.2(f)(1) for Section 10 of the Rivers and Harbors Act of 1899. When making no more than minimal adverse environmental effects determinations for proposed NWP activities, the district engineer considers the adverse effects to the aquatic environment and any other factor of the public interest (*e.g.,* 33 CFR 330.1(d)). The district engineer also applies the 10 criteria listed in paragraph 2 of Section D, District Engineer's Decision. The use of the term ''no more than minimal adverse environmental effects'' does not expand the Corps' scope of analysis. The Corps' control and responsibility remains limited to the activities it has the authority to regulate, and the effects to the environment caused by those activities.

Several commenters said that the proposed NWPs are not sufficiently protective of freshwater mussels. One commenter stated that the NWPs should be modified to provide additional protections to wilderness areas. Several commenters identified specific areas of the country where they were concerned that the use of the NWPs would authorize activities with adverse environmental impacts. Many commenters said that the NWPs have increased coastal communities' vulnerability to future flood events by accelerating wetland alteration following hurricanes. One commenter stated that the NWPs should be revoked in areas included under the Safe Drinking Water Act, such as public water systems source water areas. One commenter said that all NWPs should be subject to an acreage limit of 1/10-acre.

Impacts to freshwater mussels that are listed as endangered or threatened under the ESA are addressed through general condition 18 and the subsequent ESA section 7 consultations that occur when district engineers review PCNs and determine that a proposed NWP activity may affect listed mussels. Where there are concerns about the use of NWPs in wilderness areas and other specific waterbodies or geographic areas of the United States, division engineers can add regional conditions to the NWPs to restrict or prohibit their use in those areas. The Corps does not have the legal authority to address the

vulnerability of coastal communities to future flood events or the loss of wetlands in coastal areas due to erosion, subsidence, and sea level rise. Public water systems source water areas are generally watersheds, and the Corps does not have the authority to regulate activities in uplands in these watersheds that may affect water supplies for communities. For those NWP activities that require PCNs, district engineers can consider effects to water supplies caused by regulated activities, as one of the Corps' public interest review factors (*i.e.,* water supply and conservation at 33 CFR 320.4(m)) that can be a basis for exercising discretionary authority. The Corps believes that the ½-acre limit for the NWPs, the PCN review process, and the ability of division engineers to modify, suspend, or revoke the NWPs on a regional or case-specific basis is sufficient for ensuring that the NWPs that have the ½-acre limit authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

One commenter stated that implementing NWPs under the Navigable Waters Protection Rule (NWPR) will result in more than minimal impacts and not account for areas that were jurisdictional but are not under current rule. Many commenters said that the NWPs should include language clarifying that not all ditches constructed in adjacent wetlands are jurisdictional. Many commenters stated that the discussion of wetland jurisdiction in the NWPs should mirror that in the NWPR. Many commenters asserted that there are inconsistencies between the proposed NWPs and the NWPR. Several commenters said that the terminology in the NWPs should be consistent with the NWPR, especially the terms ''stream,'' ''tributary,'' and ''ephemeral.''

The NWPs are used to authorize activities in waters and wetlands that are jurisdictional under the Corps' permitting authorities: Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. If a project proponent wants to discharge dredged or fill material into a waterbody that is not subject to Clean Water Act jurisdiction under the NWPR, then DA authorization under an NWP or any other type of Corps permit is not required for that proposed discharge. The Corps declines to add language to this final rule regarding the jurisdictional status of ditches under the Clean Water Act because that jurisdictional status is more appropriately addressed through application of the provisions of the NWPR at 33 CFR part 328. Many of the NWPs can be used to authorize discharges of dredged or fill material into numerous wetland types that are subject to Clean Water Act jurisdiction under the NWPR. There are no inconsistencies between the proposed NWPs and the NWPR. The NWPs can be used to authorize specific activities in waters and wetlands that are subject to Clean Water Act jurisdiction under the NWPR. Some of the NWPs specifically authorize discharges of dredged or fill material into streams, so the Corps declines to replace the term ''stream'' with ''tributary.'' Under the NWPR, ephemeral features, including ephemeral streams are excluded from Clean Water Act jurisdiction.

One commenter requested that the Corps issue a new NWP with no PCN requirements that authorizes emergency projects such as repair of significant leaks from canals, tunnels, and other features, culvert repair and replacement, critical pump plant repairs, and small scale urgent natural disaster mitigation projects. One commenter suggested that the Corps issue a new NWP to authorize natural disaster mitigation projects (*e.g.,* fire or flood repairs or mitigation projects) with an acreage limit of 1/10-acre. One commenter stated that the Corps should issue a new NWP to authorize aggregate mining activities, instead of NWP 44. One commenter said that the Corps should prioritize NWP verifications for time-sensitive maintenance and emergency work. One commenter stated that the proposal should include a list of typically exempted activities, such as ditch maintenance. One commenter said that that the NWPs should include a general condition to limit the spread of invasive/noxious species.

The Corps declines to issue a new NWP to authorize the repair of leaks from canals, tunnels, and other features because NWP 3 can be used to authorize discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States to repair leaking structures or fills. The Corps also declines to issue a new NWP to authorize natural disaster mitigation projects. Some of these activities are already authorized by NWP 37, emergency watershed protection and rehabilitation activities. Some of these activities can also be authorized through the Corps' emergency permitting procedures at 33 CFR 325.2(e)(4). Nationwide permit 44 authorizes aggregate mining activities, so it is not necessary to issue another NWP to authorize those activities. District engineers currently have the authority to prioritize authorization of time-sensitive maintenance and emergency work, including the use of the emergency permitting procedures at 33 CFR 325.2(e)(4). Certain NWPs include notes that point to exemptions that may be related to authorized activities. The Corps declines to add a general condition to the NWPs to require permittees to take actions to limit the spread of invasive or noxious species because such a condition would not be reasonably enforceable and invasive or noxious species can spread through natural mechanisms outside the control of permittees. The Corps' regulations at 33 CFR 325.4(a) requires permit conditions to be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable.

(1) Status of Existing Permits

In response to the 2020 Proposal, the Corps received comments concerning the status of existing NWP authorizations and how the issuance of the final rule may affect those existing authorizations. The Corps also invited public comment on changing the expiration date for the 2017 NWPs to avoid having two sets of NWPs in effect at the same time.

Many commenters stated that current NWPs should expire on their original expiration date (*i.e.,* March 18, 2022). Several commenters expressed support for the 2017 NWPs expiring the day before the new NWPs become effective in order to provide certainty and continuity without imposing burdens on permittees, provided that all activities authorized by the 2017 NWPs remain approved regardless of whether those activities meet the requirements of the new NWPs. These commenters also wanted to avoid having differing sets of NWPs in effect at the same time.

Many commenters stated that the Corps proposed grandfathering procedure would cause uncertainty and disruption to those who are relying on the expiration date of the 2017 NWPs and the 12-month grandfathering period. A few commenters said that the grandfathering process and applicability was unclear. One commenter stated that previously verified activities should be allowed to continue under the 2017 NWPs unless the new NWPs are more restrictive. One commenter stated that if the NWPs issued in the final rule replaces the 2017 NWPs and the NWPs issued in the final rule go into effect before the 2017 NWPs were originally scheduled to expire on March 18, 2022, the Corps should notify all permittees who submitted PCNs or received NWP

verification letters under the 2017 NWPs.

The Corps acknowledges that that these changes to the NWPs may cause uncertainty and disruption for some project proponents who have received NWP verifications from the Corps. However, the Corps believes this disruption will be limited because the activities affected by the changes to the 12 existing NWPs are likely to continue to qualify for NWP authorization. Further, project proponents can work with Corps districts to efficiently obtain NWP verifications under the reissued NWPs. The information previously submitted to Corps districts via PCNs can be used to provide NWP verifications for many of the activities that will be authorized by the new NWPs for different types of utility line activities that were previously authorized by NWP 12. It is impractical to require the Corps districts to reach out to all permittees who received NWP verifications under the 2017 NWPs that are reissued in this final rule because of the number of verified activities. Once an NWP verification has been provided there is no obligation for a permittee to undertake the work that has been permitted; therefore, there it is impractical for the Corps to follow-up on every verification to ascertain if the work has been completed and/or whether the project proponent still intends to proceed with the activity authorized under the NWP.

One commenter asked what would happen to activities approved under the 2017 NWPs that would start construction prior to March 18, 2022, but after the implementation dated of the new NWPs. One commenter stated that activities that no longer qualify under the new NWPs but were verified under the 2017 NWPs should have 18 months to complete the authorized activity. One commenter questioned whether projects verified under the 2017 NWPs would still be valid as verified or would they be in non-compliance and require re-authorization either by NWP or by individual permit.

If a project proponent received an NWP verification under one of the 2017 NWPs, and the activity continues to be authorized by one of the existing NWPs that was reissued, that activity continues to be authorized by the 2017 NWP until it expires on March 18, 2022, unless the district engineer specified a different expiration date in the NWP verification letter (see 33 CFR 330.6(a)(3)(ii)). In contrast to the grandfathering provision at 33 CFR 330.6(b), the grandfathering provided by section 330.6(a)(3)(ii) is not dependent on when the project proponent commences construction. If the activity is not authorized by the reissued NWP, then the project proponent has 12 months to complete the authorized activity after the 16 final NWPs go into effect as long as the project proponent has commenced construction or is under contract to commence construction before the new expiration date for the twelve 2017 NWPs that are reissued in this final rule (see 33 CFR 330.6(b)). The Corps' regulations at 33 CFR 330.6(b) specify a 12-month grandfathering period for activities that no longer qualify for authorization under the reissued NWP if the activity has commenced or is under contract to commence prior to the expiration of the NWP. To change that 12-month period to 18 months would require rulemaking to amend the regulation. The validity of the prior NWP authorization would depend on whether the activity continues to be authorized by any of the 16 NWPs issued in this final rule, and whether any of the grandfathering provisions in 33 CFR 330.6 apply.

One commenter said that based on section 330.6(b) permittees should have until March 18, 2023 to complete projects authorized under the 2017 NWPs as long as they are under construction or contract to commence construction. One commenter stated that special emphasis should be placed on NWP 12 if it is split into three NWPs, to ensure that activities previously authorized under the 2017 NWP 12 continue to be permitted through the date specified in the verification letter. One commenter stated that the Corps should allow for a reasonable transition between existing activities authorized by an NWP and the new NWPs, for up to one year.

As discussed above, electric utility line and telecommunications activities and utility line activities for water and other substances continue to be authorized by the 2017 NWP 12 for up to 12 months as long as the project proponent has commenced construction or is under contract to commence construction before NWPs 57 and 58 go into effect. Given the anticipated effective date of this final rule, the 12-month grandfathering provision is likely to end close to March 18, 2022. The Corps believes that the current regulations provide a reasonable transition from the 2017 NWPs to the 16 NWPs issued in this final rule.

(2) Pre-Construction Notification Requirements

A few commenters stated they are supportive of the reduction of the number of PCN thresholds under various NWPs. A few commenters said they are supportive of the removal of the 300 linear foot PCN threshold. Many commenters stated that they are opposed to reducing the number of PCN thresholds for the NWPs because they believe these PCN thresholds are necessary to ensure that the activities authorized by these NWPs have no more than minimal adverse environmental effects. A few commenters said that the lack of PCNs does not meet the national no-net-loss of aquatic resources goal because these losses are not being mitigated. A few commenters stated their opposition to the removal of the 300 linear foot PCN thresholds. Several commenters said that they are opposed to federal agencies not having to submit PCNs because it is contrary to the Clean Water Act.

The changes to the PCN thresholds for the NWPs are discussed in the sections of the final rule that apply to each NWP. With the removal of the 300 linear foot limit for losses of stream bed, the Corps has also removed the ability of district engineers to waive that 300 linear foot limit on a case-by-case basis after reviewing PCNs. Activities can be authorized by NWPs with no compensatory mitigation requirements as long as those activities result in no more than minimal individual and cumulative adverse environmental effects. In FY 2018, approximately 11 percent of activities verified by district engineers as qualifying for NWP authorization required compensatory mitigation. There is no requirement in law or regulation for no net loss of aquatic resources. The requirement for what can be authorized by an NWP is that established by Section 404(e) of the Clean Water Act requiring activities authorized by NWPs to cause only minimal individual and cumulative adverse environmental effects. As discussed in Section II.D, the Corps is retaining PCN requirements for federal agencies that use the NWPs to authorize their activities.

A few commenters said that PCNs should be required for all NWP activities to ensure the authorized activities are not affecting the environment adversely and to ensure the permittee is avoiding and minimizing impacts to the maximum extent practicable. One commenter stated that a PCN should be required to ensure compliance with Section 106 of the National Historic Preservation Act. One commenter said that the timing of the review process for a PCN is not identified in the proposed rule for any of the NWPs.

The Corps establishes PCN thresholds for those NWP activities that have the potential to cause more than minimal

adverse environmental effects, to provide activity-specific review and allow district engineers to exercise discretionary authority and require individual permits for activities that will have more than minimal adverse environmental effects. General condition 20 establishes PCN requirements for proposed NWP activities that have the potential to cause effects to historic properties that are undertaken by non-federal permittees. The timing of the PCN review process is provided in general condition 32.

One commenter stated that the Corps undertakes many actions under its permitting authorities for which the tribes and villages are not notified. One commenter asked how the Corps ensures no more than minimal adverse environmental effects if a default NWP authorization occurs after 45 days has passed after the district engineer receives a PCN. One commenter asked for clarification as to how the Corps ensures compliance for activities that do not require PCNs. One commenter requested that Corps Headquarters clarify to each of the Corps districts that it is up to the permittee to determine whether a PCN is required or not.

In conjunction with the rulemaking process for the issuance of these NWPs, Corps districts have been conducting consultation and coordination with tribes to identify regional conditions and coordination procedures to ensure compliance with general condition 17, concerning tribal rights. Activities that qualify for the default authorization that occurs 45-days after the district engineer receives a complete PCN must comply with all conditions of the NWP, including the general conditions and any applicable regional conditions imposed by the division engineer. The permittee is responsible for reading the NWPs and all of their conditions to determine whether he or she is required to submit a PCN before proceeding with an authorized activity.

One commenter said that for linear projects that are considered ''single and complete,'' where some crossings do not require PCNs, the permittee should not have to divulge the non-PCN crossing information to the Corps because the permittee is not required to provide the same level of documentation for non-PCN crossings, and the project proponent should be free to move forward with the non-PCN crossings. One commenter encouraged the Corps to implement a nationwide tracking and monitoring system for NWPs with PCN requirements to share information with cooperating resource agencies so that informed decisions can be made regarding changes to the NWP program.

The information on the non-PCN crossings associated with a linear project is necessary so that the district engineer can consider all crossings of waters of the United States that require DA authorization when making his or her determination that the proposed NWP activities will result in no more than minimal cumulative adverse environmental effects. The information required by paragraphs (b)(4)(i) and (ii) of general condition 32 does not change these non-PCN crossings into those requiring PCNs. The Corps tracks all NWP verifications issued for activities that require PCNs and for activities reported to Corps districts through voluntary PCNs where the permittee seeks written verification even though he or she is not required to do so.

(3) Climate Change

Many commenters said that the Corps should consider climate change during the reissuance of these NWPs. One commenter stated that the Corps failed to analyze climate change, the risk of which will be exacerbated by the issuance of the NWPs. Some of these commenters stated that the Corps should consider increased energy consumption as a foreseeable indirect effect of the Corps' decisions for these NWPs. Several commenters asserted that the proposed changes to the NWPs will have significant impacts on the environment, including climate change. One commenter said that the cumulative impacts of stream and wetland losses from NWP activities must be considered in the context of the changing climate. Several commenters stated that the proposed NWPs help support the nation's investment of its infrastructure, including changes to infrastructure to address global climate change.

The Corps has considered climate change during the reissuance of the NWPs, and each of the national decision documents includes a discussion of climate change. Although some activities authorized by various NWPs may be associated with energy production, distribution, and use, the Corps does not have the authority to regulate or control the production, distribution, or combustion of hydrocarbons and other materials are sources of carbon dioxide and other greenhouse gases that contribute to global climate change. Permittees may use equipment during the construction of the NWP activity that emits carbon dioxide and other greenhouse gases, but those emissions occur during the construction period for the authorized activity and have an insignificant contribution to cumulative greenhouse gas emissions in the region. The activities authorized by NWPs may result in permanent or temporary impacts to wetlands and streams, and the discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States are only a subset of the variety of human activities that change the quantity and quality of wetlands, streams, and other aquatic resources. Those other human activities are discussed in section 4.0 of the national decision documents for these NWPs. Some activities authorized by the NWPs, such as utility line activities, bank stabilization activities, living shorelines, and aquatic resource restoration activities contribute to adaptation to climate change.

C. Comments on Proposed Actions Under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth

In response to the 2020 Proposal, the Corps received comments on its proposed actions under Executive Order 13921, Promoting American Seafood Competitiveness and Economic Growth. The comments on proposed NWPs A and B for seaweed mariculture activities and finfish mariculture activities, respectively, are discussed in Section II.G of this final rule. In response to the section of the 2020 Proposal on E.O. 13921, the Corps received a few comments on aquaculture in other waters of the United States, but those commenters seemed to think that the mariculture NWPs might also authorize aquaculture activities in those other waters (*e.g.,* freshwater lakes, ponds, and wetlands). The new NWPs 55 (seaweed mariculture activities) and 56 (finfish mariculture activities) limit those activities to estuarine and marine waters. These new NWPs also authorize multi-trophic mariculture activities.

D. Comments on the 2018 Legislative Outline for Rebuilding Infrastructure in America

In the 2020 Proposal, the Corps requested comment on whether to modify the NWPs that require PCNs to limit the PCN requirement to non-federal permittees. The Corps requested that commenters provide their views on whether they support or oppose having different PCN requirements for Federal and non-Federal permittees, with supporting information to explain their views.

After considering the comments received in response to the proposal based on the 2018 Legislative Outline

for Rebuilding Infrastructure in America, for the final NWPs the Corps decided to continue to subject both federal permittees and non-federal permittees to the same PCN requirements. Overall, the comments received in response to this aspect of the proposed rule did not support a reasoned and defensible rational for establishing different PCN requirements for federal and non-federal entities that use the NWPs to authorized activities that require DA authorization under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. The comments the Corps received did not provide a substantive basis for establishing different PCN requirements for federal permittees and non-federal permittees, or establishing that federal permittees generally have a better record than non-federal permittees for complying with the NWPs and complying with related laws such as the Endangered Species Act and the National Historic Preservation Act. While the Corps would retain its enforcement authorities under the proposal, continuing to require federal agencies to submit PCNs is a more efficient means of ensuring that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters opposed the proposal to remove PCN requirements for federal permittees that want to use the NWPs to authorize their activities, because it would apply different PCN requirements and standards to federal versus non-federal permittees. Some of these commenters said this change may result in inadvertent violations. Some of these commenters stated that applying different PCN requirements for federal and non-federal permittees has no rational basis, and PCN requirements should be based on the regulated activity, not who undertakes the regulated activity.

After reviewing the comments received in response to this aspect of the proposal, the Corps agrees that there is no substantive basis for establishing different PCN requirements for federal and non-federal permittees. The Corps is thus retaining the existing PCN requirements for federal permittees.

Many commenters questioned whether federal agencies employ environmental experts qualified to review the projects before submitting the PCNs to the Corps and ensure that those federal agencies comply with applicable laws, regulations, and policies. Some these commenters said that expertise is inconsistent in terms of presence and depth among different federal agencies. They stated that staff at Corps districts are the best equipped with the technical knowledge and familiarity to administer the program and provide compliance oversight.

The Corps agrees that knowledge regarding environmental laws and regulations, and experience in preparing environmental documentation to demonstrate compliance with environmental laws, varies among people as a whole, and is not dependent on whether they work for a federal government agency. As discussed in the 2020 Proposal, many non-federal permittees seek the assistance of environmental consultants to help them obtaining DA authorization through the NWP authorization process.

Many commenters pointed out that PCNs allow the NWP program to meet the goal of no more than minimal individual and cumulative adverse impacts to the environment. Many of them said that exempting activities undertaken by federal agencies would reduce the ability of the Corps to track the cumulative effects of the NWP program. Many commenters expressed concerns with the Corps not assessing compensatory mitigation for federal permittees. They said there would be no mechanism for oversight and assurance that mitigation is completed and legally binding. Some of these commenters stated that federal permittees would have no incentive to avoid and minimize impacts and it is a clear conflict of interest for federal agencies, as they are incentivized to ensure their projects are permitted with as little cost as possible.

The Corps is continuing to require PCNs from federal permittees, so there will be no change in the number of PCNs. District engineers will still review PCNs and require compensatory mitigation and other forms of mitigation when necessary to ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects.

Regarding the proposed definition of non-federal permittee, several commenters asked about the circumstances under which a non-federal permittee would be considered a federal permittee, and whether federal funding or some other federal nexus involving a local partner would be a factor. Some commenters inquired whether a state or local agency who has been delegated NEPA authority be considered a non-federal permittee. Several commenters said that there would need to be a clearer definition to help identify federal permittees who would no longer have to submit PCNs for proposed NWP activities. Because the Corps is retaining PCN requirements for federal agencies, it declines to speculate on how it would have implemented the proposal.

Several commenters stated that delegation of the section 404 permitting program to another federal agency is not likely to be legally permissible and might expose the Corps to litigation. Some of these commenters said that case law suggests that such delegation of a federal agency's statutory authority is not allowed, especially in the absence of memorandum of agreement between agencies. Not requiring PCNs from federal permittees for NWP activities is not be a delegation of the section 404 permitting program. The Corps continues to implement the NWP program and take actions necessary ensure that NWP activities comply with the terms and conditions of those authorizations, including potential actions identified in its enforcement regulations at 33 part CFR 326.

Several commenters did not support the inclusion of state departments of transportation (DOTs) that have been assigned NEPA responsibilities in the category of federal permittees that would not have to submit PCNs for proposed NWP activities. Some of these commenters said that state DOTs may forgo internal mitigation programs if PCNs were no longer required and district engineers would not have the ability to impose mitigation requirements on NWP activities through conditions added to the NWP authorization. Some commenters said that long-term linear transportation projects are some of the biggest contributors of turbidity in the nation's waterbodies and can have permanent impacts to streams and wetlands. Some DOTs already have funding agreements with the Corps in most states to provide supplemental staff that are required to implement impartial decision-making and are overseen and reviewed by non-funded regulators to ensure transparency and fairness. A few commenters said that if these critical safeguards be removed, DOTs will not be impartial or unbiased, and could undermine the environmental protections provided by the PCN process. Since the Corps is not changing the PCN requirements for federal permittees, it declines to speculate on how it would have implemented the proposed definition of ''non-federal permittee'' and other aspects of the proposal.

A few commenters stated that removing PCN requirements for federal permittees could limit the ability of states to ensure that state water quality standards are being met under Section

401 of the Clean Water Act. If PCNs are not required, the regulatory scope of water quality protection shifts from pre-impact permitting review to more resource intensive field compliance, creating a burden on the regulatory entities responsible for protection of water quality. Pre-construction notifications ensure that NWP activities are consistent with water quality standards, water quality management plans/continuing planning process, total daily maximum loads, and anti-degradation policy.

The PCN requirements do not affect the requirements of Section 401 of the Clean Water Act. If a certifying agency does not issue water quality certification for the issuance of an NWP that does not require pre-construction notification, the project proponent is still required to obtain an activity-specific water quality certification or waiver for the proposed discharge.

A few commenters stated that the further an agency's focus is from natural resource management, the input from state fish and wildlife agencies is more critical. These commenters said that the participation of state natural resource agencies in the PCN review process helps ensure potential impacts to state trust resources are considered, and ensures public trust property is not taken without compensation. The Corps does not coordinate PCNs with state natural resource agencies, except for a few exceptions. Those exceptions are identified in paragraph (d) of general condition 32.

Several commenters pointed out that both federal and state projects are causes of some of the nation's largest wetland losses. These commenters said that if PCN requirements are removed, there will be no way to assess the impacts of these large-scale projects and it would result in huge aquatic resource losses. Several commenters stated that few federal agencies have the level of experience in working with and consulting tribes and said that PCNs should continue to be required in order to provide communication between the potentially impacted tribe, the Corps, and the federal agency regarding any potential impacts to tribal lands and resources. Since the Corps is retaining PCN requirements for federal permittees, these concerns have been addressed.

A commenter said that the preamble to the proposed rule explains that the PCN process also provides a database to inform renewal of NWPs. A couple of commenters stating that the Corps' assumption that non-federal entities, such as private entities, non-profits and even state governments do not possess the same or higher expertise than the federal government is arbitrary and unfair. One commenter stated that there has been an erosion of positions within agencies along with the required expertise for such environmental reviews. Since the Corps is retaining PCN requirements for federal permittees, there is no need to speculate on how it would have implemented the proposal.

A couple of commenters said that Section 313 of the Clean Water Act states in no uncertain terms that all federal agencies ''shall be subject to, and comply with, all federal, state, interstate, and local requirements respecting the control and abatement of water pollution in the same manner, and to the same extent, as any nongovernmental entity.'' A couple of commenters stated that removal of the PCN requirements for federal permittees would make it difficult for states to identify violations and impossible for the Corps to ensure that the conditions of the permits are being property implemented, especially since recent changes to the EPA's regulations for Clean Water Act Section 401 water quality certifications, which preclude certifying authorities from monitoring and enforcing conditions of permitted activities. Since the Corps is retaining PCN requirements for federal permittees, there is no need to respond to these comments.

One commenter requested clarification regarding use of the phrase ''NEPA responsibility for all federal highway project in the state'', and asked whether the Corps intended to only provide federal permittee status to those NEPA assignment states who accept all federal highway projects in the state. One commenter stated that state transportation agencies would gain efficiency by elimination of PCNs for many small projects. A few commenters supported the proposal and believe it will streamline review and approval of permitting while allowing the Corps to focus on individual permitting needs. Several commenters supported the proposed definition of ''non-federal permittee'' including the inclusion of state DOTs. The Corps is not adopting the proposed definition of ''non-federal permittee'' so it is not necessary to address the comments on the proposed definition.

One commenter supports the PCN process and encourages the Corps to work with state agencies for additional options such as reducing comment periods to reduce overall time constraints associated with Corps permitting. Several commenters suggested that there should be a certification process through which individuals receive training by the Corps and demonstrate that they have sufficient knowledge to preserve the intent of the NWPs. They said the Corps should develop a set of criteria that each entity needs to meet to demonstrate proficiency to allow the entity to be exempt from submitting PCNs for proposed NWP activities.

The Corps does not solicit comments from state agencies on proposed NWP activities, except for certain NWP activities identified in paragraph (d) of general condition 32. The Corps does support the development of a certification process for potential users of the NWPs. Certain NWPs do not require the submission of PCNs but for those that do, district engineers will continue to review and render decisions on those actions.

One commenter suggested that the Corps exempt private companies that are undertaking projects in conjunction with, or in response to, federal projects. One commenter stated that the Corps should clarify whether states, or entities acting with or on behalf of states, would be exempt from the requirement to submit PCNs when operating under the Surface Transportation Block Grant Program, which allows states to implement road projects and other projects using federal money with some amount of regulatory oversight by the Federal Highways Administration. A couple commenters suggested that if the Corps does not require PCNs for activities undertaken federal permittees, the PCN requirements for all applicants could be included as regional conditions to the NWPs. The Corps is retaining the PCN requirements for federal permittees, therefore it declines to speculate on how it would have implemented the proposal.

One commenter suggested modifying the PCN exemption to only encompass federal, state, or local agencies that have established their credentials for application of the NWP program. One commenter suggested an exemption from PCN requirements for federal permittees when pre-construction notification is required solely as a result of federal consultation thresholds noted in the NWP general conditions. One commenter suggested there would be a benefit in including a statement clarifying that state transportation agencies with NEPA delegation are the federal leads in terms of ESA Section 7 and NHPA 106 compliance. One commenter stated that most DOTs strive for consistency and implement NEPA requirements on all projects, which ensures compliance with federal regulations and allows previously non-

federal aid projects to become federal aid projects when additional federal funds become available. One commenter suggested that if this proposal is enacted, the Corps should provide specific standards for professional qualifications similar to 36 CFR part 61, Appendix A. The Corps is retaining the PCN requirements for federal permittees, so it declines to speculate on how it would implement the proposal.

One commenter stated that to the extent there is a perception of delay caused through federal administrative shortfalls and backlogs, a greater level of funding for Corps staff and offices would be a better investment in reducing perceived delays. This commenter said that exchanging one federal staff funding shortfall for another agency with less expertise would not produce a net gain in permitting efficiency while complying with the duty to authorize only those impacts that will have minimal adverse effects on the environment. One commenter suggested that the Corps evaluate whether a PCN requirement should be based on qualifications rather than the federal status of a permittee. This commenter said that an audit process could be implemented to verify past and continued quality of the applicant's work. One commenter suggested the Corps focus on how to improve staff training and the mechanics of the PCN process so that it is completed in a reliable, transparent, and effective manner within the designated time frames. The Corps is retaining the PCN requirements for federal permittees, so these concerns have been addressed.

E. Comments on Regional Conditioning of Nationwide Permits

Under Section 404(e) of the Clean Water Act, NWPs can only be issued for those activities that result in no more than minimal individual and cumulative adverse environmental effects. For activities that require authorization under Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Corps' regulations at 33 CFR 322.2(f) have a similar requirement. Since it can be difficult for the Corps to draft national NWPs in such a way that they account for regional differences, an important mechanism for ensuring compliance with these requirements is regional conditions imposed by division engineers to address local environmental concerns. Effective regional conditions help protect local aquatic ecosystems and other resources and help ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse effects on the environment and are not contrary to the public interest.

Corps regional conditions are added to the NWPs by division engineers in accordance with the procedures at 33 CFR 330.5(c). Water quality certification (WQC) and Coastal Zone Management Act (CZMA) consistency concurrence regional conditions are also added to the NWPs if an appropriate certifying authority issues a water quality certification or CZMA consistency concurrence with special conditions prior to the finalization of the issued, reissued, or modified NWPs.

Corps regional conditions approved by division engineers cannot remove or reduce any of the terms and conditions of the NWPs, including general conditions. Corps regional conditions cannot lessen PCN requirements. In other words, Corps regional conditions can only be more restrictive than the NWP terms and conditions established by Corps Headquarters when it issues or reissues an NWP.

The Corps' regulations for establishing WQC regional conditions for the NWPs are located at 33 CFR 330.4(c)(2). If, prior to the issuance or reissuance of NWPs, a state, authorized tribe, or EPA issues a Clean Water Act section 401 water quality certification with conditions, the division engineer will make those water quality certification conditions regional conditions for the applicable NWPs, unless he or she determines that a specific condition in a water quality certification issued for the issuance of an NWP does not comply with 40 CFR 121.7(d)(2). If the district engineer makes such a determination, then he or she will consider that condition waived under 40 CFR 121.9(b) after written notice is provided to EPA and the certifying authority consistent with 40 CFR 121.9(c). For more information on compliance with Section 401 of the CWA, refer to Section III.G.

For CZMA consistency concurrences issued by a state for the issuance of an NWP, if the division engineer determines those CZMA concurrence conditions do not comply with 33 CFR 325.4, then the conditioned CZMA consistency certification will be considered an objection, and the project proponent will need to request an activity-specific CZMA consistency concurrence from the state (see 15 CFR 930.31(d)) under subpart D of 15 CFR part 930.

Corps regional conditions may be added to NWPs by division engineers after a public notice and comment process and coordination with appropriate federal, state, and local agencies, as well as tribes. After Corps Headquarters publishes in the **Federal Register** the proposal to issue, reissue, or modify NWPs, all district engineers issue local public notices to advertise the availability of the proposed rule in the **Federal Register** and to solicit public comment on proposed regional conditions and/or proposed revocations of NWP authorizations for specific geographic areas, classes of activities, or classes of waters (see 33 CFR 330.5(b)(1)(ii)).

As discussed above, regional conditions are an important tool for taking into account regional differences in aquatic resources and their local importance and for ensuring that the NWPs comply with the requirements of Section 404(e) of the Clean Water Act, especially the requirement that activities authorized by NWPs may only result in no more than minimal individual and cumulative adverse environmental effects. Regional conditions are modifications of the NWPs that are made by division engineers. Regional conditions can only further condition or restrict the applicability of an NWP (see 33 CFR 330.1(d)). Under 33 CFR 330.5(c)(1)(i), the first step of the Corps' regional conditioning is for district engineers to issue public notices announcing proposed regional conditions, and to solicit public comment on those proposed regional conditions, usually for a 45-day comment period. Those public notices also solicit suggestions from interested agencies and the public on additional regional conditions that they believe are necessary to ensure that the NWPs authorize only those activities that have no more than minimal adverse environmental effects. The district public notices are generally issued shortly after Corps Headquarters publishes the proposed NWPs in the **Federal Register**.

After the public comment period ends for the district public notices, the Corps district evaluates the comments and begins preparing the supplemental documents required by 33 CFR 330.5(c)(1)(iii) for each NWP. Each supplemental document will evaluate a specific NWP on a regional basis (*e.g.,* by Corps district geographic area of responsibility or by state) and discuss the need for regional conditions for that NWP. Each supplemental document will also include a statement by the division engineer that will certify that the NWP, with approved regional conditions, will authorize only those activities that will have no more than minimal individual and cumulative adverse environmental effects. The supplemental documents may cover a

Corps district, especially in cases where the geographic area of responsibility for the Corps district covers an entire state. The supplemental documents may cover a state when there is more than one Corps district in the state, and the lead Corps district for that state is responsible for preparing the supplemental documents. If more than one Corps district operates in a state, the lead district is responsible for preparing the supplemental documents and coordinating with the other Corps districts. The supplemental documents include an evaluation of public and agency comments, with responses to those comments, to show that the views of potentially affected parties were fully considered (33 CFR 330.5(c)(1)(ii)). The supplemental document also includes a statement of findings demonstrating how substantive comments were considered. After the supplemental documents are drafted by the district, they are sent to the division engineer for review along with the district's recommendations for regional conditions. The division engineer may approve the supplemental documents or request changes to those supplemental documents, including changes to the regional conditions recommended by the district.

After the division engineer approves the regional conditions and signs the supplemental documents, the district issues a public notice on its website announcing the final Corps regional conditions and when those regional conditions go into effect (see 33 CFR 330.5(c)(1)(v)). Copies of the district's public notice are also sent to interested parties that are on the district's public notice mailing list via email or the U.S. mail. The public notice will also describe, if appropriate, a grandfathering period as specified by 33 CFR 330.6(b) for those who have commenced work under the NWP or are under contract to commence work under the NWP (see 33 CFR 330.5(c)(1)(iv)). A copy of all Corps regional conditions approved by the division engineers for the NWPs are forwarded to Corps Headquarters (see 33 CFR 330.5(c)(3)).

Under the current regulations, Corps Headquarters does not have a formal role in the development and approval of Corps' regional conditions by division engineers. However, Corps Headquarters provides templates for the supplemental documents required by § 330.5(c)(1)(iii), to promote consistency in those supplemental documents. If requested by district and division offices, Corps Headquarters also provides advice on appropriate Corps regional conditions for the NWPs. The Corps is a highly decentralized organization, with most of the authority for administering the regulatory program delegated to the 38 district engineers and 8 division engineers (see 33 CFR 320.1(a)(2)). District engineers are responsible for the day-to-day implementation of the Corps Regulatory Program, including the evaluation of applications for individual permits, evaluating PCNs for proposed NWP activities, evaluating notifications for activities authorized by regional general permits, responding to requests for approved and preliminary jurisdictional determinations, conducting compliance and enforcement actions, and other tasks. Division engineers are responsible for overseeing implementation of the Regulatory Program by their districts, and making permit decisions referred to them by district engineers under the circumstances identified in 33 CFR 325.9(c). Under that section of the Corps' regulations, a division engineer can refer certain permit applications to the Chief of Engineers for a decision. Other than making permit decisions under the circumstances listed in § 325.9(c), Corps Headquarters is responsible for development of regulations, guidance, and policies.

When a state, authorized tribe, or EPA issues a WQC for the issuance of an NWP and that WQC includes conditions, those conditions become conditions of the NWP authorization, unless one or more conditions is waived because they do not meet the criteria at 40 CFR 121.7(d)(2). The processes for states, approved tribes, and EPA to issue WQCs for the issuance of the NWPs, are separate from the Corps' regional conditioning process under 33 CFR 330.5(c), and are governed by state, tribal, or EPA, regulations. The Corps' current regulations for water quality certification for the NWPs are found at 33 CFR 330.4(c), and those regulations provide a process for WQC conditions becoming conditions of the NWPs when WQCs are issued for the NWPs before the NWPs are issued by Corps Headquarters.

When a state issues a general CZMA consistency concurrence with conditions for an NWP, those conditions become CZMA regional conditions if, after recommendation by the district engineer, the division engineer determines those conditions are acceptable under 33 CFR 330.4(d)(2). The processes for states to issue general CZMA consistency concurrences for the NWPs, are separate from the Corps' regional conditioning process under 33 CFR 330.5(c), and are governed by Department of Commerce regulations.

When the final WQCs and CZMA consistency concurrences are issued, District and division engineers will review those WQCs and CZMA consistency concurrences and determine which conditions become conditions for the final NWPs. Division engineers will then finalize any Corps regional conditions. After division engineers finalize Corps regional conditions, Corps districts will issue public notices announcing the final regional conditions and the final WQCs and CZMA consistency concurrences for the issuance of the NWPs. The Corps will post copies of the district public notices announcing the final Corps regional conditions and final WQC/CZMA conditions in the *regulations.gov* docket (docket number COE–2020–0002), under ''Supporting and Related Material.''

At present, districts manage their own processes for soliciting public comment on their regional conditions. In general, they make solicitations of public comment available on their own website and do not always make the comments they receive publicly available. To further improve the nationwide transparency of the regional conditioning process, the Corps is considering revising the regulations governing the regional conditioning process at 33 CFR 330.5(c). Specifically, the Corps is considering whether to require the districts to post and solicit public comment on notices proposing regional conditions in separate dockets at *www.regulations.gov.* Even though such changes were outside the scope of this action, the Corps solicited public comment on whether to implement this or a similar requirement relating to the regional conditioning process and any factors we should consider in a future rulemaking. While the comments relate to matters that were outside the scope of this action, the Corps appreciates the helpful suggestions it received from the public. The Corps will consider them as we continue to examine whether changes may be necessary to the regulations governing the regional conditioning process.

Several commenters said that regional conditions are excessive and/or unnecessary. Several commenters requested that Corps Headquarters review and concur with regional conditions before they are finalized. A few commenters said that regional conditions may be appropriate in some cases in specific areas of the country. A few commenters said that rationale and justification for regional conditions should be made available to the public. A few commenters recommended that Corps Headquarters provide detailed

guidance to district offices regarding how to develop regional conditions. A few commenters said that Corps districts are inconsistent on how they create regional conditions. A couple of commenters said that current regional conditions should not change. One commenter said that regional conditions should be specific to watersheds or ecoregions and not differ between districts.

The Corps believes that regional conditions are necessary to tailor the NWPs on a regional basis to ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Under the Corps' current regulations at 33 CFR 330.5(c), division engineers have the authority to add regional conditions to the NWPs and Corps Headquarters has no role in that approval process. The supplemental documents division engineers prepare for adding regional conditions to the NWPs require consideration of the comments received on the district's public notices on the proposed regional conditions and a statement of findings showing how substantive comments were considered by the division engineer (see 33 CFR 330.5(c)(1)(iii)). Regional conditions do not need to be consistent across districts, among divisions, or nationally because they are intended to address specific regional issues or concerns for the aquatic environment or any of the Corps' public interest review factors. If regional conditions are specific to watersheds, differences in regional conditions among districts are inevitable because different watersheds are likely to have different resource concerns and different factors affecting what adverse environmental effects might be considered more than minimal.

One commenter stated that Corps districts should be able to develop and identify appropriate regional conditions. One commenter said that the proposed changes to regional conditions will remove coordination processes with state partners. One commenter remarked that the proposed changes will result in a disproportionate impact to floodplains and flood-prone areas. One commenter said that the regional conditions for NWPs 12, C, and D should be the same in each region. One commenter stated that there is inconsistency between whether or not Corps districts consider oil and gas natural pipelines as utility lines in regional conditions.

Corps districts identify regional conditions, and make recommendations to division engineers. The approval authority for regional conditions lies with the division engineer (see 33 CFR 330.5(c)). Regional conditions can provide for coordination with state partners, and that coordination may be removed as regional conditions are considered for a new set of NWPs. The Corps does not have the authority to regulate floodplains and flood-prone areas per se. The Corps has the authority to regulate discharges of dredged or fill material into waters of the United States, and those waters and proposed discharges may be located in floodplains or flood-prone areas. Having identical regional conditions for NWPs that authorize utility line activities would be contrary to the intent of regional conditions, which is to address regional differences in aquatic resources and ensure that the NWPs authorize only those activities that result in no more than minimal individual and cumulative adverse environmental effects. Oil and natural gas pipelines are a type of utility line and regional conditions are intended to address specific resource concerns.

One commenter said that regional conditions should include programmatic compliance with other federal laws. One commenter stated that regional conditions should be used to require in-kind mitigation and adopt impact and mitigation thresholds or associated methodologies. One commenter said that regional conditions should be developed to provide additional protection for species of concern and cultural/historical sites. One commenter asserted that regional conditions should be developed to require tribal consultation for every permit. One commenter said that regional conditions should prohibit work during spawning period for fish of cultural concern or which would jeopardize wild rice beds.

Regional conditions may be helpful in ensuing programmatic compliance with other federal laws. Regional conditions can also be used to specify mitigation requirements for the NWPs. Regional conditions can help provide protection for listed species, historic properties, and cultural resources, often by adding PCN requirements to help ensure that required consultations for those resources are undertaken. Decisions on whether and how to consult with tribes on proposed NWP activities are made on a case-by-case basis by district engineers. Regional conditions may add time-of-year restrictions on authorized activities to ensure that those activities have no more than minimal adverse effects on fish spawning or rice beds.

Several commenters requested greater transparency in the process of establishing regional conditions, saying that public notices, rationales for regional conditions, and comments received on proposed regional conditions should be available on separate dockets at *www.regulations.gov.* Several commenters requested revisions to governing regulations to require posting of any proposed additions of, changes to, or revocations of regional conditions in separate dockets on *www.regulations.gov.* Several commenters requested that the Corps create and maintain a single, national website where all proposed and final regional conditions can be viewed. The Corps will consider these comments when it prepares the next rulemaking for the issuance of NWPs.

A few commenters said that public notice processes for regional conditions should be consistent between districts. A few commenters stated that districts are inconsistent and limit comment by requiring subscriptions to respective mailing lists rather than publishing notices in the **Federal Register** or on *www.regulations.gov.* One commenter said that public notices for regional conditions should be published in the **Federal Register**. Two commenters asked for the same level of written justification for adoption of regional conditions that is required to reissue or modify the NWPs. One commenter said that publication of these documents on separate web pages or dockets is redundant and unnecessary. One commenter stated that that comments received on regional conditions should be posted to a web page. One commenter stated that the Corps analyses for regional conditions do not satisfy statutory requirements. Two commenters said that it is difficult to find public notices or regional conditions on district web pages.

The public notice process for regional conditions is consistent among all Corps districts, because the public notice process is described in the Corps' regulations at 33 CFR 330.5(c)(1). The current regulations governing the regional conditioning process relies on public notices, and does not include provisions requiring the publication of notices in the **Federal Register**. During the next rulemaking process for the NWPs, the Corps will decide whether to use *www.regulations.gov* for managing and posting public comments received on proposed regional conditions. Each Corps district is responsible for managing its own web pages, and regional conditions apply to a particular Corps district, so it is appropriate for Corps districts to post public notices for regional conditions proposed for their districts on their web pages.

F. Comments on Proposed Removal of the 300 Linear Foot Limit for Losses of Stream Bed

In the proposed rule, the Corps proposed to remove the 300 linear foot for losses of stream bed from NWPs 21 (Surface Coal Mining Activities), 29 (Residential Developments), 39 (Commercial and Institutional Developments), 40 (Agricultural Activities), 42 (Recreational Facilities), 43 (Stormwater Management Facilities), 44 (Mining Activities), 50 (Underground Coal Mining Activities), 51 (Land-Based Renewable Energy Generation Facilities), and 52 (Water-Based Renewable Energy Generation Pilot Projects). All of these NWPs have a ½-acre limit for losses of non-tidal waters of the United States, including non-tidal wetlands and non-tidal streams. With the exception of NWPs 43 and 51, these NWPs require pre-construction notification for all activities. Nationwide permit 43 does not require PCNs for maintenance of existing stormwater management facilities, as long as those maintenance activities are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. Nationwide permit 51 does not require PCNs for activities that result in the loss of ⅒-acre or less of waters of the United States. Therefore, district engineers will review all proposed activities for these on a case-by-case basis, except for the NWP 43 and 51 activities identified above. When reviewing these PCNs, district engineers apply the 10 criteria in paragraph 2 of Section D, District Engineer's Decision, to determine whether the proposed activities will result in no more than minimal individual and cumulative adverse environmental effects.

In the proposed rule, the Corps presented a number of reasons for these proposed changes to NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The Corps' rationale comprises four categories of considerations: (1) The Corps employs several tools in the NWP Program to ensure that NWP activities result only in no more than minimal individual and cumulative adverse environmental effects; (2) removing the 300 linear foot limit would provide consistency across the numeric limits used by the NWP Program for all categories of non-tidal waters of the United States (*i.e.,* jurisdictional wetlands, streams, ponds, and other non-tidal waters); (3) it would further the objective of the NWP Program stated in 33 CFR 330.1(b) (*i.e.,* to authorize with little, if any, delay or paperwork certain activities having minimal impacts), by providing equivalent quantitative limits for jurisdictional wetlands, streams, and other types of non-tidal jurisdictional waters, and NWP authorization for losses of jurisdictional stream bed that have no more than minimal individual and cumulative adverse environmental effects; and (4) using acres or square feet (*i.e.,* an area-based metric) instead of linear feet is a more accurate approach to quantifying losses of stream bed and also serves as a better surrogate for losses of stream functions when a functional assessment method is not available or practical to use.

After reviewing the comments received in response to the proposed rule, for the reasons discussed below the Corps has decided to remove the 300 linear foot limit for losses of stream bed from the 10 NWPs listed above. The comments received in response to the proposed rule are summarized below. The Corps' responses to those comments are also provided along with the comment summaries.

Retaining the ½-acre limit for losses of non-tidal jurisdictional waters and wetlands in these 10 NWPs while removing the 300 linear foot limit for losses of stream bed will help further Congressional intent with respect to Section 404(e) of the Clean Water Act when that provision was enacted into law in 1977. Section 404(e) authorizes the Corps to issue, after notice and opportunity for public hearing, general permits on a state, regional, or nationwide basis for any category of activities involving discharges of dredged or fill material if the Corps determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Section 404(e) does not prescribe any particular approaches for ensuring that activities authorized by general permits result in no more than minimal individual and cumulative adverse environmental effects, thus the Corps developed the PCN process and provided division and district engineers with the authority to modify, suspend, or revoke NWP authorizations on a regional or activity-specific basis after the NWPs are issued by Corps Headquarters. General permits provide a process for authorizing, with minimal paperwork and delays, activities that have no more than minimal individual and cumulative adverse environmental effects. General permits are an important tool for the Corps managing its personnel and workload so that it can focus its efforts on evaluating permit applications for proposed activities that have the potential to cause more than minimal adverse environmental effects.

Removing the 300 linear foot limit for losses of stream bed under these 10 NWPs provides equivalent quantitative limits for all categories of non-tidal jurisdictional waters, including non-tidal ''tributaries,'' ''lakes, ponds, and impoundments of jurisdictional waters,'' and ''adjacent wetlands'' (see 33 CFR 328.3(a)). These non-tidal waters will continue to be subjected to the ½-acre limit for losses of non-tidal waters. Except for NWPs 43 and 51, these NWPs require PCNs for all authorized activities, and district engineers will review these PCNs to determine which activities can be authorized by an NWP and which activities should require individual permits. When reviewing a PCN, the district engineer has the authority to exercise discretionary authority to modify, suspend, or revoke the NWP authorization (see 33 CFR 330.1(d)). When a district engineer reviews a PCN, and if she or he determines that the proposed activity would have more than minimal individual or cumulative net adverse effects on the environment or otherwise may be contrary to the public interest, he or she will either modify the NWP authorization to reduce or eliminate those adverse effects, or instruct the prospective permittee to apply for a regional general permit or an individual permit (§ 330.1(d)). To determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, the district engineer will apply the 10 criteria in paragraph 2 of Section D, District Engineer's decision.

Those ten criteria for making minimal adverse environmental effects determinations are:

(1) The direct and indirect effects caused by the NWP activity;

(2) the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal;

(3) the environmental setting in the vicinity of the NWP activity;

(4) the type of resource that will be affected by the NWP activity;

(5) the functions provided by the aquatic resources that will be affected by the NWP activity;

(6) the degree or magnitude to which the aquatic resources perform those functions;

(7) the extent that aquatic resource functions will be lost as a result of the

NWP activity (*e.g.,* partial or complete loss);

(8) the duration of the adverse effects (temporary or permanent);

(9) the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion); and

(10) mitigation required by the district engineer.

If an appropriate functional assessment method is available and practicable to use, that assessment method may be used by the district engineer to help determine whether the proposed activity will result in no more than minimal adverse environmental effects.

The removal of the 300 linear foot limit for losses of stream bed will help increase administrative efficiency by providing a mechanism to authorize, through the NWP Program activities that result in the loss of greater than 300 linear feet of jurisdictional stream bed, but less than ½-acre of non-tidal jurisdictional waters. Under the 2017 NWPs, filling or excavating more than 300 linear feet of a perennial stream bed requires an individual permit even under circumstances where the loss of the stream bed would result in no more than minimal individual and cumulative adverse environmental effects. Under this final rule, district engineers would review PCNs for proposed losses of jurisdictional stream bed (plus any other losses of non-tidal waters of the United States) that are less than ½-acre and determine whether those proposed activities can be authorized by one of these 10 NWPs. If, for a particular PCN, the district engineer determines that the individual and cumulative adverse environmental effects would be more than minimal, he or she will exercise discretionary authority and require an individual permit. This approach provides administrative efficiency by providing a mechanism for district engineers to distinguish which proposed activities should be authorized by an NWP versus which activities should require individual permits with a public notice and comment process and activity-specific evaluations under NEPA, the public interest review, and the Clean Water Act section 404(b)(1) Guidelines.

This approach also adds efficiency in terms of reducing processing times and paperwork for proposed activities that have no more than minimal adverse environmental effects and that are likely to generate few, if any, public or agency comments in response to a public notice for an individual permit application. When more activities that result in no more than minimal adverse environmental effects can be authorized by an NWP, there can be more staff and other resources for Corps districts to devote to undertaking other tasks, such as the review and approval of mitigation banks and in-lieu fee programs and overseeing their operation, conducting compliance actions to ensure that authorized activities are being conducted in accordance with the terms and conditions of their DA authorizations, and conducting approved and preliminary jurisdictional determinations that help project proponents plan and design their proposed projects to avoid and minimize impacts to jurisdictional waters and wetlands.

Another benefit of removing the 300 linear foot limit for losses of jurisdictional stream bed and shifting the quantification of losses of jurisdictional stream bed towards the ½-acre limit for losses of non-tidal waters of the United States is more accurate accounting of the impacts of activities authorized by these 10 NWPs. The discharges of dredged or fill material authorized by these NWPs occur over an area of a river or stream bed and also may include impacts to other aquatic resources such as wetlands or open water areas (*e.g.,* lakes or ponds). The discharge to a river or stream has a length and a width, and the width can vary depending on the physical characteristics of the impact area, the type of activity being conducted (*e.g.,* bank stabilization, channel excavation, channel realignment), and other factors. To be regulated under Section 404 of the Clean Water Act, a discharge of dredged material involves any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States that is incidental to any activity, including mechanized land clearing, ditching, channelization, or other excavation (see 33 CFR 323.2(d)(1)(iii)). A regulated discharge of fill material involves the addition of fill material into waters of the United States that has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States (see 33 CFR 323.3(e) and (f)). The direct impacts of these activities are most accurately quantified on an area basis, not a linear basis, to inform a district engineer's decision on whether a proposed activity should be or is authorized by an NWP and to track cumulative impacts.

Accurate quantification of stream bed losses authorized by an NWP is an important component of determining whether a proposed NWP activity will result in no more than minimal individual adverse environmental effects. (See item 1 above from paragraph 2 of Section D, District Engineer's Decision: Understanding ''the direct and indirect effects caused by the NWP activity.'') Accurate quantification of stream bed losses is also important for tracking cumulative impacts of activities authorized by an NWP, both on a national and regional basis, and for determining whether a particular NWP activity will contribute to more than minimal cumulative adverse environmental effects. (See item 2 of paragraph 2 of the District Engineer's Decision: ''The cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse environmental effects are no more than minimal.'')

As discussed in the 2020 Proposal (85 FR 57316), discharges of dredged or fill material into jurisdictional streams can cause losses of stream bed along only a portion of the stream bed (*e.g.,* bank stabilization projects that involve discharging fill along the edge of the stream, with no fill in the rest of the stream bed) or across the entire stream bed (*e.g.,* excavating the stream bed to mine aggregates) along a stream reach. A wide variety of activities involving filling or excavating stream bed may be authorized by these NWPs, such as bank stabilization, channel realignment, culvert installation or replacement, stream channel restoration, the installation of grade control structures (*e.g.,* rock), fills for footings for bridges, livestock crossings, utility line crossings, and temporary fills for construction and access. Quantifying losses of stream bed in linear feet does not distinguish between filling or excavation activities that occur only in a portion of the stream bed along an ordinary high water mark versus filling or excavation activities that occur in the entire stream bed, from ordinary high water mark to ordinary high water mark.

Accurate quantification of losses of stream bed and losses of other types of jurisdictional waters and wetlands is also important for monitoring and evaluating the cumulative adverse environmental effects caused by NWP activities. In response to the 2020 Proposal, numerous commenters criticized the Corps' assessment of cumulative effects for the NWPs. An essential step in conducting a cumulative effects analysis for an NWP is estimating how many times that NWP may be used during the period the NWP is in effect, the quantity of jurisdictional waters and wetlands that may be lost or

directly altered by the activities authorized by that NWP, whether those losses or alterations are permanent or temporary, and what, if any compensatory mitigation is being used to offset those losses. The Corps provides those estimates in its national decision documents, and those estimates are more robust if they use a common metric, so that it is possible to calculate total losses and offsets during the period the NWP is in effect.

Division engineers have discretionary authority to modify, suspend, or revoke NWP authorizations on a regional basis (33 CFR 330.5(c)) to help ensure that the NWPs are only used to authorize activities that have no more than minimal individual and cumulative adverse environmental effects. For example, if a Corps district determines, in a particular watershed, county, Corps district, or other geographic region, that cumulative losses of stream bed authorized by NWPs may be approaching a level that might exceed the ''no more than minimal cumulative adverse environmental effects'' threshold, the Corps district can request that the division engineer modify, suspend, or revoke the relevant NWP authorizations in that region. The division engineer can add regional conditions to the appropriate NWPs to restrict or prohibit their use in particular categories of waters, or suspend or revoke the NWP authorization so that those NWP(s) can no longer be used to authorize regulated activities in that geographic region. The division engineer's authority to modify, suspend, or revoke NWP authorizations on a regional basis can also be used to sort out which activities can be authorized by an NWP versus which activities should require individual permits.

District engineers have discretionary authority to modify, suspend, or revoke NWP authorizations on a case-specific basis (see 33 CFR 330.5(d)) to help ensure that NWPs are only used to authorize specific activities that have no more than minimal individual and cumulative adverse environmental effects. A district engineer can add conditions to an NWP authorization to reduce potential adverse environmental effects that might be caused by a proposed NWP activity, such as mitigation requirements to avoid or minimize direct and indirect effects caused by that activity. One example is a time of year restriction to prevent discharges of dredged or fill material from occurring during spawning seasons for fish or other aquatic organisms. Another example of a permit conditions to help reduce adverse environmental effects caused by an NWP activity might be to require the use of certain best management practices. A district engineer might also add permit conditions to the NWP authorization to require compensatory mitigation to offset losses of waters of the United States caused by the NWP activity.

As the Corps implements this final rule, it will continue to rely on these administrative tools that have long been used with these 10 NWPs to help ensure that authorized activities will result in no more than minimal individual and cumulative adverse environmental effects. Those tools are the ½-acre limit for losses of non-tidal waters of the United States, the pre-construction notification requirements and associated activity-specific review by district engineers, the regional conditions that can be added by division engineers, and the activity-specific conditions that can be added by district engineers when reviewing individual PCNs.

The proposal was made in accordance with the recommendations in the report issued by the Office of the Assistant Secretary of the Army (Civil Works) in response to E.O. 13783 on ways to streamline the NWPs. In the proposed rule, the Corps invited public comment on the proposal to remove the 300 linear foot limit and to rely on the ½-acre limit, the PCN process, the proposed modification of the ''mitigation'' general condition (general condition 23), and other tools to comply with the statutory and regulatory requirement that activities authorized by an NWP must result in no more than minimal individual and cumulative adverse environmental effects. The Corps also invited comment on whether there are situations where quantifying losses of stream bed in linear feet might more accurately represents the actual amount of stream bed filled or excavated as a result of an NWP activity and would result in more defensible determinations on whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects. In the proposed rule, the Corps asked commenters to provide information that would help illustrate or explain how and under what circumstance using a linear foot measure to quantify losses of stream bed would be more accurate than using square feet or acres to quantify the amount of authorized impacts.

The Corps also invited comment on the legal, regulatory, policy, or scientific bases for imposing different numeric limits on jurisdictional stream bed losses versus losses of non-tidal jurisdictional wetlands or other types of non-tidal jurisdictional waters. Commenters were encouraged to provide supporting information in the form of citations to laws, regulations, and policies, and the scientific literature, because substantive information would be valuable in assisting the Corps in preparing the final NWPs.

The Corps also requested comment on an alternative hybrid approach to establishing consistent quantitative limits for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Under the proposed hybrid approach, losses of stream bed would continue to be quantified in linear feet as long as the activities authorized by these NWPs would result only in the loss of stream bed. There would be linear foot limits for losses of stream bed by stream order identified using the Strahler (1957) method, and the mean stream widths identified by Downing et al. (2012). If a proposed NWP activity would result in the loss of jurisdictional stream bed plus other types of waters of the United States, such as non-tidal jurisdictional wetlands, the losses of waters of the United States would be quantified in acres and subjected to the ½-acre limit. In the preamble to the proposed rule, the Corps provided a table for the hybrid approach (see 85 FR 57321). A critical component of effectively applying the hybrid approach is identifying the correct stream order for the stream segment that is proposed to be filled or excavated as a result of the proposed NWP activity. In this hybrid approach, the linear foot limits would only apply to losses of stream bed. If a proposed NWP activity would result in a combination of losses of jurisdictional stream bed and other types of waters of the United States, such as non-tidal jurisdictional wetlands, then the ½-acre limit would apply to the combined losses of stream bed and non-tidal wetlands, to keep those losses below ½-acre.

In conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed, the Corps proposed to remove the provisions in these NWPs regarding the ability of district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed when the applicant submits a PCN and requests a waiver of that 300 linear foot limit. On April 21, 2020, EPA and the Department of the Army published a final rule to define ''waters of the United States'' entitled the Navigable Waters Protection Rule (85 FR 22250). On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a federal

district court-issued stay in that state. The rule revised the definition of ''waters of the United States'' at 33 CFR 328.3 such that ephemeral features, including ephemeral streams, are categorically excluded from jurisdiction under the Clean Water Act (see 33 CFR 328.3(b)(3)). Therefore, there would be no need to request waivers for losses of ephemeral stream bed (regardless of length) since NWP authorization (or any other form of DA authorization) will not be needed to authorize discharges of dredge or fill material into ephemeral streams. See Section III.C, for more discussion on the potential impact of the Navigable Water Protection Rule on the NWPs.

In addition, the Corps proposed to remove the agency coordination process for seeking input from federal and state agencies on whether the district engineer should grant the waiver of the 300 linear foot limit requested by an applicant for an NWP verification. Removing the waiver provision may reduce costs to permittees by reducing the amount of time the district engineer needs to make her or his decision. For example, the district engineer would not have to wait up to 25 days (see paragraph (d)(3) of the ''pre-construction notification'' general condition (GC 32) to make the decision on whether to issue the NWP verification. Removal of the agency coordination for these activities is also likely to reduce administrative costs to the Corps, by reducing the amount of staff time needed to send copies of PCNs to the agencies and summarizing and responding to agency comments. Removal of the waiver provision and associated agency coordination would also free up additional time for Corps staff to review other PCNs, other permit applications, and other regulatory actions such as jurisdictional determinations and compliance activities. As mentioned above, under the Navigable Waters Protection Rule, ephemeral streams are not ''waters of the United States.'' See 33 CFR 328.3(b)(3). Therefore, it should be noted that this would likely reduce the current number of waivers and required interagency coordination process from state and federal agencies, since the current waivers apply only to certain intermittent streams.

Many commenters opposed the removal of the 300 linear foot limit for losses of stream bed. Many commenters supported the proposed change, stating that calculating losses of stream bed in acres is a more accurate measure of those losses since acreage takes both the length and width of the stream channel into account when determining the amount of stream bed filled or excavated by an NWP activity. Several commenters in favor of the proposed change expressed concern with how this change would affect mitigation banks and credit calculations for future and past permits. Several commenters believed this change would continue to ensure that the activities authorized by these NWPs would result in no more than minimal impacts.

As discussed above, the Corps is removing the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 for the reasons discussed in this final rule to increase the efficiency of the NWP program, utilize a metric that more accurately reflects the amount of impact, and to allow NWP authorization of losses of stream bed where district engineers determine that those losses would have no more than minimal adverse environmental effects after reviewing PCNs. Quantifying losses of stream bed in acres or square feet will be more accurate, provide a more substantial and defensible basis for decision-making by district engineers on PCNs for these activities, and provide more accurate data for the Corps to track cumulative impacts of the activities authorized by these NWPs. The removal of the 300 linear foot limit will not affect the ability of district engineers to require compensatory mitigation or other forms of mitigation for losses of stream bed. In addition, it should not have a substantial effect on mitigation banks that have already been approved and mitigation banks that may be approved in the future. Depending on how existing mitigation banks quantify the credits they produce, there may have to be some technical changes in how credit transactions occur between mitigation bank sponsors and permittees, to determine the appropriate number of stream credits that are needed to offset a permitted loss of stream bed.

A few commenters supported the removal of the 300 linear foot limit because the district engineer retains the ability to exercise discretionary authority to require individual permits if the adverse environmental effects caused by a proposed activity would be more than minimal. These commenters also said they support the removal of the 300 linear foot limit as long as Corps divisions and districts can continue to develop and use regional conditions in districts that have specific resource concerns.

The PCN process is an administrative tool that helps ensure that activities authorized by NWPs cause no more than minimal individual and cumulative adverse environmental effects, by providing activity-specific review of these activities by district engineers before they are authorized by an NWP. The ½-acre limit is another tool that helps ensure that activities authorized by these NWPs have no more than minimal adverse environmental effects. In geographic areas where there are concerns about cumulative losses of headwater streams and the functions they provide, division engineers can add regional conditions to these NWPs to reduce the acreage limit from ½-acre to a lower acreage limit, such as ¼-acre or 1/10-acre. In addition, division engineers can add regional conditions to these NWPs to lower the threshold for requiring stream compensatory mitigation from 3/100-acre to a different acreage threshold.

Many commenters expressed concerns with removing the 300-linear foot limit on loss of stream bed for these NWPs, stating that this change would allow much larger impacts to smaller stream channels since they typically have smaller widths and therefore a permittee could impact a much longer length of stream before reaching the ½-acre limit. Many commenters said that a linear foot measurement was more appropriate for calculating stream impacts and losses than an acreage-based system because streams are fundamentally linear features in the landscape. Many commenters stated that the Corps has not provided any scientific rational or reasoning behind this change and even the scientific studies cited by the Corps were not interpreted appropriately.

As discussed above, the Corps will rely on other, existing protective mechanisms within the NWPs to ensure that the activities authorized by these NWPs will result in no more than minimal individual and cumulative adverse environmental effects. Those tools include the ½-acre limit, the PCN requirements for these NWPs, and the ability of division and district engineers to further condition or restrict the applicability of an NWP in situations where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest (see 33 CFR 330.1(d)). While rivers and streams have a strong linear component, they also vary substantially in width. Discharges of dredged or fill material into waters of the United States that cause losses of waters of United States through the filling or excavation of stream beds occur over an area, and using acres or square feet to quantify losses of stream bed is more informative to determinations of minimal effects and

accurate in data accounting than using linear feet. The potential losses of stream functions, and whether those losses are more than minimal, can be addressed through the PCN review process. When determining whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects, district engineers will apply the 10 criteria in paragraph 2 of Section D, District Engineer's Decision. Decisions regarding quantitative limits for the NWPs are administrative decisions because the legal threshold for general permits (''no more than minimal individual and cumulative adverse environmental effects'') is a subjective threshold. Applying this subjective threshold to complex ecological systems requires a district engineer to exercise his or her judgment as to whether that threshold is crossed for particular NWP activity.

Another tool that the Corps added to this final rule to help ensure that the activities authorized by these NWPs will result in no more than minimal individual and cumulative adverse environmental effects is the addition of a 3/100-acre threshold for stream compensatory mitigation in paragraph (d) of the mitigation general condition (general condition 23). The 1/10-acre wetland mitigation threshold in general condition 23 has been effective in providing incentives for project proponents to reduce wetland losses well below the 1/2-acre limit to avoid the costs of providing wetland compensatory mitigation. As shown in figure 5.1 of the Regulatory Impact Analysis for this final rule, more than 80 percent of losses of waters of the United States verified by district engineers in fiscal year 2018 as qualifying for NWP authorization were less than 1/10-acre. The losses of waters of the United States in figure 5.1 include losses of stream bed, which were quantified in acres. The Corps anticipates that the 3/100-acre stream compensatory mitigation threshold will also be an effective incentive to permittees to reduce losses of stream bed to avoid the costs of providing stream compensatory mitigation to offset losses of greater than 3/100-acre of stream bed. For NWP activities that require PCNs, district engineers continue to have discretion to require stream compensatory mitigation for losses of stream bed above or below the 3/100-acre threshold in paragraph (d) of general condition 23.

Several commenters also questioned the Corps' use of the study by Downing et al. (2012), which examined stream channels all over the world, stating that stream channels may be narrower in the United States (citing an average width in the United States of 2.6 feet). Several commenters stated support of a hybrid approach in lieu of an acreage calculation, but were concerned about the variability of stream order classifications and the availability of tools to Corps districts to implement that approach in an effective and defensible manner. One of these commenters noted that LiDAR is not available in all areas of the country. Many commenters opposed the proposed 'hybrid approach' in the preamble in which stream impact limits would vary by stream order by applying a mean stream width. Some of these commenters asserted that a linear foot metric is still likely a more accurate and easier method since determining stream order is highly varied along with determining a stream width.

The Corps acknowledges that the study by Downing et al. (2012) does not fully represent the variability in stream dimensions. One of the purposes of using the information in that study was to demonstrate how a linear foot limit for losses of stream bed results in disparate differences in the amount of stream bed that can be filled or excavated under an NWP depending on where an affected stream reach is located in a tributary network (*i.e.,* a headwater stream versus a stream segment located further downstream in a watershed). In a study of headwater streams in North America and New Zealand, using field surveys of headwater streams instead of the published data and satellite imagery used by Downing et al. (2012), Allen et al. (2018) found a typical width of 1.05 feet for headwater streams. The Corps agrees that the hybrid approach proposed in the preamble to the 2020 Proposal would not be an efficient or effective approach to establishing quantitative limits for these 10 NWPs. There is not sufficiently accurate mapping of headwater streams in the United States to implement such a hybrid approach, and the hybrid approach would not take into account regional variability in stream geomorphology. The Corps does not agree that a linear foot metric is easier or more accurate than an acreage-based metric. The area of stream bed filled or excavated as a result of an NWP activity is already calculated by the Corps to record impacts to aquatic resources, and it represents the amount of stream bed lost as a result the discharges of dredged or fill material regulated under Section 404 of the Clean Water Act.

Many commenters also questioned how stream width was to be measured (ordinary high water mark to ordinary high water mark versus stream bed/bottom) which could also produce variability in how an acreage limit would be applied. Many commenters recognized that the measures for small and large streams should be different but until a more appropriate metric is developed, acreage should not be used in lieu of linear feet since it would be inappropriate to adopt a measure that better represents larger stream systems while the overwhelming majority of impacts occur to smaller streams and are therefore better represented for the time being by a linear foot measurement.

Stream width should be measured from ordinary high water mark to ordinary high water mark, perpendicular to the longitudinal direction of the stream channel. That is consistent with the definition of ''stream bed'' in Section F of the NWPs. Commenters did not suggest a more accurate method for quantifying impacts to small and large streams in their comments. Establishing different metrics for small versus large streams also presents challenges in terms of consistently determining what constitutes a small stream versus a large stream, which has the potential for being an arbitrary distinction and would add another layer of complexity to the NWP program.

Many commenters noted that smaller stream channels provide important ecological functions and values and they provided numerous references to scientific studies that document the importance of these stream channels as linear systems in the landscape. Some of these commenters said impacts to small stream channels were more severe and/or permanent (*e.g.,* complete losses by filling entire stream reaches) and noted that small streams are more susceptible to fragmentation impacts, are harder to restore/mitigate, and have compounding effects to downstream waters when impacts are cumulative and more than minimal. Many commenters noted that, in general, disproportionate impacts already occur to these smaller order stream channels because it is easier from an engineering standpoint and ultimately less costly to impact them versus larger order stream channels, and that removing the 300 linear foot limit would provide even less incentive to avoid and minimize impacts to these important resources.

The ecological functions of smaller stream channels are to be considered by district engineers when they review PCNs for proposed activities involving filling or excavating stream beds. When evaluating PCNs, district engineers consider the 10 criteria in paragraph 2

or Section D, District Engineer's Decision. Those criteria include: The environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity, and the importance of the aquatic resource functions to the region. Division engineers can add regional conditions to the NWPs to impose lower acreage limits or other restrictions to address concerns about potential losses of smaller stream channels and the functions they provide, including cumulative impacts to those smaller stream channels. The Corps acknowledges that, because of their size, smaller stream channels may be more susceptible to proposed development activities and other activities involving discharges of dredged or fill material into waters of the United States. Project proponents are less likely to fill larger stream channels because of the water that flows towards those larger stream channels, but other activities such as bank stabilization, excavation activities in the stream bed, and realigning stream channels may be authorized by these NWPs. Removing the 300 linear foot limit and relying on the ½-acre limit and PCN review process to identify activities that require individual permits helps the Corps implement its permit program more effectively, to efficiently authorize activities with no more than minimal adverse environmental effects via NWP, and focusing more of its resources on evaluating individual permit applications for activities that are likely have more substantial environmental impacts.

Many commenters said that this change would allow more than minimal impacts because of the disproportionate length of impacts to headwater streams that would be allowed now under the NWP program, which is said to be counter to and inconsistent with the goal and purpose of the NWP program. Many commenters questioned how the Corps could reconcile and justify this change based on the long-standing history of the 300-linear foot limit for losses of stream bed in the NWP program. Many commenters stated that individual permits should be required for proposed impacts to more than 300 linear feet of stream bed, to allow for the public and federal, state, and local resource agencies to comment on proposals to fill or excavate several thousand feet of stream bed.

The Corps will be relying on other, existing protective mechanisms within the NWPs to ensure that these NWPs authorize only those activities that have no more than minimal adverse environmental effects. The NWP program has changed over time as new information is considered and alternative ways of implementing the program are identified to further the program's objective of regulating, ''with little, if any, delay or paperwork certain activities having minimal impacts'' (33 CFR 330.1(b)). The removal of the 300 linear foot limit, continued application of the ½-acre limit, plus the ability of division and district engineers to exercise their discretionary authority to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively, will ensure that activities that would cause more than minimal adverse environmental effects will be evaluated through the individual permit process.

Many commenters expressed concern about other changes within this proposal, when combined with the removal of the 300 linear feet limit would eliminate agency coordination with federal and state resource agencies under paragraph (d) of general condition 32. One commenter said that when reviewing the number of individual permits issued versus activities authorized under NWPs that even with what the commenter considers the more stringent 300-linear foot limit in place there is no justifiable need for reducing regulatory burden since the number of individual permits is so small compared to NWP verifications and this change would likely not result in any significant decrease in number of individual permits or regulatory burden.

For the 10 NWPs that had the 300 linear foot limit for losses of stream bed, the agency coordination process in paragraph (d) of general condition 32 was limited to requests for waivers of the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Ephemeral streams are not waters of the United States (see 33 CFR 328.3(b)(3)) and therefore not subject to jurisdiction under Section 404 of the Clean Water Act. In its Regulatory Impact Analyses for the proposed and final rules, the Corps acknowledges that the removal of the 300 linear foot limit is likely to result in a modest increase in NWP authorizations (174 per year), and a commensurate decrease in the number of activities that require individual permits. However, a modest reduction in the number of individual permits that must be processed each year can help improve administration of the Corps Regulatory Program and allow the Corps to devote more time and resources to working with project proponents to reduce the environmental impacts of activities that have the potential to result in more substantial impacts to jurisdictional wetlands and waters.

Many commenters said that the proposed 1/10-acre mitigation threshold for losses of stream bed was not an adequate tool for ensuring no more than minimal adverse environmental effects based on the disproportionately large amount of impacts to smaller headwater streams that would need to occur before compensatory mitigation was required. Many commenters expressed concern about the potential for increased likelihood for out-of-kind mitigation being provided to offset headwater stream impacts if mitigation is based on an acreage or other area-based metric for losses of stream bed. These commenters said that out-of-kind mitigation would likely increase because it would be the only option available to permittees due to fewer stream credits being generated and available as mitigation bankers and other mitigation providers adapt to this change and the uncertainty in the market that this change might create.

The comments received on the proposed 1/10-acre threshold for stream mitigation are discussed in the section of this preamble that discusses the comments received on general condition 23. In response to those comments, the Corps reduced the threshold for stream mitigation from 1/10-acre to 3/100-acre. As explained in the discussion of general condition 23 below, this change in the stream mitigation threshold aligns with current practice for stream mitigation requirements in the NWP program, and the recommendations for the stream mitigation threshold provided by commenters. The Corps uses a watershed approach for compensatory mitigation (see 33 CFR 332.3(c)). The goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites (see 33 CFR 332.3(c)(1)). A watershed approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape (33 CFR 332.3(c)(2)(i)), and may involve the use of out-of-kind mitigation.

Under a watershed approach, other approaches to stream restoration may be used to generate stream credits besides headwater stream channel reconfiguration projects. These other approaches may include process-based

stream restoration activities such as dam removal, culvert replacements, levee setbacks or removals, riparian area restoration, allowing beavers to construct dams to aggrade incised channels, or installing structures that mimic beaver dams to aggrade incised channels (Beechie et al. 2010) to generate compensatory mitigation credits for activities authorized by these NWPs. The use of beaver dams or structures to aggrade incised stream channels may result in wetland/stream complexes for which an area-based credit metric may be more appropriate than a linear foot-based metric. Focusing on restoring stream functions can be more ecologically successful in improving stream functions than form-based restoration approaches such as channel reconfiguration that have had questionable success in restoring degraded streams (Palmer et al. 2014). The stream credits generated by channel reconfiguration projects in headwater streams can be quantified in linear feet or acres, because the Corps' compensatory mitigation regulations do not mandate a specific approach for quantifying stream credits. Section 332.8(o)(1) states that the principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular resource types. The preamble to the 2008 mitigation rule states that ''district engineers retain the discretion to quantify stream impacts and required compensatory mitigation in terms of area or other appropriate units of measure'' (73 FR 19633).

The Corps received many comments and questions about how these changes would likely negatively affect long-standing stream mitigation accounting and the mitigation banking industry in general. These commenters said that a linear foot metric has always been used for stream assessment methodologies and the basis for mitigation accounting systems, and many commenters stated that changing this metric would be unnecessarily burdensome and costly to stream restoration professionals and likely result in fewer stream restoration projects. One commenter stated that the proposed change would not increase mitigation opportunities in larger or higher order stream channels as proposed since the restoration of larger streams is more complex than smaller streams and is dependent on many variables to include funding availability, site selection, engineering and design considerations, mitigation requirements associated with the project, market incentives, and the inability to control future impacts in the headwaters which can jeopardize the larger stream restoration project.

As stated in the previous paragraphs, the Corps' regulations do not require use of a linear foot metric for stream assessment methodologies or for quantifying stream impacts or compensatory mitigation credits. The removal of the 300 linear foot limit for losses of stream bed and the changes to general condition 23 are likely to benefit the mitigation banking industry by providing more opportunities for stream restoration projects that can generate stream credits to offset losses of stream bed authorized by the NWPs and other types of DA permits. The Corps acknowledges that some efforts will need to be made to address differences in accounting systems, but mitigation providers including mitigation bank sponsors and in-lieu fee program sponsors should be able to estimate the amount of stream credits quantified in linear feet that are needed to offset an specific acreage of stream bed lost as the result of an NWP activity. The district engineer can assist in these determinations to ensure that the amount of stream mitigation credits is roughly proportional to the authorized losses of stream bed.

Several commenters said that establishing a stream compensatory mitigation threshold of 1/10-acre would allow approximately 1,675 linear feet of a first order stream channel with a 2.6-foot wide channel to be impacted under these NWPs before any compensatory mitigation would be required, which does not meet the Corps' mandated goal of no net loss to aquatic resources and would cause more than minimal effects to these aquatic resources.

In response to public comment, the Corps has modified paragraph (d) of general condition 23 to change the proposed 1/10-acre threshold for stream mitigation to 3/100-acre to make the threshold more consistent with current practice and the recommendations made by commenters. The reasons for changing the proposed 1/10-acre stream mitigation threshold to 3/100-acre are provided in the discussion of general condition 23 below. There is no mandated goal of no net less to aquatic resources in any law or regulation that applies to the Corps' NWP Program. Compensatory mitigation, including stream compensatory mitigation, is required for NWP activities on a case-by-case basis to ensure that the authorized activities result in no more than minimal adverse environmental effects. District engineers determine when compensatory mitigation is required for NWP activities. In prior versions of the NWPs, the Corps had no threshold for requiring compensatory mitigation for losses of stream bed, so those commenters were referring to district practices. Corps districts determined on an activity-specific basis when stream mitigation is necessary for specific NWP activities.

One commenter asserted that based on ORM2 data analyzed for stream channel impacts, that the proposed 1/10-acre stream compensatory mitigation threshold would result in the loss of an additional 130,000 linear feet of headwater streams in which no mitigation would be provided. Several commenters expressed concerns about how this change would affect current mitigation banks that were in the process of being approved and inquired whether all previously executed mitigation banking instruments would need modification to continue to operate and sell credits to permittees. One commenter said that the proper regulatory tool to rectify the disparity between stream impacts versus stream mitigation would be the 2008 mitigation rule and requiring higher mitigation ratios and not revision of these NWPs.

The 2017 NWPs and prior NWPs had no threshold for requiring stream mitigation for NWP activities. The proposed addition of the 1/10-acre stream mitigation threshold in paragraph (d) of general condition 23 is a new threshold. That threshold has been reduced to 3/100-acre in response to many commenters that provided calculations to support the reduction. Many commenters did not take into account the ability of district engineers to require stream compensatory mitigation for losses of stream bed less than the acreage threshold specified in paragraph (d) of general condition 23. This is similar in practice to the 1/10-acre wetland mitigation threshold in paragraph (c) of general condition 23, where district engineers also have had the authority to require wetland compensatory mitigation for wetland losses less than 1/10-acre.

Several commenters recommended delaying these changes to allow for more time to study potential effects and one commenter requested that due to the potential for significant environmental effects, an environmental impact statement should be prepared for this propose change. One commenter said that the Corps already converts stream loss/impacts to acreage in their Regulatory Program database (ORM2) for accounting purposes and asked would the change from linear feet to acreage even be needed in the first place. Several commenters said that the current 300-linear foot threshold was

too high and should be even further reduced.

The Corps is only removing a quantitative limit from these 10 NWPs, and is not changing stream compensatory mitigation requirements aside from establishing an acreage threshold in paragraph (d) of general condition 23 that is generally consistent with current agency practice. Under the waiver provision in the 2017 version of these 10 NWPs, district engineers could waive the 300 linear foot limit for losses of intermittent and ephemeral stream beds, but the loss of stream bed could not exceed ½-acre. Therefore, it has been a long-standing practice in the NWP program to quantify of losses of stream bed in acres. The removal of the 300 linear foot limit and the change to general condition 23 does not require an environmental impact statement. As one commenter recognized, the Corps tracks losses of stream bed in its ORM2 database in acres.

Several commenters seemed to misunderstand the PCN requirements of these NWPs and believed that the proposed changes implied that no notification would be required for any losses of waters of the United States less than 1/10-acre for any of these NWPs and that the 1/10-acre mitigation threshold was the same as the PCN threshold. This misunderstanding resulted in many comments concerned about the Corps not even knowing what impacts are occurring if PCN thresholds are not triggering activity-specific review of these activities by district engineers, and stated that this change would allow activities with more than minimal adverse environmental effects to occur. Several commenters said that the rulemaking process for the NWPs in cases where the Corps does not review PCNs the authorization is automatically issued in some cases with no mitigation proposed. These commenters stated that not requiring PCNs could cause more than minimal impacts.

The 1/10-acre stream mitigation threshold proposed in paragraph (d) of general condition 23 is not the same as the 1/10-acre PCN threshold in NWP 51. If activities are authorized by NWPs without the requirement to submit PCNs, then compensatory mitigation is not required for those NWP activities, because compensatory mitigation requirements must be imposed by district engineers by adding conditions to the NWP authorization. However, it should be noted that all activities authorized by these 10 NWPs require PCNs, except for certain activities authorized by NWPs 43 and 51. Nationwide permit 43 does not require PCNs for the maintenance of stormwater management facilities. Nationwide permit 51 does not require PCNs for the loss of 1/10-acre or less of waters of the United States.

Many commenters said that the removal of the 300 linear foot limit would result in a loss of critical habitat for many aquatic species listed under the Endangered Species Act which have cultural and economic importance to tribes. One commenter stated that the removal of the 300 linear foot limit could result in long reaches of streams channels upstream of tribal lands being developed which could cause, without any notification to the affected tribes, downstream changes to tribal lands in terms of stream flow, water quality, subsistence of water use, or cultural water use. Several commenters asked how the tools that the Corps mentioned in the proposed rule as safeguards, such as the PCN review process, regional conditions, activity-specific permit conditions, and use of discretionary authority, prevent more than minimal adverse environmental effects. Several commenters oppose the proposed removal of the 300 linear foot limit because it could essentially be a 'tipping point' for a headwater stream system, and that there would be no way to recover the functions and values lost to that system because of approval of large impacts to streams.

The removal of the 300 linear foot limit does not affect how compliance with Section 7 of the ESA is conducted for the NWPs. If the district engineer reviews a PCN for a proposed activity authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, or 52, and determines that activity may affect listed species or designated critical habitat, she or he will conduct section 7 consultation with the U.S. FWS or NMFS as appropriate. Activities authorized by these NWPs must also comply with general condition 17, tribal rights. During the rulemaking process for these NWPs, Corps districts have been consulting or coordinating with tribes to identify regional conditions and coordination procedures to help ensure compliance with general condition 17. As discussed in the proposed rule, the PCN review process, regional conditions, and activity-specific conditions have been used successfully for years to ensure that activities authorized by the NWPs result in no more than minimal adverse environmental effects. Tipping points are difficult to identify, and if they can be identified, they are likely to vary from watershed to watershed.

One commenter said that headwater streams warrant more protection because of their relative importance in providing habitat, hydrologic, and water quality benefits to downstream waters, and said that replacing a linear metric with an area-based metric will reduce protection of headwater streams. This commenter stated that most nutrient and hydrologic inputs to streams occur along the borders of riparian zones and streams, so impacts to streams should be quantified in linear feet. In addition, this commenter noted that the longer total stream length and higher nitrogen removal efficiency of lower order streams is the main reason stream length is so important to water quality and why headwater streams are much more important to water quality functions in stream networks than are higher order streams. This commenter said that headwater streams are being lost at high rates, and that more losses of these streams will result in increases of eutrophication of downstream waters, more downstream flooding, and more transportation of pollutants to downstream waters. This commenter stated that using area as a quantitative limit for both headwater streams and higher order rivers will decrease protection and diminish the ecological importance of headwater streams. This commenter concluded that the current linear foot limit is appropriate for streams because they are linear systems that interact with their landscapes along linear borders.

The Corps believes that an appropriate level of protection can be provided to headwater streams through the ½-acre limit, the PCN process, and the ability of division and district engineers to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively. When reviewing PCNs, district engineers will apply the 10 criteria identified in paragraph 2 of Section D, District Engineer's Decision. In regions where there are concerns that the use of the NWPs may result in more than minimal cumulative adverse effects to headwater streams and the functions they provide, division engineers can add regional conditions to these NWPs to establish an acreage limit lower than ½-acre or revoke one or more of these NWPs. Headwater streams are not provided any special status under the Corps' regulations or the U.S. EPA's Clean Water Act Section 404(b)(1) Guidelines. The only streams that are special aquatic sites under the 404(b)(1) Guidelines are riffle and pool complexes (see 40 CFR 230.45), and many headwater streams are not riffle and pool complexes.

For the reasons provided above, the Corps has removed the 300 linear foot limit from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52.

G. Response to Comments on Specific Nationwide Permits

(1) NWP 12. Oil or Natural Gas Pipeline Activities

The Corps proposed to modify this NWP to limit it to oil or natural gas pipeline activities, and issue two new NWPs to authorize electric utility line and telecommunications activities (proposed new NWP C, now designated as NWP 57) and utility line activities for water and other substances (proposed new NWP D, now designated as NWP 58). The Corps also invited public comment on national construction standards and best management practices that could be incorporated into the text of NWP 12 to help ensure that this NWP authorizes only those activities (*i.e.,* discharges of dredged or fill material into waters of the United States and/or structures or work in navigable waters of the United States) that result in no more than minimal individual and cumulative adverse environmental effects.

General Comments

Some commenters expressed their support for dividing NWP 12 into three separate NWPs while some commenters objected to that aspect of the proposed rule. Many commenters stated that the Corps should reissue NWP 12 in its current form. One commenter said that the 2017 NWP 12 contains sufficient PCN thresholds and conditions to provide appropriate environmental protections. One commenter objected to the proposed modifications to NWP 12 made in response to E.O. 13783, Promoting Energy Independence and Economic Growth, stating that these changes would make it easier for oil and gas pipeline activities to occur at the expense of the environment. Several commenters said that the Corps should limit the number of activities authorized by this NWP because continuing to authorize these activities contributes to cumulative effects to natural resources.

After reviewing the comments received in response to proposed NWPs 12, C, and D, the Corps is finalizing and issuing these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities, NWP 57 authorizes electric utility line and telecommunications activities, and NWP 58 authorizes utility line activities for water and other substances. These NWPs are issued to fulfill the objective of the NWP program, which is to authorize, with little, if any, delay or paperwork certain activities having no more than minimal impacts (33 CFR 330.1(b)). The proposed modifications to NWP 12 were made, in part, to respond to the direction provided by E.O. 13738, which is to revise existing regulations that ''unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.'' In this NWP, the Corps has retained the terms and conditions that are necessary to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects. The Corps acknowledges that the use of the NWPs to authorize activities during the 5-year period the NWP is in effect results in some cumulative adverse environmental effects, but the limits, PCN requirements, general conditions, and the ability of division and district engineers to modify, suspend, and revoke NWP authorizations all help to ensure that this NWP causes no more than minimal cumulative adverse environmental effects at the national, regional, and site scales.

A few commenters stated that the proposed NWP 12 would result in reduced opportunities for the Corps and for the public to evaluate the impacts of oil and natural gas pipeline activities on water resources and the environment in general. One of these commenters said that the Corps should provide additional opportunities for public involvement. One commenter stated that public participation opportunities during the NWP permitting process are sufficient; and expanding the existing requirements at the district level would cause unwarranted delays in permitting. One commenter suggested that the Corps should notify the public of proposed NWP 12 activities. A few commenters said that pipelines can cause significant direct and indirect impacts to fish and wildlife habitat and water quality associated with an increase in watershed runoff.

The public is provided an opportunity to comment on the Corps' proposal to issue, reissue, or modify an NWP when Corps Headquarters publishes its proposed rule in the **Federal Register** to start the public comment period. However, after an NWP is issued, there is no public comment process for specific NWP activities. If, for a proposed oil or natural gas pipeline activity, the district engineer exercises discretionary authority and requires an individual permit for that activity, the public will have an opportunity to provide comments in response to the public notice issued by the Corps district. When reviewing PCNs for proposed oil or natural gas pipeline activities, district engineers consider the potential direct and indirect impacts on fish and wildlife habitat and water quality, as well as other public interest review factors identified in 33 CFR 320.4(a)(1).

One commenter said that natural gas pipeline activities authorized by NWP 12 comply with industry standards that are protective of the environment and public safety. One commenter stated that pipelines provide a safe, reliable, efficient, and cost-effective way to move bulk liquids, particularly over long distances, and that the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration concurs with that statement. The Corps acknowledges these comments.

One commenter said that while oil or natural gas pipelines may be regulated by other agencies, the Corps is not relieved of its obligation to conduct a NEPA analysis for leaks or spills. A few commenters stated that the Corps must consider in its NEPA review the impacts that could result from authorizing a pipeline that would carry toxic material, including leaks or spills, and that the draft decision document doesn't take the required ''hard look''.

In the national decision document for the issuance of this NWP, the Corps discusses leaks or spills that may occur during the construction and/or operation of oil or natural gas pipelines. The Corps does not have the authority to take actions to prevent or control potential leaks or spills that may occur during the construction or operation of oil or natural gas pipelines. Since the Corps does not regulate the release of oil, natural gas, or products derived from oil or natural gas, it is not required to perform a detailed analysis of the effects of those possible future leaks or spills because those leaks or spills are not an effect of the Corps' proposed action (see the definition of ''effects or impacts'' at 40 CFR 1508.1(g)).

One commenter stated that pipeline abandonment issues in NWP 12 should be treated consistently across the districts and recommended that the NWP 12 terms should provide this consistency. A few commenters said that NWP 12 should continue to authorize emergency installation, replacement or repair of utility lines. One commenter requested that the Corps clarify the types of time-sensitive activities, including integrity digs, that are authorized under NWPs 12 and 3. One commenter requested clarification of the scope of maintenance activities under NWP 12. One commenter said that the Corps should facilitate the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate

adaptive and resilient energy systems through the issuance of general permits.

Corps districts have discretion to determine on a case-by-case basis how to address pipeline abandonment activities. Nationwide permit 12 can be used to authorize emergency installation, replacement or repair of utility lines. The reduction of the number of PCN thresholds for this NWP may facilitate the implementation of these emergency activities by reducing delays in securing NWP authorization. The Corps does not believe that it is necessary add text to the NWP to specifically address integrity digs, because discharges of dredged or fill material into waters of the United States for integrity digs can be considered part of maintenance, which is included in the first sentence of this NWP. The activities authorized by this NWP can contribute to the construction, repair, and/or replacement of climate resilient underground linear infrastructure to support climate adaptive and resilient energy systems.

One commenter stated that the Corps should ensure that activities authorized by NWP 12 do not commence construction in uplands in protected critical habitats until the ESA section 7 consultation process has been completed. A few commenters indicated concern that cumulative impacts are not adequately considered in the decision document for NWP 12. A few commenters asserted that the scope of the cumulative impacts has proven to be more than minimal. One of these commenters stated that the draft decision document for NWP 12 already acknowledges that the cumulative impacts are more than minimal. A few commenters said that the Corps should consider the cumulative upstream and downstream impacts of its actions regarding oil and natural gas pipelines, including climate impacts. A few commenters expressed concern for potential effects on drinking water and aquifers. One commenter expressed a general concern for waterways affected by NWP 12 activities.

The Corps does not have the authority to prevent project proponents from conducting activities in uplands before they receive NWP verifications from district engineers in response to PCNs. The national decision documents issued by Corps Headquarters address cumulative impacts in accordance with the Clean Water Act Section 404(b)(1) Guidelines at 40 CFR 230.7 for the issuance of general permits. The Council on Environmental Quality's NEPA regulation at 40 CFR 1508.1(g)(3) repealed the 1978 definition of ''cumulative impact,'' so under the current NEPA regulations the cumulative effects analysis for an NWP is similar to the approach the Corps uses under 40 CFR 230.7(b)(3): Estimating the number of times the NWP is anticipated to be used during the 5-year period it will be in effect, the authorized impacts to jurisdictional waters and wetlands, and the compensatory mitigation required to offset losses of jurisdictional waters and wetlands. Those impacts, and the compensatory mitigation, are evaluated against the current environmental setting (*i.e.,* the affected environment), which includes the past and present effects of human activities and natural events that have shaped the current environmental setting. The Corps does not have the authority to regulate the operation of any oil or natural gas pipeline, or the emissions that result from combustion of oil or natural gas, or from the industrial processes that derive other products from oil or natural gas. Therefore, under the current NEPA regulations, the Corps is not required to evaluate those upstream and downstream impacts, including potential impacts on the planet's climate. The national decision document for this NWP considers effects on water supply and conservation as part of the public interest review. When reviewing PCNs, district engineers will evaluate the effects of proposed NWP activities on waterways.

Activities Authorized by NWP 12

One commenter said that the first sentence of NWP 12 should be revised as follows: ''Activities required for the construction, replacement, maintenance, repair and removal of oil, natural gas and gaseous fuel pipelines and utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.'' The Corps declines to make this change because it is covered by the definition of ''oil or natural gas pipeline'' provided in the second paragraph of this NWP.

Oil or natural gas pipelines. One commenter stated that if the Corps moves forward with limiting NWP 12 to oil or natural gas pipeline activities, it should also delete the phrase ''including outfall and intake structures'' because oil and natural gas pipelines and distribution systems do not contain water outfall or water intake pipe structures. The Corps has made this change to the second paragraph of this NWP.

A few commenters said that the terms ''oil'', ''gas'', and ''natural gas'', and ''petrochemicals'' are vague and overbroad for the purposes of determining compliance with the proposed NWPs and can have various meanings, and that any proposed changes should be subjected to notice and comment procedures. A few commenters stated that terms associated with the proposed NWP 12 that require clarification include ''utility lines,'' since pipeline activities authorized by NWP 12 might be both pipelines and utility lines; ''other substances,'' because gas and petrochemicals can be found in many types of infrastructure and industrial products; and ''gas'' and ''natural gas,'' because liquified petroleum gas is not a natural gas.

The Corps has made changes to the definition of ''oil or natural gas pipeline'' to take into account the wide variety of products that may be derived from oil or natural gas and transported in these pipelines. In response to comments received in response to the 2020 Proposal, and to provide additional clarity on the types of products that may be transported by oil or natural gas pipelines versus utility line activities that may be authorized by NWP 58, the Corps has replaced the term ''petrochemical products'' with the phrase ''products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel. heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.'' The revised definition was developed using information from the U.S. Energy Administration.[2]

A few commenters said that the proposed definition of ''oil or natural gas pipeline'' for the proposed NWP 12 is inadequate and inconsistent with the definitions in the Oil Pollution Act. One commenter suggested the Corps add ''and derivatives'' after 'petrochemical products' for clarity. One commenter suggested removal of the phrase ''for any purpose'' from the proposed definition of ''oil or natural gas pipeline'' because it creates uncertainty about what activities may actually be authorized by the NWP.

The Corps developed its own definition because this NWP also authorizes regulated activities associated with natural gas pipelines and products derived from oil or natural gas. The Corps has deleted ''for any purpose'' because NWP 12 is now limited to oil or natural gas pipeline activities.

One commenter stated that the existing NWP 12 uses the category

[2] *https://www.eia.gov/energyexplained/oil-and-petroleum-products/* (accessed November 4, 2020).

''utility lines'' which is still used in proposed NWPs C and D, but the proposed NWP 12 uses the new term ''oil and natural gas pipelines'' which causes conflicting redundancies with various aspects of the proposed NWPs 12, C, and D. One commenter said that many of natural gas pipe construction and repair projects that will need NWP authorization involve pipelines that will be used to transport geologic natural gas as well as other lower carbon gaseous fuels such as renewable natural gas, hydrogen, and power-to-gas methanated hydrogen. This commenter said that to avoid confusion and streamline the process for these projects, the Corps should not split off any buried pipe-based utility lines into the proposed new NWP D. One commenter remarked that the Corps should clarify that NWP 12 is available for underground pipelines and utility lines whether they carry geologic natural gas or a blend with lower-carbon gaseous fuels.

Nationwide permits 12, 57, 58 authorize activities for different types of utility lines, so there will be some redundancies because of similarities among these different types of utility lines, but there are also some differences, which result in different text in each of these NWPs. Nationwide permit 12 authorizes oil or natural gas pipeline activities that may carry different types of natural gas. Nationwide permit 58 can be used to authorize pipeline activities that require DA authorization and are used to convey hydrogen, methanated hydrogen, or carbon dioxide.

Oil or natural gas pipeline substations. One commenter said that the paragraph on substations in the proposed NWP 12 should be revised to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station. One commenter said that if the Corps issues proposed new NWP C, then the references to ''substations'' should be removed from NWP 12 and replaced with boosting or compressor stations and natural gas metering and pressure regulating station. This commenter also recommended revising the fourth paragraph in the proposed NWP 12 to state that it authorizes construction, maintenance, replacement or expansion work in a non-tidal jurisdictional water for an oil or natural gas or gaseous fuel custody transfer station, boosting station, compression station or metering and/or pressure regulating station. One commenter noted that the term ''natural gas pipeline substation'' is used in the proposed language for the proposed NWP 12 and requested clarification regarding how above-ground natural gas facilities including district regulators and gate stations fit into NWP 12.

The Corps has modified this paragraph to provide examples of substations associated with oil or natural gas pipelines. This NWP can be used to authorize discharges of dredged or fill material into waters of the United States for above-ground natural gas facilities including district regulators and gate stations.

Access roads. One commenter said that only temporary access roads should be authorized by NWP 12, and that permanent access roads are more appropriately authorized under NWP 14. The Corps disagrees, and is retaining the NWP authorization for permanent access roads, because access roads are associated with utility lines are not usually available for public use.

One commenter said that the proposal to add the word ''over'' to activities that are routed in or under navigable waters subject to Section 10 of the Rivers and Harbors Act of 1899 is unnecessary as structures routed over section 10 waters would be considered bridges and be regulated under Section 9 of the Rivers and Harbors Act of 1899. The Corps has modified the second sentence of the seventh paragraph of this NWP by adding the word ''may'' because there may be circumstances where section 10 authorization is required for oil or natural gas pipelines routed over navigable waters of the United States.

A few commenters stated that the Corps does not have jurisdiction over inadvertent returns, leaks, or spills. One commenter said that NWP 12 should continue to authorize the remediation of inadvertent returns of fluids during drilling operations without additional changes. A few commenters stated that the Corps has not sufficiently evaluated the risks, impacts, and mitigation measures associated with inadvertent returns of drilling fluid. A few commenters expressed appreciation for the clarification in the decision document that the Corps' jurisdiction is limited to authorizing temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids through sub-soil fissures or fractures that might occur during horizontal directional drilling.

The Corps does not have jurisdiction over inadvertent returns, leaks, or spills that may occur during horizontal directional drilling to install or replace oil or natural gas pipelines. The eighth paragraph of this NWP authorizes, to the extent that DA authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. The purpose of this paragraph is to provide authorization for regulated activities that are necessary to remediate inadvertent returns of drilling fluids to reduce adverse environmental effects that might be caused by releases of drilling fluids to the surrounding environment.

One commenter expressed support for retaining the clarification that NWP 12 authorizes temporary mats for moving equipment. A few commenters said that the Corps should stop considering temporary mats/panels as a regulated activity or clarify that they are not to be considered as a ''loss of waters'' for the purposes of PCN requirements because of their temporary effects. One commenter requested clarification that activities resulting in the loss of greater than 1/10-acre of waters of the United States require a PCN to the Corps, but temporary discharges do not count toward that 1/10-acre PCN threshold.

The determination as to whether the use of timber mats in waters of the United States for oil or natural gas pipeline activities constitutes a discharge of dredged or fill material into waters of the United States should be made by district engineers after evaluating site-specific and activity-specific circumstances. Any discharge of dredged or fill material into waters of the United States that results in a loss of greater than 1/10-acre of waters of the United States requires pre-construction notification. As explained in the definition of ''loss of waters of the United States,'' waters of the United States temporarily filled, flooded, excavated, or drained, but restored pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

One commenter said there is inconsistency in the text of NWP 12 because it states that there must be no change in pre-construction contours of waters of the United States, but NWP 12 also authorizes losses of waters of the United States. This commenter recommended revising the text of NWP 12 to state that ''there must be no change in pre-construction contours which results in permanent loss of waters of the United States.'' One commenter stated that the Corps should adopt a strict interpretation of the

amount of ''temporary fill'' authorized by this NWP for the purposes of assessing cumulative impacts and should also consider the timing and duration of temporary fills, including temporary mats. This commenter indicated that permitted temporary fills generally occur in stages and not all at the same time.

Some activities authorized by NWP 12 (*e.g.,* the construction of substations and permanent access roads) result in permanent fills while other authorized activities, such as the placement of temporary fills, require restoration to pre-construction elevations. Temporary fills do not contribute to cumulative impacts because they are removed upon completion of the work and the permittee is required to restore the affected area to pre-construction elevations. The Corps acknowledges that temporary fills may occur during different stages of construction, maintenance, repair, or removal of an oil or natural gas pipeline activity.

Pre-Construction Notification Thresholds

Many commenters opposed reducing the number of PCN thresholds in this NWP. Several commenters suggested that reducing the PCN requirement would result in the NWP authorizing activities that have more than minimal adverse environmental effects, including cumulative effects. Many of these commenters suggested retaining the existing PCN thresholds. One of these commenters requested further clarification regarding which activities would no longer require PCNs. A few of these commenters stated that maintaining the status quo creates greater regulatory certainty to the industry. Many commenters said that reducing the PCN thresholds for this NWP undermines the Corps' ability to ensure that authorized activities NWPs will result in no more than minimal individual and cumulative adverse environmental effects, and reduces the opportunity for the Corps to require individual permits when adverse environmental effects would be more than minimal. One commenter remarked that the proposed reduction in PCN thresholds would cause increased harm to rivers, streams, and wetlands.

The Corps proposed to retain those PCN thresholds associated with NWP 12 activities that result in losses of waters of the United States or have potential effects on navigation. To reduce regulatory burdens in response to E.O. 13783, the Corps proposed to remove a number of PCN thresholds because of the requirement in the NWP to restore temporary impacts to pre-construction elevations or because they are already addressed by another PCN threshold. If a proposed NWP 12 activity does not trigger any of the three PCN thresholds in the text of the NWP, or a PCN threshold in the text of one of the NWP general conditions (*e.g.,* general condition 18, endangered species and general condition 20, historic properties), then pre-construction notification is not required for the proposed activity unless a division engineer has imposed a regional condition to require PCNs in a particular geographic region. Division engineers can add regional conditions to add PCN thresholds that were removed from the text of NWP 12, if he or she determines the PCN threshold is necessary to ensure that the NWP authorizes only those activities that have no more than minimal adverse environmental effects. Adverse effects to rivers, streams, and wetlands are generally caused by the discharges of dredged or fill material or structures or work authorized by this NWP, not by the presence or absence of a PCN threshold.

Many commenters expressed support for proposed reduction in PCN thresholds for NWP 12 and the associated reduced administrative burden that reduction would provide. One commenter voiced support for the reduction in PCN requirements as it would reduce the potential for infrastructure litigation and encourage private investment. One commenter stated that PCN thresholds should be removed when they are duplicative or burdensome. One commenter said that if the PCN requirements to be removed are truly redundant it would pose no additional burden on the regulated public.

The Corps acknowledges these comments, and the Corps' intent with these changes is to reduce burdens on the regulated public and focus the PCN thresholds on those activities that have some potential to cause more than minimal adverse environmental effects. For these activities, district engineers should be given the opportunity to evaluate these activities on a case-by-case basis.

Many commenters stated that the PCN process incentivizes permittees to avoid, minimize, and compensate for impacts to aquatic resources in order to reduce permitting delays. Some of these commenters said that the reduced PCN requirements would result in violations to general condition 23, mitigation. One commenter stated that the remaining PCN thresholds and the other NWP 12 terms and conditions reasonably limit the adverse environmental effects of the activities authorized by NWP 12. One commenter said that the Corps should encourage the districts to refrain from adding PCN thresholds to this NWP, specifically through regional conditions. A few commenters expressed concern that the reduction of PCN thresholds will likely be subject to litigation. One commenter suggested that any resulting litigation could cause uncertainties for the industries that rely on the NWP program.

The NWPs provide incentives for project proponents to reduce impacts to waters of the United States to obtain DA authorization in less time than is required under the individual permit process. Reducing the number of PCNs does not violate general condition 23. The NWPs authorize activities that have no more than minimal individual and cumulative adverse environmental effects, and it is not necessary to require compensatory mitigation for every NWP activity. The PCN thresholds themselves do not limit adverse environmental effects; the adverse environmental effects caused by regulated activities authorized by an NWP are limited by the constraints in the text of the NWP (*e.g.,* the ½-acre limit, requirements to restore temporary impacts to pre-construction elevations) and in the NWP general conditions. Division engineers have the authority to add regional conditions to replace the PCN thresholds that were in prior versions of NWP 12, if those division engineers determine that adding those PCN thresholds is necessary to ensure that the NWP only authorizes those activities that result in no more than minimal individual and cumulative adverse environmental effects. While potential litigation risk is a consideration when contemplating changes, other factors such as administrative efficiency, reduction of regulatory burdens, and other approaches for maintaining environmental protections are other considerations that the Corps considers as well.

A few commenters stated that the proposed reduction in PCN thresholds could expedite permit processing time and preclude a thorough review by the Corps. One commenter said that reducing the number of PCN thresholds would allow for the potential for spills near stream beds. One commenter opposed the simplified PCN requirements, stating that the proposal does not improve inter-agency coordination or reduce impacts on the environment. One commenter said that PCNs should be required for all NWP 12 activities. One commenter stated that the Corps fails to show how compliance with Clean Water Act Section 404(e)

would be achieved without a process to track all NWP activities.

The reduction in PCN thresholds allows Corps districts to shift their resources towards evaluating proposed activities that require DA authorization that have the potential for greater adverse environmental effects. Reducing the number of PCN thresholds will not alter the potential for spills to occur near stream beds because spills are accidents and not planned activities that the Corps would evaluate as part of a PCN. The reduction in the number of PCN thresholds in NWP 12 does not alter any agency coordination procedures because agency coordination is not required for any NWP 12 activities. It is not necessary to require PCNs for all NWP 12 activities, because many of the activities authorized by NWP 12 result in only temporary impacts to aquatic resources. The Corps does not have to track all NWP activities to comply with Section 404(e) of the Clean Water Act. Since the inception of the NWP program in 1977, many of the NWPs have not require pre-construction notification, thus the changes that are being finalized are not a departure from the Corps practice or procedures.

A few commenters said that reducing the PCN requirement does not comply with the Corps' mandate under ESA section 7 to ensure consultation occurs when necessary. One commenter said that PCN should be required for all maintenance activities in waters of the United States, especially if the waters contain ESA-listed species. A few commenters opposed reducing the number of PCN thresholds for NWP 12 because the PCN process allows state natural resource agencies to provide expertise in determining the effect of projects on state resources, affected species, and their habitat. A few commenters stated the reduced number of PCN thresholds would not comply with the NHPA. One commenter said that the proposed reduction in PCN thresholds could have potential impacts to cultural resources and affect the protection of historic properties. Several commenters said that the proposed reduction of PCN thresholds poses risks of significant impacts to tribal rights and treaty-reserved resources.

General condition 18 addresses compliance with section 7 of the ESA. Under paragraph (c) of general condition 18, non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat even if a PCN is not otherwise required. This includes maintenance activities that might affect listed species or designated critical habitat. None of the activities authorized by NWP 12 require coordination with state natural resource agencies, and the PCN thresholds that have been removed from NWP 12 did not require that coordination.

General condition 20 addresses compliance with section 106 of the NHPA. Under paragraph (c) of general condition 20, non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties even if a PCN is not otherwise required. The reduction in PCN thresholds for NWP 12 does not change the PCN requirement in general condition 20. During the process for issuing these NWPs, Corps districts have been consulting or coordinating with tribes to identify regional conditions or coordination procedures to ensure that activities authorized by NWP 12 and other NWPs do not have substantial adverse effects on tribal rights and, as appropriate, treaty reserved resources. Division engineers can add PCN requirements to address tribal concerns as appropriate.

One commenter objected to the lack of a PCN threshold based on pipeline diameter. One commenter requested that the Corps provide additional information regarding the outcomes of PCN reviews under the current NWPs and an explanation for how environmental protection would be maintained without the PCN review process. One commenter stated that the Corps should clearly identify the information required by all applicants to support the analysis of temporal and cumulative impacts and recommended separate analyses for all impacts to waters of the United States within the total impact limitation of ½-acre.

Pre-construction notification thresholds are established for activities that have the potential to result in more than minimal adverse environmental effects, and pipeline diameter has not been demonstrated to have potential to be a useful PCN threshold. During their reviews of PCNs, district engineers document their conclusions as to whether the proposed activity will result in no more than minimal adverse environmental effects, or whether it is necessary to exercise discretionary authority and require an individual permit for the proposed activity. This documentation includes the district engineer's consideration of cumulative effects.

In the paragraphs below, the Corps discusses each of the five PCN thresholds it proposed to remove to simplify the PCN requirements for this NWP. The Corps discusses the comments received and provides responses to those comments. In the paragraphs that follow, the Corps uses the term ''utility line'' because it proposed the same PCN thresholds for NWP 12 and proposed new NWPs C and D (now designated as NWPs 57 and 58, respectively in this final rule). Also discussed below is the Corps' proposal to add a new PCN threshold to NWP 12 for new oil or natural gas pipelines greater than 250 miles in length.

(i) *The activity involves mechanized land clearing in a forested wetland for the utility line right-of-way.* Many commenters said that allowing mechanized land clearing through forested wetlands without requiring PCNs will cause more than minimal adverse environmental effects and recommended that this PCN threshold requirement be retained. Many commenters said that PCNs should be required for mechanized land clearing associated with NWP 12 to prevent the loss of wetland resources, functions and services, including water quality, erosion control, and flood mitigation. A few commenters suggested a maximum acreage for forest clearing activities without a PCN associated with NWP 12. One commenter stated that the PCN threshold should be modified to require PCNs for ''loss or permanent conversion.''

If construction of an oil or natural gas pipeline involves mechanized land clearing in a forested wetland for the right-of-way for that pipeline, the installation of the pipeline must cause no change in pre-construction contours of waters of the United States. Any temporary fills must be removed upon completion of construction, and the affected areas restored to pre-construction elevations. If there are any permanent fills associated with the mechanized land clearing of a forested wetland, and the loss of waters of the United States is greater than 1/10 acre, a PCN is required. In areas where temporary fills occur, the wetlands in the right-of-way will remain, although there may be a conversion in wetland type. Those wetlands will continue to perform wetland functions, including hydrologic functions, biogeochemical cycling, and habitat functions, but there may be some changes to those functions and the degree to which the wetlands perform those functions. Division

engineers can impose regional conditions to require PCNs for mechanized land-clearing in a forested wetland, and they can add regional conditions to impose an acreage limit on impacts resulting from mechanized land-clearing of forested wetlands.

Many commenters said that PCNs should be required for mechanized land clearing in forested wetlands to allow district engineers to consider avoidance, minimization, and the need for compensatory mitigation, as compliance with the 404(b)(1) guidelines, and further recommended retention of this PCN threshold. One of these commenters stated that temporary impacts should also be considered. Many commenters expressed concern that mechanized land clearing in forested wetlands would result in the long-term and/or permanent conversion of these areas to emergent and scrub-shrub wetlands, and further indicated that these scrub-shrub and emergent wetlands do not provide the same degree of ecological functions and services or provide the same values. Several of these commenters asserted that this conversion in wetland type causes more than minimal adverse effects to the environment.

Paragraph (a) of general condition 23 requires project proponents to design and construct their NWP activities to avoid and minimize temporary and permanent adverse effects to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site). Division engineers can add regional conditions to this NWP to require PCNs and compensatory mitigation for mechanized land-clearing of forested wetlands. Activities that are authorized by NWPs do not require activity-specific evaluation under the 404(b)(1) Guidelines (see 40 CFR 230.5(b)). Emergent and scrub-shrub wetlands perform valued wetland functions, even though those functions differ to some degree from the functions performed by forested wetlands.

A few commenters stated that clearing of forested wetlands can impact wetland hydrology and soils through rutting and soil compaction by machinery. Many commenters stated that a review of pre- and post-construction hydrogeomorphic method assessments demonstrates significant permanent impacts to forested wetlands resulting from mechanized land clearing and temporary discharges. Several commenters said that forested wetlands along the Gulf Coast provide vital stopover areas for migratory birds and that the proposed removal of this PCN threshold would be most profound along the Gulf Coast where pipelines are regularly constructed through forested wetlands.

The text of this NWP that applies to the construction of the pipeline requires that there is no change in pre-construction contours of waters of the United States. If there are permanent impacts to certain features of these forested wetlands, those impacts are caused by the activities authorized by NWP 12, not the presence or absence of any PCN threshold. Soil compaction can be caused by a variety of activities other than discharges of dredged or fill material. If the activity results in a loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN. For those Corps districts in the Gulf Coast, division engineers add regional conditions to require PCNs for mechanized land-clearing activities in forested wetlands.

Several commenters said that the Corps does not cite any sources for stating that mechanized land clearing in forested wetlands usually results in only temporary impacts. A few commenters stated that the Corps has not provided any scientific rationale demonstrating that loss of forested wetland would not result in more than minimal adverse environmental effects. A few commenters said that the consensus in the scientific literature contradicts the Corps' assertion, with multiple studies and practices indicating that mechanized clearing results in irreversible and permanent alteration of forested wetland's functions. One commenter cited paragraph (i) of general condition 23 which allows district engineers to require mitigation for the permanent conversion of wetland types to offset losses of specific functions. One commenter said that the functions of forested wetlands have been estimated by the Corps to have a value of $10,401 per acre per year. A few commenters stated that mechanized land clearing can result in sediment disturbance and potential water quality impacts in wetland areas. A few commenters stated that removing the PCN requirement for mechanized land clearing in forested wetlands would make NWP 12 vulnerable to litigation.

The text of NWP 12 requires temporary impacts to be restored after the pipeline is constructed. If the construction of the pipeline results in the loss of greater than 1/10-acre of waters of the United States, then the project proponent is required to submit a PCN to the Corps. The removal of the PCN threshold is an administrative decision to improve regulatory efficiency, reduce redundancy, and focus the district engineer's evaluation efforts on proposed activities that have the potential to result in more than minimal adverse environmental effects. If mechanized land-clearing causes irreversible and permanent alteration of forested wetland's functions, it is because of the physical effects of the discharge of dredged or fill material into waters of the United States and the periodic maintenance in the pipeline right-of-way that causes those changes in wetland functions. The Corps regulates the former, but does not regulate the mowing and cutting of vegetation to maintain the plant community in the pipeline right-of-way as herbaceous vegetation or scrub-shrub vegetation. Paragraph (i) of general condition 23 is retained in these NWPs, so for those NWP 12 activities that require PCNs, district engineers can require compensatory mitigation to offset permanent losses of certain wetland functions.

One commenter stated that impacts to forested wetlands are permanent or semi-permanent and should not be considered temporary. One commenter suggested the cumulative effects of forested wetland conversion cannot be tracked without a PCN requirement. One commenter stated that the removal of the PCN for mechanized land clearing in forested wetlands is a change with implications for market growth of the ecological restoration industry. One commenter stated that mechanized land clearing can increase non-point source pollution in a water of the United States and can increase nutrient loading in first and second order streams. One commenter said that mechanized land clearing in forested wetlands is associated with an increase in the spread of invasive species.

Forested wetlands that have been converted to herbaceous or scrub-shrub wetlands continue to function as wetlands. Therefore, from a wetland perspective, the impacts caused by the below-ground installation of the pipeline are temporary as long as temporary fills are removed and the affected area is restored to pre-construction elevations. Although the wetland type has changed as a result of the activity, district engineers can require compensatory mitigation to offset losses of specific wetland functions for those NWP 12 activities that require PCNs. If the permittee wants to conduct mechanized land clearing of a forested wetland for an oil or natural gas pipeline right-of-way, he or she must restore the disturbed soils so that there is no change in pre-construction contours of waters of the United States in that right-of-way. If there will be permanent changes in pre-

construction contours in waters of the United States, and the area of those permanent changes will exceed 1/10-acre, then a PCN is required. Permanent adverse effects can be addressed through the PCN review process. Where appropriate to ensure minimal adverse effects on the environment in a particular region, division engineers can add regional conditions to require PCNs for mechanized land clearing in a forested wetland right-of-way.

(ii) *The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet.* One commenter stated that the 500 linear foot PCN threshold should be maintained since the 1/10-acre threshold only covers losses of waters of the United States and retaining it would allow the district engineer to evaluate the site-specific conditions and make an informed decision. One commenter said that removal of the 500 linear foot PCN threshold limits the Corps ability to review projects that will affect habitat, ecosystems, and the environment on tribal lands and within tribal usual and accustomed areas that cross state lines and international borders and further indicated that this would constitute a violation of the United States and trust and responsibility and obligation to protect treaty resources.

The 1/10-acre PCN threshold for losses of waters of the United States provides an opportunity for district engineers to evaluate site-specific conditions and determine whether the proposed oil or natural gas pipeline activities are authorized by NWP 12. The 1/10-acre PCN threshold also provides district engineers with the opportunity to assess potential effects on habitat, ecosystems, environmental conditions on tribal lands, and tribal usual and accustomed areas. District engineers can work with tribes to develop coordination procedures to help protect treaty resources. In addition, activities authorized by NWP 12 must comply with general condition 17, tribal rights.

One commenter said that if this PCN threshold is removed, the Corps cannot evaluate the impacts of temporary losses or determine if specific restoration or mitigation measures are necessary, or if an individual permit would be necessary. One commenter said that the proposal to remove the 500 linear foot PCN threshold should be coterminous with other section 404 permitting requirements, but since this justification does not apply in all situations it is inappropriate. An example cited by this commenter is utility lines directionally drilled under wetlands.

Temporary impacts should not normally require PCNs because the aquatic resources and the functions they provide should recover after the temporary fills are removed and the affected area restored to pre-construction elevations. The removal of the 500 linear foot PCN threshold improves the Corps' efficiency in administering the section 404 program. Further, it is consistent with section 404 permitting requirements, because the Corps determines which activities should require PCNs to trigger review on a case-by-case basis.

(iii) *The utility line is placed within a jurisdictional area (i.e., water of the United States), and it runs parallel to or along the stream bed that is within that jurisdictional area.* One commenter stated that installing pipelines that run parallel to a watercourse can have significant impacts on hydrogeomorphology of the watercourse and lead to substantial erosion and degradation. A few commenters recommended retention of the requirement for a PCN when the proposed activity would run parallel to and within a stream bed, citing the potential for those activities to downgrade aquatic resource functions.

As discussed in the 2020 Proposal (85 FR 57326), the Corps proposed to remove this PCN threshold because the text of NWP 12 requires restoration of these temporary impacts. The third paragraph of NWP 12 addresses the requirements for trenching and backfilling underground oil or natural gas pipelines to ensure those impacts are temporary and do not result in a loss of waters of the United States. The ninth paragraph of NWP 12 also addresses the requirements for restoring temporary fills, so that those fills do not result in losses of jurisdictional waters and wetlands. Further, in Corps districts where the construction of oil or natural gas pipelines in jurisdictional waters and wetlands parallel to a stream channel have the potential to cause more than minimal individual and cumulative adverse environmental effects, division engineers may add regional conditions to NWP 12 to require PCNs for these activities.

(iv) *Permanent access roads are constructed above grade in waters of the United States for a distance of more than 500 linear feet.* Several commenters said that the PCN requirement for permanent access roads should be retained to ensure NWP 12 activities not authorize more than minimal adverse effects. One commenter opposed the removal of the PCN threshold for associated access roads and culvert-related activities so that district engineers can evaluate potential impacts to fish passage.

The PCN threshold for losses of greater than 1/10-acre of waters of the United States applies to permanent access roads, and that PCN threshold is sufficient for providing district engineers with the opportunity to review those activities to determine if they qualify for NWP authorization. The Corps is removing this PCN threshold for above-grade permanent access roads because it is redundant with the 1/10-acre PCN threshold. Concerns about potential impacts to fish passage are addressed by NWP general condition 2. General condition 2 states that no NWP activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. Furthermore, general condition 2 requires all permanent and temporary crossings of waterbodies to be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

(v) *Permanent access roads are constructed in waters of the United States with impervious materials.* A few commenters suggested a maximum length for impervious surfaces without a PCN associated with NWP 12. The current PCN requirement for losses of waters of the United States greater than 1/10-acre is sufficient to trigger activity-specific review for permanent access roads constructed with impervious materials, to allow district engineers to determine whether a particular proposed access road will result in no more than minimal adverse environmental effects.

Proposed Addition of a PCN Threshold for New Oil or Natural Gas Pipeline Activities Greater Than 250 Miles in Length

Many commenters objected to the proposed PCN threshold for new oil or natural gas pipelines that are greater than 250 miles in length, stating that it is arbitrary and capricious, and indicated that there is no reasonable basis for the 250-mile threshold. One commenter expressed support for the addition of the 250-mile pipeline length PCN requirement. One of the commenters said that this PCN threshold is inconsistent with other PCN thresholds. Many commenters objected to removing the current PCN thresholds and replacing them with the 250-mile PCN threshold. One commenter expressed support for the proposal to require that PCNs include information on all discharges associated with a pipeline, including those that

would not otherwise require a PCN. One commenter stated that the phrase ''associated with an overall project'' was unclear and undefined.

As discussed in the 2020 Proposal, this PCN threshold is being added for new oil or natural gas pipelines to provide district engineers the opportunity to review all crossings of waters of the United States for new long-distance oil or natural gas pipelines to ensure that the activities authorized by NWP 12 will result in no more than minimal individual and cumulative adverse environmental effects (see 85 FR 57327). Given the concerns expressed by numerous commenters regarding the potential cumulative adverse environmental effects that may be caused by NWP 12 activities, this is not an arbitrary or capricious addition to the PCN requirements for NWP 12. This new PCN threshold is not a replacement for the PCN thresholds the Corps is removing from NWP 12. It is a new PCN threshold to address stakeholder concerns about cumulative effects. The phrase ''associated with an overall project'' refers to the entire oil or natural gas pipeline that is greater than 250 miles in length.

Several commenters supported a scope or length-based PCN threshold but suggested that the Corps adopt more protective PCN thresholds in place of the proposed 250-mile threshold. One of these commenters said that significant cumulative environmental impacts are likely to occur at a much lower length. One of these commenters suggested changing the distance in this PCN threshold to 25 miles, while another commenter suggested 75 miles, and a third commenter suggested a 5-mile threshold. One commenter said that the Corps should require PCNs for any proposed oil or natural gas pipeline activity resulting in five or more crossings.

The Corps believes that this new PCN threshold, plus the other two PCN thresholds in NWP 12 (*i.e.,* activities requiring section 10 authorization, and discharges resulting in the loss of greater than 1/10-acre of waters of the United States), are sufficiently protective of the aquatic environment by providing information to district engineers to conduct case-specific reviews of proposed NWP 12 activities that have the potential to result in more than minimal individual and cumulative adverse environmental effects. In furtherance of the Corps' review of cumulative effects, paragraph (b)(4) of NWP general condition 32 requires PCNs for proposed NWP activities for linear projects to include and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. Although the Corps agrees that using a threshold of five or more crossings is based on a numerical impact, it could be more challenging to implement since there may be proposed oil or natural gas pipeline activities where there are five or more crossings and none of those crossings require PCNs.

One commenter suggested replacing the PCN threshold for new oil or natural pipeline activities with lengths of greater than 250 miles with a PCN requirement for oil or natural gas pipeline activities that cross state or district boundaries. Several commenters objected to the proposed 250-mile PCN threshold, but some of these commenters said that the acreage PCN threshold is sufficient to ensure no more than minimal adverse environmental effects. A few commenters remarked that the length of a pipeline is not a predictor of its crossings of waters of the United States or environmental impacts and that this PCN threshold has no link to the Corps' regulatory authority. A few commenters stated that the 250-mile PCN threshold is inconsistent with the other proposed utility line activity permits as they do not contain that PCN threshold. One commenter objected to the 250-mile PCN threshold because it is limited to new oil or natural gas pipelines (*i.e.,* the material to be transported after the pipeline is constructed).

As discussed above, the purpose of this new PCN threshold is to provide information to district engineers to facilitate their review of the cumulative effects that may be caused by new long-distance oil or natural gas pipelines that have waterbody crossings that require NWP 12 authorization. These new long-distance oil or natural gas pipelines may be constructed within a single state or Corps district. The Corps agrees that the number of aquatic resources and their distribution in the landscape is variable, and therefore the number of crossings of waters of the United States is similarly variable. However, the Corps finds that a length of 250 miles is both a good indicator of potential cumulative effects of an oil or natural gas pipeline while minimizing the potential for inconsistent implementation of the PCN requirement across districts. In addition, some oil or natural gas pipeline crossings may not require DA authorization because they are installed through horizontal directional drilling, do not involve a waterbody subject to Section 10 of the Rivers and Harbors Act, and do not involve discharges of dredged or fill material into waters of the United States. The Corps does not believe that this PCN threshold is necessary for new NWPs 57 and 58 because long-distance electric utility lines are often constructed as overhead utility lines and utility lines for water and other substances (*e.g.,* potable water, wastewater, sewage) are often constructed to serve local communities and thus are likely to be shorter in overall length.

One commenter stated that the Corps' Regulatory Impact Analysis for the proposed rule is flawed because it assumes the new 250-mile PCN requirement would result in no additional PCNs. One commenter said that if the Corps does move forward with a 250-mile PCN threshold for new oil or natural gas pipeline activities that applicants be allowed to provide the PCNs based on desktop data as some areas may not be accessible for field surveys if the project is in the development stage. One commenter stated that the 250-mile PCN threshold would result in the majority of pipeline projects being constructed without review and would result in damage to historic properties. One commenter said that the 250-mile threshold has no scientific or technical basis.

The new 250-mile PCN requirement is unlikely to require more PCNs for NWP 12 activities because the likelihood of a new oil or natural gas pipeline greater than 250 miles in length not having any crossings of waters of the United States that require PCNs under the other PCN thresholds is extremely small. In addition, the requirement to provide in the PCN the locations and proposed impacts for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require preconstruction notification, does not trigger a requirement for the project proponent to submit full PCNs for those other non-PCN crossings of waters of the United States. This portion of the new PCN requirement is nearly identical to an existing requirement in paragraphs (b)(4)(i) and (ii) of general condition 32. Paragraph (b)(4)(i) requires the project proponent to include in the PCN any

other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require pre-construction notification.

Furthermore, paragraph (b)(4)(ii) of general condition 32 currently requires project proponents to include in PCNs for linear projects where one or more single and complete crossings require pre-construction notification, the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those waters and wetlands. This quantification also must include those single and complete crossings authorized by an NWP not requiring PCNs. The only additional information required by the 250-mile PCN threshold is the location of all non-PCN crossings. The Regulatory Impact Analysis for this final rule has been updated to identify this new PCN threshold as a change. The lack of discussion of the proposed 250-mile PCN threshold in the Regulatory Impact Analysis for the proposed rule was an error. When a project proponent develops a proposal for a new oil or natural gas pipeline, some degree of environmental analysis and review is needed to determine whether there are any crossings of waters of the United States that require DA authorization, and whether any of those crossings require PCNs. The new PCN threshold should not impose any additional burdens on the regulated public. New oil or natural gas pipelines must comply with general condition 20 for historic properties as do all activities authorized by an NWP.

One commenter objected to the proposed 250-mile PCN threshold, and limiting it to the installation of new oil or natural gas pipelines (versus conducting repair or maintenance activities) along the majority of the distance of the overall project length, stating that a PCN requirement should be triggered even if short distances of the pipeline are being replaced. A few commenters stated that the proposed 250-mile PCN threshold is counter to, and could undermine, the Corps' longstanding definition of a single and complete linear project, and would allow district engineers to require individual permits because of the length of pipeline and cumulative impacts regardless of the independent utility of the separate and distant crossings.

The maintenance of existing oil or natural gas pipelines is likely to have fewer adverse environmental effects than the construction of new oil or natural gas pipelines, because those maintenance activities occur to existing pipelines for which some degree of adverse environmental effects has already occurred and a current environmental setting that includes the existing pipeline. The 250-mile PCN threshold does not undermine the Corps' definition of single and complete linear project because each separate and distant crossing of waters of the United States can continue to be authorized by an NWP. If one crossing of waters of the United States for an oil or natural gas pipeline requires an individual permit, then 33 CFR 330.6(d) applies and the district engineer will determine which activities require individual permits and which activities can be authorized by an NWP. Section 330.6(d) of the Corps' NWP regulations, as well as Note 2 of NWP 12, remain in effect. Section 330.6(d) and Note 2 maintain the Corps' long-standing process regarding the use of NWPs and individual permits to authorize linear projects such as oil or natural gas pipelines.

One commenter stated that the 250-mile PCN threshold would discourage pipeline developers from avoiding and minimizing impacts to waters of the United States, and from planning longer routes to avoid sensitive resources. One commenter said that the 250-mile PCN threshold will add an unnecessary layer of uncertainty and litigation risk. One commenter stated that a 250-mile PCN threshold would authorize potentially significant pipeline activities without any district or division review. One commenter stated that oil or natural gas pipelines greater than 250 miles in length are so large they are bound to cause more than minimal effects and should not be approved under an NWP. One commenter stated that the length of the utility line should not be used as a PCN threshold; environmental conditions and impacts should be used instead.

Regardless of the addition of the 250-mile PCN threshold, pipeline developers are still required to comply with paragraph (a) of NWP general condition 23, which requires project proponents to avoid and minimize losses of waters of the United States on the project site, including permanent and temporary losses of those resources. The purpose of the new PCN threshold is to add a mechanism to provide information for the district engineer's cumulative effects determination and the district engineer's decision on whether to issue NWP verifications for the proposed crossings of waters of the United States. The information on all of the crossings will inform whether or not the cumulative adverse environmental effects of all crossings are or are not more than minimal. This PCN threshold also provides the district engineer to require an individual permit for the proposed oil or natural gas pipeline activities when he or she determines the cumulative adverse environmental effects of the proposed crossings of waters of the United States are more than minimal. This may help reduce litigation risk. The 250-mile PCN threshold provides information for the district engineer's review, who also uses information on current environmental conditions and potential impacts of the proposed NWP activities to determine whether NWP authorization is appropriate for these NWP 12 activities. Division engineers do not have a role in reviewing NWP PCNs.

Other Provisions of NWP 12

One commenter said that Note 2 should be reissued with no changes, as it clarifies concepts such as ''single and complete project,'' ''single and complete non-linear project,'' ''independent utility,'' and the interaction of the NWPs with individual permits. The Corps has reissued Note 2 with no changes. Note 2 differs from the 250-mile PCN threshold in that an individual permit is required for the proposed oil or natural gas pipeline if one or more crossings of waters of the United States does not qualify for NWP authorization. Under the 250-mile PCN threshold, an individual permit is required if the district engineer determines the cumulative adverse environmental effects of all crossings of waters of the United States that require DA authorization will result in more than minimal cumulative adverse environmental effects.

A few commenters objected to authorizing separate and distant crossings as single and complete projects. These commenters believe that the practice causes more than minimal cumulative adverse effects. A few commenters expressed opposition to allowing multiple ''single and complete'' project authorizations of the same pipeline to be authorized by the NWP 12, stating that it would be more appropriate to consider the entire pipeline as a single and complete project. One of these commenters said that more individual permits should be required for these activities.

The authorization of separate and distant crossings of waters of the United States as single and complete projects for the purposes of NWP authorization is a long-standing practice consistent with the Corps' regulations at 33 CFR 330.2(i).

One commenter expressed concern with the cumulative effects analyses for multiple single and complete crossings and the inability to account for NWP activities that do not require PCNs. One commenter said that the proposed reissuance of NWP 12 is arbitrary and capricious and in violation of the Clean Water Act because it allows unlawful piecemealing of large pipelines and other linear projects to avoid individual permit review. One commenter stated that an entire pipeline project should be subject to NEPA review, including a cumulative review of all impacts to waters of the United States.

Paragraph (b)(4) of NWP general condition 32 requires project proponents to include in PCNs any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require DA authorization but do not require pre-construction notification. This information is used by district engineers to determine whether the proposed activity will result in no more than minimal individual and cumulative adverse environmental effects.

Activities authorized by NWP 12 are not subject to additional NEPA review, because Corps Headquarters fulfills the requirements of NEPA when it finalizes the national decision document for the issuance or reissuance of the NWP. The national decision document includes an assessment of effects of the Corps proposed action (*i.e.,* the issuance or reissuance of the NWPs) in accordance with the Council on Environmental Quality's definition of ''effects or impacts'' at 40 CFR 1508.1(g) in their NEPA regulations. This analysis of effects or impacts under NEPA includes the projected use of the NWP over the 5-year period it is expected to be in effect. For an NWP that authorizes discharges of dredged or fill material into waters of the United States, the national decision document also includes a cumulative impact analysis conducted in accordance with 40 CFR 230.7(b)(3).

One commenter stated that acreage limits and thresholds should remain constant with separate consideration at each single and complete crossing of waters of the United States authorized by NWP 12. One commenter said that each crossing should require a separate permit. One commenter expressed concern that the phrase ''separate and distant'' is not defined and would not prevent a pipeline from being used multiple times in close proximity and/or on the same waterbody under NWP 12. Another commenter said that no additional definition of ''separate and distant'' is necessary. One commenter stated that the Corps should impose an overall limit on cumulative effects allowed for a project with multiple ''single and complete'' crossings.

Nationwide permit 12 has a ½-acre limit for each single and complete project. As discussed above, and in 33 CFR 330.2(i), each separate and distant crossing of waters of the United States may qualify for a separate NWP authorization. The Corps declines to define the phrase ''separate and distant'' because what constitutes separate and distant crossings can vary across the country because of differences in the distribution of waters and wetlands in the landscape, local hydrologic conditions, local geologic conditions, and other factors. What constitutes separate and distant crossings is more appropriately determined by district engineers on a case-by-case basis. When reviewing a PCN, the district engineer considers the cumulative effects of all crossings of waters of the United States for the oil or natural gas pipeline activity, and applies the 10 criteria listed in paragraph 2 of Section D, District Engineer's Decision.

One commenter said that Note 4 should refer to the General Bridge Act of 1946 instead of Section 9 of the Rivers and Harbors Act of 1899. The Corps has made this change to Note 4.

With respect to Note 5 of this NWP, a few commenters requested that the Corps provide clarification and examples of exempted utility line activities under Section 404(f) of the Clean Water Act. One commenter suggested that the Corps provide examples of utility line activities that do not qualify for the exemption. In accordance with the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act, the U.S. EPA has the authority to determine which activities are eligible for the Clean Water Act section 404(f) exemptions.

Comments on Proposal To Issue Separate NWPs for Different Utility Line Sectors

Many commenters expressed support for dividing oil and natural gas pipeline activities from other types of utility line activities. Several commenters acknowledged that the three types of utility lines are of varying sizes and lengths, constructed with different methods, and have different relative impacts to streams and wetlands. One commenter said that the proposed division of NWP 12 into three separate NWPs ensures that the activities authorized by these NWPs are substantially similar in nature and will further ensure that each of the NWPs will have no more than minimal adverse effects on the environment. One commenter stated that permitting utility line activities through three separate NWPs helps reduce litigation risk for some types of utility line activities.

The Corps acknowledges that issuing three separate NWPs for different types of utility lines helps ensure that the categories of activities authorized by these NWP are substantially similar in nature and that they will result in no more than minimal individual and cumulative adverse environmental effects. The issuance of three NWPs for different categories of utility line activities may also help reduce regulatory uncertainty for electric utility line operators, telecommunications companies, state, tribal, and local water authorities, and other entities that construct, maintain, and operate these utility lines. It may also provide diversity and stability to the NWP program and allow Corps districts to continue to authorize categories of utility line activities by an NWP in the event that one of the three NWPs is invalidated or stayed by a federal court. Most of the past litigation on NWP 12 has been for oil or natural gas pipelines, not electric and telecommunications lines or utility lines that convey potable water, wastewater, sewage and other such substances. Issuing separate NWPs for electric utility line and telecommunications activities and for utility lines for water and other substances will help provide some degree of regulatory certainty for the entities that construct and maintain those types of utility lines. These separate NWPs will also benefit the people who rely on electric utility lines and telecommunication lines and utility lines for water and other substances to deliver energy, information, entertainment, potable water, and other goods and services. The public will also benefit from the removal of sewage and wastewater to protect public health and the environment.

A few commenters requested that if NWP 12 is divided that the Corps be clear that all provisions relating to substations, foundations, and access roads, and as well as provisions on inadvertent returns of drilling fluids, temporary structures and fills (including use of temporary mats), and accompanying notes, remain with the

same legal effect and with no additional restrictions. The Corps has written these three NWPs in a consistent manner to provide a similar framework for authorizing regulated activities associated with utility lines, utility line substations, access roads, actions to remediate inadvertent returns, and the authorization of temporary impacts for construction and other activities.

One commenter suggested that the Corps issue separate NWPs for utility lines based on the distinction as to whether they are overhead utility lines, such as electric and telecommunication lines, or underground utility lines. One commenter requested that the Corps change the proposed NWP 12 to authorize ''underground pipeline or utility line related activities.'' Several commenters said that buried linear utility lines have substantially similar environmental effects on waters of the United States. One commenter indicated there is variability and no reasonable justification for dividing the NWPs based on above-ground and below-ground activity types. A few commenters said that the construction of oil, natural gas, water, and other utilities typically require more ground and vegetation disturbance than the construction methods for electrical utility lines. These commenters also stated that electrical utility lines have more flexibility to avoid aquatic resources, and that discharges of dredged or fill material associated with electric utility lines typically have a smaller footprint than they do for other in-ground utility lines. One commenter said that the Corps should keep all buried, underground utility lines in NWP 12, rather than create a new NWP for utility line activities for water and other substances, because best management practices for protecting waters from trenching or boring for pipes are similar in nature regardless of the product to be carried in the pipe.

After reviewing the public comments, the Corps determined that issuing separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility line activities for water and other substances would be the best approach for reducing regulatory uncertainty for different utility line sectors.

One commenter suggested that the Corps further distinguish between natural gas and petroleum liquids in recognition of the differences in environmental consequences of potential leaks. One commenter recommended that the Corps further distinguish between large interstate natural gas pipelines and smaller intrastate natural pipelines and service lines.

The Corps does not have the authority to address the environmental consequences of leaks from oil or natural gas pipelines. Those environmental consequences are more appropriately addressed by federal, state, and local government agencies that have the legal authority to require operators of oil or natural gas pipelines to take actions in response to leaks.

Many commenters objected to the proposed separation of NWP 12 into three NWPs and requested that the 2017 NWP 12 be retained in its historic form. Many of these commenters said that the Corps should focus its concerns on the environmental impacts of the authorized activities rather than the type of material transported by various utility lines. Several commenters objected to the proposed division of the NWP 12 activities indicating that it would cause additional complications to permitting utility line activities rather than streamlining the process. One commenter remarked that there are no substantive differences between the three proposed NWPs and therefore issuing separate NWPs is unnecessary. Several commenters said that issuing three separate utility line NWPs will increase litigation risk and uncertainty for the regulated public.

As discussed above, the Corps believes that separating NWP 12 into three different NWPs to authorize utility line activities for different utility line sectors will help enhance regulatory certainty for utility line sectors that are not a frequent target for litigation because of the lower degree of concern about the potential direct and indirect environmental impacts of the substances those utility line sectors carry (*e.g.,* electricity, potable water, wastewater). As with any change in the NWP program, prospective permittees will experience some challenges associated with those changes, but over time they will adjust to those changes and can realize the benefits of those changes. Prior versions of NWP 12 have been subjected to litigation, so the issuance of three separate NWPs for utility line activities is likely to pose no greater litigation risk than prior versions of NWP 12.

One commenter said that the Corps only analyzed differences but not similarities among these different types of utility lines. A few commenters said that the proposed division of NWP 12 activities is an abrupt and unjustified departure from the long-standing view that utility lines are activities that are substantially similar. One of these commenters said that the proposed change is a departure from the NWPs that were first promulgated in 1977. A few commenters said that a general permit should encompass activities that are similar in nature consistent with Section 404(e) of the Clean Water Act.

When proposing to issue new NWPs for activities that were authorized by a previous NWP, discussing the differences among those NWPs and the associated categories of activities is an important part of explaining the proposed action. The changes are being proposed through the normal rulemaking process, and are being made in response to events that have raised concerns about potential increases in regulatory uncertainty for specific categories of regulated entities. When the NWPs were first issued in 1977, there were 15 NWPs. When the NWPs were last issued in December 2016, there were 52 NWPs. The number of NWPs has increased substantially over time in response to changes in the Corps Regulatory Program, litigation, studies, and other factors. The three utility line NWPs being issued in this final rule represent categories that are similar in nature (*i.e.,* oil/natural gas; electricity, including communications carried by electricity; and water, wastewater, sewage, stormwater, and other substances). Section 404(e) of the Clean Water Act does not specify how broad or narrow categories of activities authorized by NWPs and other general permits must be. The Corps has substantial discretion to identify categories of activities that are appropriate for NWPs and other general permits.

One commenter noted that the Corps' response to public comments for the 2017 NWPs rejected the idea that utility line activities are not substantially similar, stating that the Corps explained that the agency interprets the 'categories of activities that are similar in nature' requirement broadly to keep the NWP program manageable in terms of the number of NWPs. A few commenters said that the history of the NWPs indicates that there is no prior precedent in past NWP rulemaking for arbitrarily dividing NWPs that are intended to cover categories of activities that are similar in nature. One of these commenters further indicated that the mining NWPs (21, 44, 49, and 50) and the development NWPs (29 and 39) are not analogous as their development came about differently, indicating that they largely had to do with the end of NWP 26.

As discussed above, Section 404(e) of the Clean Water Act gives the Corps substantial discretion in how broad or narrow to define categories of activities

for general permit authorization. The proposal to issue three separate NWPs for utility line activities instead of reissuing NWP to authorize all utility line activities was made, in part, in response to concerns about regulatory uncertainty for various utility line sectors. The proposal is also an opportunity to tailor the NWPs so that they will authorize activities that have no more than minimal individual and cumulative adverse environmental effects by making targeted changes to the text of each of these NWPs, as appropriate.

This proposal is consistent with prior NWP rulemaking efforts, in which the Corps issued new NWPs to authorize categories of activities with numerous similarities in the text of the NWP, including acreage limits and other limits, PCN thresholds, and categories of waters in which those NWPs may be used to authorize discharges of dredged or fill material into waters of the United States. For example, in 2007 the Corps issued two new NWPs to authorize discharges of dredged or fill material into waters of the United States for coal mining activities (see 72 FR 11092). The Corps issued NWP 49 for coal remining activities and NWP 50 for underground coal mining activities. These two coal mining NWPs were issued even though the Corps had issued and reissued NWP 21 for surface coal mining activities over time since NWP 21 was first issued in 1982 (47 FR 31794).

In 2000, the Corps issued five new NWPs and modified six existing NWPs to replace NWP 26, which authorized discharges of dredged or fill material into headwaters and isolated waters (65 FR 12818). Four of the new NWPs (NWP 39 for residential, commercial, and institutional developments; NWP 40 for agricultural activities; NWP 42 for recreational facilities; and NWP 43 for stormwater management facilities) authorized discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. Each of these NWPs had a ½-acre limit for losses of non-tidal waters of the United States. The categories of activities established for these four NWPs were based on the operational purposes they served, which the Corps does not have the authority to regulate. Those operational purposes included providing places for people to live, work, learn, and produce goods and services (NWP 39); agriculture activities, including farm buildings (NWP 40); recreational facilities and associated features (NWP 42); and stormwater management facilities (NWP 43).

Similar to these NWPs, the three NWPs the Corps is issuing to authorize various sectors of utility line activities are differentiated by the substances those utility lines carry, despite the Corps' lack of authority to regulate the substances being conveyed by those utility lines. If Congress had intended the categories of general permits issued under Section 404(e) of the Clean Water Act to be based on the activity the Corps regulates (*i.e.,* discharges of dredged or fill material into waters of the United States), it would not have written the text of section 404(e) to refer to ''any category of activity involving discharges of dredged or fill material.'' The text of section 404(e) clearly allows the Corps to issue any number of NWPs that authorize discharges of dredged or fill material into waters of the United States. Furthermore, those categories can be based on how the authorized activity will be used after the project proponent has completed the construction activities associated with the discharges of dredged or fill material into waters of the United States, and how people will use the completed activities even though the Corps generally has no authority to regulate how the constructed facilities are operated. These principles apply to the three NWPs the Corps is issuing for these three utility line sectors.

One commenter said that the proposed changes to NWP 12 and the proposed issuance of separate NWPs for other types of utility lines are not consistent with congressional intent to reduce administrative burdens and the Administration's policy on infrastructure development and maintenance. This commenter cited Executive Order 13777, ''Enforcing the Regulatory Reform Agenda'' (February 24, 2017), Executive Order 13783, ''Promoting Energy Independence and Economic Growth'' (March 28, 2017), and the 2018 ''Legislative Outline for Rebuilding Infrastructure in America.''

The Corps believes that this issuance of these three NWPs (NWPs 12, 57, and 58) are consistent with priorities for infrastructure development because they will help reduce regulatory uncertainty and burdens on the regulated public. The issuance of these NWPs will not cause any increases in the number of activities authorized by an NWP or the number of activities requiring individual permits. The three NWPs are consistent in general structure, but they have some differences because of the different types of substances those utility lines convey and how those utility lines are designed and constructed.

Several commenters stated that the proposed division of NWP 12 activities into separate NWPs discourages the beneficial and common practice of joint trenching and the use of utility corridors where various types of utilities are co-located, and further indicated that these features should be permissible under NWP 12 as a single and complete project. Several commenters said that the proposal to issue three separate NWPs would increase costs and delays associated with energy infrastructure projects. A few commenters stated that the division of NWP 12 into three NWPs would increase the number of permits needed by some applicants. One commenter cited NWP general condition 28 as a reason not to divide NWP 12 into three different NWPs for different types of utility lines.

The issuance of these three NWPs will not discourage joint trenching and the use of utility corridors for multiple utility lines. For example, if a project proponent proposes to construct a water line next to an oil or natural gas pipeline, the provisions of NWP general condition 28, use of multiple NWPs, would apply. For each crossing of a separate and distant waterbody, both NWP 58 and 12 could be used, as long as the loss of waters of the United States at each single and complete project does not exceed ½-acre. The issuance of these three NWPs will not cause increased costs and delays for energy infrastructure projects, except for a relatively brief period of time as the transition from the 2017 NWPs to the 2021 NWPs occurs. The Corps acknowledges that there will be some increases in the number of permits that project proponents will need to obtain, but those permits will generally be used concurrently, and consistent with general condition 28. The use of multiple NWPs to authorize single and complete projects is a longstanding practice in the NWP program.

A few commenters said that the when the Corps considers whether to make changes to an established and well-functioning NWP program, it should be conscious of how changes to the framework for permitting utility lines will affect the investment community, and in turn the country's ability to continue to deliver competitively-priced energy from diverse sources to U.S. consumers and other end-users, and to further domestic energy independence. A few commenters remarked that pipeline and other infrastructure operators need regulatory certainty to build, maintain, and upgrade pipelines and other utility infrastructure. One commenter expressed support for the Corps' efforts to improve the NWP

program, but cautioned the Corps to avoid changes that could introduce inefficiencies. A few commenters said that the proposed division of NWP 12 into three separate NWPs would likely introduce unnecessary strain on agency resources, delays in the permit reviews, regulatory inconsistency in the permitting process. One commenter objected to dividing the NWP 12 into three separate NWPs because they are very similar and can be more easily tracked and understood as one category.

The Corps acknowledges that there will be some challenges and opportunities with these changes to the NWP program, but it should also be noted that the NWP program changes each time the Corps goes through the rulemaking process to issue or reissue the NWPs and that adjustments need to be made under the new NWPs. The issuance of NWP 57 will help support renewable energy generation facilities and the transfer of electricity from those generation facilities to residential, commercial, industrial, and other users. The NWPs will continue to provide regulatory certainty for pipelines and other types of utility lines. None of these three NWPs require agency coordination, so other federal agencies should not be adversely affected by the splitting of NWP 12 into three separate NWPs.

One commenter said that if the Corps were to move forward with the division of the NWP 12 activities it must take into consideration the differences between distribution and transmission pipelines as the physical characteristics of the pipelines inherent in these different uses may have a larger effect on waters of the United States than the material being transported. A few commenters suggested that if NWP 12 were reissued without change, over time the use of NWP 12 would shift from oil and gas pipelines to other utility sectors to account for new investment in more secure and resilient utility systems, and that a two-year period is an inadequate sampling for this decision making effort.

The Corps does not agree that is necessary to address differences between distribution and transmission pipelines. These NWPs authorize utility lines of various sizes, and the Corps focuses its analysis of potential adverse environmental effects or impacts that are caused by the activities that are directly related to the Corps' regulatory authority (*i.e.,* discharges of dredged or fill material into waters of the United States regulated under Section 404 of the Clean Water Act and structures and work in navigable waters of the United States regulated under Section 10 of the Rivers and Harbors Act of 1899). The Corps does not believe it is useful to engage in speculation about potential future trends in the number of oil or natural gas pipelines versus the number of electric utility lines and telecommunications lines versus the number of utility lines carrying water and other substances. The Corps estimated the potential permitting changes using data on NWP verifications issued between March 19, 2017, and March 19, 2019, which provides a robust sample size.

One commenter said that that, according to the Congressional Research Service, the Corps does not have a centralized database or other information on the number of individual permits it issues for pipeline and utility line projects, nor does it have a database on the utility line activities that are authorized by NWP 12, and that any attempt by the Corps to draw out a reasoned, data-driven basis for dividing NWP 12 into three separate NWPs is premature at this time.

The Corps does have a centralized database that tracks NWP verifications issued, regional general permit verifications issued, and individual permits issued, including the types of activities authorized by those general permits and individual permits. From that data, the Corps was able to estimate the number of NWP activities that were likely associated with oil or natural gas pipelines, electric and telecommunications lines, and utility lines for water and other substances.

One commenter stated that dividing the NWP 12 would add complexity to ESA and NHPA compliance. One commenter said that the Corps appropriately recognizes that the techniques used to construct water and electric utility lines have fewer impacts to waters of the United States than other uses of NWP 12 involving transport of petrochemicals. The issuance of these three NWPs will not add complexity to ESA or NHPA compliance because they must comply with the same NWP general conditions, including general condition 18, endangered species, and general condition 20, historic properties. A single compliance process under either law can serve multiple NWPs for those activities that may use NWP 12 and 58, for example.

A few commenters stated that there is no logical grouping to be found for dividing the proposed NWP activities based on pipe diameter, size, and any associated ground disturbances. A few commenters said that the Corps' information on diameter and pipeline lengths are based upon incomplete generalizations that do not withstand scrutiny. One commenter stated that justification for dividing NWP 12 cannot be based upon the diameter of the pipeline or conduit. One commenter remarked that the size of the pipe may determine a minimum width of a trench but that some smaller pipelines may require larger trenches depending on the circumstance and that this is not a valid criterion for separating the NWPs. One commenter said that the Corps failed to make a persuasive case that length of a utility line would be a determining factor when considering ground disturbances and division of the NWP activities. One commenter said that with respect to the Corps' jurisdiction under Section 10 of the Rivers and Harbors Act of 1899, it is the presence of a pipeline that affects navigation, not the substance it contains.

The discussion in the preamble to the 2020 Proposal regarding the differences among the three utility line sectors that were the basis for the modified NWP 12 and the proposed new NWP C and D was intended to demonstrate that there are some differences among those sectors. The final NWPs are based on sectors, not construction techniques or sizes of the utility lines. The text of the three NWPs makes no references to the diameters or length of the utility lines. The Corps agrees that for utility lines that cross navigable waters of the United States and require section 10 authorization, the Corps focuses its evaluation on potential effects on navigation, not the substance being conveyed by the utility line.

A few commenters said that the Corps' jurisdiction as related to these NWPs is limited to its statutory authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. One commenter expressed concern that the proposed issuance of separate NWPs could lead the Corps to consider factors outside of its statutory authority. A few commenters stated that consideration of the type of substances that can be conveyed by a utility constitutes overreach of the Corps' statutory jurisdiction. These commenters went on to reference statements from the Corps that it does not regulate the operation of oil and natural gas pipelines, but that the Corps regulates discharges of dredged or fill material into waters of the United States associated with their construction.

The Corps recognizes that under these three NWPs the Corps' statutory authority is limited to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. However, for these three NWPs and many of the other NWPs, the categories of activities authorized by those NWPs relate to how

the constructed activities will be used (*e.g.,* residences for NWP 29, recreational facilities for NWP 42, land-based renewable energy generation for NWP 51), even though the Corps does not have the authority to regulate the operation of the constructed structure or fill. As discussed above, the text of section 404(e) recognizes that the Secretary could issue any number of general permits, including NWPs, for any number of categories of activities involving discharges of dredged or fill material into waters of the United States.

A few commenters said that the terms used to describe the applicability of NWP 12 cause ambiguous situations with respect to which substances would qualify as oil, gas, or petrochemicals and to which NWP would apply. These commenters also indicated confusion associated with common situations where petrochemical products are added to non-petroleum products prior to transport and generally suggested the source of the material to be transported has little or no bearing on the methods for construction, maintenance, repair or replacement of the pipeline on the best management practices needed to protect waters of the United States.

The Corps has attempted to provide more clarity regarding the differentiation of utility line sectors that would fall under NWPs 12, 57, or 58. The Corps recognizes that there may be situations where a prospective permittee may be unsure which NWP applies. The prospective permittee could coordinate with the appropriate Corps district to get assistance in identify which NWP would be most appropriate for a particular project. If the project proponent is contemplating constructing different types of utility lines for a particular project, multiple NWPs could be used as long as the project proponent complies with NWP general condition 28, which addresses use of multiple NWPs for a single and complete project.

General Comments on Best Management Practices

A few commenters supported the incorporation of specific best management practices (BMPs) for the utility line NWPs. A few commenters said that adding additional BMPs or standards to this NWP would result in redundant requirements to manage on these projects without providing additional benefits. A few commenters said that division engineers can tailor standards to meet region-specific needs and issue additional regional conditions with their discretionary authority. One commenter stated that the BMPs for protecting water features during trenching, boring, or sleeving construction methods for installing, replacing, or maintaining pipes at stream or wetland crossings are similar in nature, regardless of what product will travel in the pipeline once construction is completed. One commenter stated that the three categories of utility lines under proposed NWPs 12, C, and D, would authorize sufficiently similar activities and require the same or similar environmental provisions in order to meet the no more than minimal impacts requirement under section 404(e) of the Clean Water Act. One commenter said that because of the overarching federal regulatory regime, NWP 12 and its general conditions, regional conditions added by division engineers, and applicable state requirements there are no additional BMPs that could be practically or lawfully added to NWP 12.

The Corps agrees that there are no national best management practices to add to NWPs 12, 57, and 58. As discussed below, a few commenters submitted suggestions for best management practices. The Corps has considered those best management practices, and has concluded that best management practices are more appropriately addressed as regional conditions added to the NWPs by division engineers or activity-specific conditions added NWP authorizations by district engineers.

A few commenters said that imposing additional best management practice requirements would risk conflict or redundancy with other applicable regulations. A few commenters suggested that the if the Corps were to become aware of best management practices to add to NWP 12 then it should conduct a subsequent notice and comment procedure for these BMPs as none were specifically proposed. A few commenters indicated that a 60-day notice is inadequate for stakeholders and agencies to compile BMPs and best available science for the invitation to comment. One commenter recommended that the Corps maintain the existing NWPs and instead conduct an extensive outreach campaign to stakeholders to determine BMPs for the utility line NWPs. One commenter said that when developing industry specific standards and BMPs, the duration and location of temporary fill impacts across a project site should be taken into consideration. One commenter requested that the Corps provide examples the types of construction methods for access roads that are considered to minimize adverse effects to waters of the United States as noted in several NWPs.

The Corps has decided not to add any best management practices to NWPs 12, 57, and 58. After reviewing the BMPs suggested by commenters, the Corps determined that the text of these NWPs already include some common BMPs, such as requiring the top 6 to 12 inches of the trench to normally be backfilled with topsoil from the trench, constructing the trench so that it does not drain waters of the United States through a French drain effect, or stabilizing exposed slopes and stream banks immediately after completion of construction of the stream crossing.

Comments on Best Management Practices for NWP 12

One commenter said that impacts from work on natural gas pipelines and gas utility lines are minimal and temporary, and BMPs under the existing NWP 12 protect waters of the United States. One commenter stated that if the Corps decides to impose any BMPs on interstate natural gas pipelines they must not conflict with the FERC's Plan and Procedures. Several commenters stated that The U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) Office of Pipeline Safety imposes stringent pipeline safety regulations under 49 CFR part 192 on natural gas interstate transmission pipelines and gas utility intra-state natural gas transmission and distribution utility lines. One commenter stated that the 2017 NWP 12 provides adequate environmental protections under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899, and that no additional industry-specific standards or BMPs should be added to the NWPs as national enforceable terms. One commenter stated that pipeline rights-of-way should be maintained in herbaceous condition within 10-feet centered on the pipeline. One commenter stated that applicants should have to produce containment and clean up contingency plans as BMPs for all of the utility line permits. One commenter said that a trench should not be constructed or backfilled in a matter that would redirect shallow groundwater flow paths, to avoid altering vegetative communities or flow in streams downslope of the trenches. One commenter said that appropriate measures should be taken to maintain water quality conditions downstream of the site.

As discussed above, the Corps is not adding any BMPs to the text of NWPs

12, 57, and 58 that were not in the proposed texts of these NWPs.

Best management practices recommendations. One commenter said that a list of BMP manuals that support oil and gas pipeline development and maintenance activities in Appendix G of the document titled ''Considering Best Practices for Managing Pipeline Permitting.'' Several of these documents are excellent resources for best management practices related to impacts to wetlands and streams. One commenter recommended the following BMPs for NWP 12:

- All excavations should be backfilled with the excavated material after installation of the appropriate structures.
- Side-cast spoil material from trench excavation should be placed on the side of the trench opposite streams and wetlands.
- Spoil material from trench excavation should be placed on the side of the trench to be reused as backfill with the A-horizon placed back in its original position.
- Excess spoil material must be removed to an approved upland disposal site.
- Stream banks at crossings must be restored after construction has been completed.
- Disturbed stream banks can be restored by planting woody vegetation and by using bioengineering techniques for stream bank stabilization.
- Right-of-ways through and adjacent to streams and through forested wetlands should be maintained in low growing, woody vegetation to minimize erosion and sedimentation. Maintenance of this right-of-way should be conducted with mowing rather than with chemicals to reduce the potential for contamination and negative impacts on aquatic resources.
- If chemicals are used, a 50-foot buffer on either side of the stream crossing should be established in order to retain the riparian vegetation while reducing the amount of chemical runoff into the aquatic environment.
- Any open trench must be temporarily fenced to reduce the likelihood of wildlife becoming trapped and must include a ramped section which would allow wildlife to escape.
- A full visual inspection of every open trench section must be made daily to identify any trapped wildlife in need of rescue.

One commenter provided an example list of industry BMPs, but indicated that should the Corps chose to incorporate them in the text of NWP 12 and the other utility NWPs, it must understand that all BMPs are not appropriate to all circumstances. This commenter provided the following list of BMPs:

- Requiring, where appropriate, a plan to address the prevention, containment, and cleanup of sediment or other materials caused by inadvertent returns of drilling fluids.
- Requiring notification to the Corps and implementation of a remediation plan in the event of an inadvertent return of drilling fluids.
- Siting poles and tower foundations outside of surface waters where practicable.
- Visually marking waters of the United States near work areas.
- Using techniques that minimize rutting and damage to wetlands, such as installing mats prior to placing or driving equipment over wetlands or streams for temporary access or using wide-track equipment.
- Establishing stockpiling/work areas outside of surface waters.
- Construction monitoring during routine inspection and maintenance activities to avoid unauthorized discharges into surface waters.

A few commenters suggested modifying the text of NWP 12 to encourage the use of directional drilling. One commenter said that when horizontal directional drilling (HDD) is not possible, the flume method should be the required method for use of the NWP 12 over the dam-and-pump or open-cut stream crossing methods in order to minimize impacts to aquatic resources. One commenter suggested when HDD is used the permittee should erect sediment control measures between the drill site and nearby sensitive resources to prevent drilling mud releases from reaching sensitive resources, conduct regular on-site briefings for personnel to identify and locate sensitive resources, and maintain response equipment on-site or in an accessible location and in good working-order. One commenter suggested that HDD contractors should be required to employ a full-time, qualified on-site mud engineer to continuously monitor the drilling fluid circulation and returns as a preventative measure.

The Corps declines to add text to NWPs 12, 57, and 58 to encourage horizontal directional drilling. The use of horizontal directional drilling is more appropriately determined on a case-by-case basis. The Corps lacks the authority to require HDD contractors to employ a full-time, qualified on-site mud engineer to monitor drilling fluid circulation and potential inadvertent returns of drilling fluid.

One commenter said that Congress did not intend the NWP program to be used to streamline the authorization of major infrastructure projects and that each water crossing for major pipeline projects that transport highly toxic and dangerous materials should require individual permit reviews. A few commenters stated that environmental impact statements should be required for oil or natural gas pipelines. One commenter said that a programmatic ESA consultation should be completed for this NWP. One commenter stated that the construction and operation of oil and gas pipelines pose significant risk to protected species and should require individual permits. Another commenter said that the Corps must determine the environmental safety of HDD at a particular location and associated mitigation measures. One commenter suggested a definition for ''stand-alone project'' to require that all the crossings within major watersheds are evaluated together as single and complete since the cumulative impacts would be to one system.

Section 404(e) of the Clean Water Act provides the Corps with the authority to issue NWPs to authorize categories of activities involving discharges of dredged or fill material into waters of the United States to streamline the authorization process for these activities, as long as they result in no more than minimal individual and cumulative adverse environmental effects. Section 404(e) does not prohibit the issuance of general permits for utility lines and other infrastructure projects. As many commenters recognized, the Corps does not have the discretion to control the types of substances conveyed by oil or natural gas pipelines or other types of utility lines. Compliance with the Endangered Species Act is discussed in Section III.D of this final rule: Compliance with Relevant Statutes. The Corps declines to add a definition of ''stand-alone project'' because cumulative impacts are already evaluated by district engineers over appropriate geographic regions, such as watersheds, Corps districts, states, etc.

A few commenters stated that NWP 12 should be revised to consider the protection of tribal treaty rights. One commenter said that the Corps should conduct tribal consultation for the reissuance of the NWP 12. One commenter suggested the Corps adopt a policy of early consultation with Indian Tribes and other actors on these types of projects, above the timeline required by the NHPA section 106 process to allow the Corps to preemptively address concerns and avoid delays, litigation, and other increased costs. One commenter said that the draft NWP 12 decision document fails to address the

high correlation of pipeline construction projects with rates of missing and murdered Indigenous women and children and indicated that the Corps had not consulted the tribes on the matter. One commenter stated that there are a variety of utility lines that have direct, indirect, and cumulative impacts on treaty reserved resources and that the proposed changes require additional review to fully understand the extent of potential resource impacts. One commenter requested the Corps continue to require PCNs in Washington State to adequately protect treaty resources.

Tribal treaty rights are addressed through NWP general condition 17 for all NWPs, including NWP 12. Consultation with tribes on the proposed NWPs is discussed in Section V of this final rule (Administrative Requirements), in the section for E.O. 13175. The draft decision document does not discuss pipeline construction projects and missing and murdered people because that issue is more appropriately addressed by local, state, tribal, and federal law enforcement officials. Concerns about potential impacts to treaty resources in Washington State are more appropriately addressed through regional conditions, which can add PCN requirements to this NWP, where appropriate.

This NWP is reissued with the modifications discussed above.

(2) NWP 21. Surface Coal Mining Activities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed (discussed above in Section II.F), remove the reference to integrated permit processing procedures, and remove the requirement for the permittee to obtain written verification from the district engineer so that the 45-day PCN review period would apply to this NWP as it does to other NWPs with ½-acre limits for losses of waters of the United States. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

Many commenters opposed removing the provision that requires a written verification from the district engineer before commencing the authorized activity, instead of allowing a default authorization to occur if the Corps does not respond to a complete PCN within 45 days. Several commenters expressed support for the default authorization to occur if the district engineer does not respond to the PCN within 45 days. Many commenters opposed removal of the PCN requirements from this NWP. One commenter said that in order to further expedite permitting for a coal mining project, no PCNs should be required.

The Corps removed the requirement for the permittee to obtain written authorization before commencing the activity to be consistent with the other NWPs that have a ½-acre limit for discharges of dredged or fill material into non-tidal waters of the United States (*e.g.,* NWPs 29, 39, 40, 42, 43, 44, 51, and 52). The Corps did not propose to remove any PCN requirements from this NWP. All activities authorized by this NWP require PCNs.

One commenter stated support for the language regarding integrated permitting processing procedure language. One commenter requested addition of text to the NWP stating that no work can begin until formally approved by the U.S. Department of Interior or the state, and final approval is not necessary before submitting a PCN to the district engineer. One commenter said that NWP 21 should be expanded to include a requirement for federal and state agency coordination when pitcher plant bog wetlands, bald cypress, and/or tupelo swamps are impacted. This commenter also stated that this NWP should not authorize discharges of dredged or fill material into these types of wetlands.

The Corps removed the language referencing integrated permit processing procedures, since those procedures have never been developed for this NWP since that text was added to the NWP in 2007 (see 72 FR 11184). Project proponents may be required to obtain separate authorizations from the Department of Interior's Office of Surface mining or the state, but those authorizations are a separate process from the Corps' NWP authorization process. Authorization by an NWP does not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. (See item 2 in Section E, Further Information.) Division engineers can add regional conditions to this NWP to restrict or prohibit discharges of dredged or fill material into certain wetland types if those discharges are likely to result in more than minimal individual and cumulative adverse environmental effects. District engineers can also exercise discretionary authority to modify, suspend, or revoke an NWP after reviewing the PCN, to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters said that NWP 21 should be revoked because the adverse effects of surface coal mining on the environment are significant. One commenter objected to the removal of stream mitigation requirements. One commenter said that the applicant should be required to ensure that toxic substances are not released back into the water column through re-exposure from dredge activities. Several commenters said that the proposed changes to this NWP unlawfully put the interests of the regulated public above the Corps statutory mandate to protect the environment.

The activities authorized by this NWP cannot result in the loss of greater than ½-acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters. In addition, all activities authorized by this NWP require PCNs. The ½-acre limit, the PCN requirements, and the ability of division and district engineers to modify, suspend, or revoke this NWP on a regional or activity-specific basis ensure that the activities authorized by this NWP result in no more than minimal adverse environmental effects. The Corps did not propose to remove any stream mitigation requirements from this NWP. Despite the changes to this NWP, these activities are reviewed by district engineers on a case-by-case basis since all activities require PCNs.

This NWP is reissued as proposed.

(3) NWP 29. Residential Developments

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter said that this NWP should clarify that the acreage limits are applied cumulatively for both the original construction and any subsequent expansion of the development. One commenter stated that this NWP should not be issued to developments proposed in channel migration zones and floodplains where projects can directly and indirectly impact essential fish habitat, critical habitat, and habitats occupied by federally threatened or endangered species. One commenter said that as a result of climate change, residential

developments have increased the public safety risk. One commenter asked if projects occurring in floodplains and authorized by this NWP are consistent with the 2008 biological opinion on the Federal Emergency Management Agency's National Flood Insurance Program.

This NWP includes a subdivision provision, which states that for residential subdivisions, the aggregate total loss of waters of the United States authorized by this NWP cannot exceed ½-acre, including any loss of waters of the United States associated with the development of individual subdivision lots. Activities authorized by this NWP must comply with general condition 10, fills within 100-year floodplains. If the district engineer reviews the PCN and determines that the proposed activity may adversely affect essential fish habitat, he or she will initiate essential fish habitat consultation with the NMFS. If the district engineer reviews the PCN and determines the proposed activity may affect ESA-listed species or designated critical habitat, she or he will initiate section 7 consultation with the U.S. FWS and/or NMFS as appropriate (see general condition 18). Potential public safety risks associated with residential developments are more appropriately addressed by local or state land use planning and zoning agencies. The 2008 biological opinion on the Federal Emergency Management Agency's National Flood Insurance Program only applies to that program. It does not directly apply to the Corps' NWP program.

One commenter said that authorizing residential developments with golf courses results in devastating impacts on the environment through habitat loss and fragmentation, nutrient loading that causes algal blooms, and the use of pesticides/herbicides, which must be considered under an environmental impact statement, and therefore, should require an individual permit. One commenter stated that a ½-acre loss of waters of the United States is not minimal and that any loss over 1/10-acre should require compensatory mitigation. One commenter said that compensatory mitigation should be required for all unavoidable impacts to wetlands and streams authorized by this NWP. One commenter said that if the Corps does not require compensatory mitigation under NWP 29, the adverse environmental effects are more than minimal. One commenter said that the reliance on compensatory wetland mitigation often leads to a net loss of wetland functions and values and that NWPs like NWP 29 could lead to the loss of thousands of acres of wetlands.

The Corps regulates discharges of dredged or fill material into waters of the United States, and this NWP limits those discharges to non-tidal waters of the United States. If the proposed NWP 29 activity includes the construction of a golf course, the district engineer will review the PCN and determine whether the proposed activity qualifies for NWP authorization. The Corps does not have the authority to regulate the use of pesticides or herbicides, and therefore is not required to consider the potential use of pesticides or herbicides when reviewing PCNs for proposed activities. Nutrient loading can be the result of non-point source pollution. Nutrient loading may also result from discharges of certain substances from point sources regulated under Section 402 of the Clean Water Act, which is administered by states with approved programs or the U.S. EPA. General condition 23 requires compensatory mitigation for all wetland losses greater than 1/10-acre that require PCNs, unless the district engineer determines that some other form of mitigation would be more environmentally appropriate. Wetland compensatory mitigation projects required for activities authorized by the NWPs must comply with the Corps' regulations at 33 CFR part 332, which require monitoring and other actions to ensure that the required compensatory mitigation offsets the permitted wetland losses.

One commenter said the array of wetland and water types that authorized under NWP 29 and lost are varied and that the Corps cannot determine environmental effects are minimal when they are speculative and unquantifiable. One commenter stated that the cumulative impacts of authorizing large residential driveways in waters of the United States threatens nearshore benthic habitat that is important to salmonids. One commenter said that it is unclear how permit authorizations are coordinated with local agencies to ensure the appropriate use of NWP 29 and that local protections should apply to the permit.

All activities authorized by this NWP require PCNs. Therefore, district engineers review all proposed activities and determine whether those activities qualify for NWP authorization. When reviewing PCNs, district engineers consider cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse effects are no more than minimal (see paragraph 2 of Section D, District Engineer's Decision). If the proposed NWP activity may affect ESA-listed species, including list salmon species, the district engineer conducts ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate. Nationwide permit 29 authorizations are not coordinated with local agencies. As stated in Section E, Further Information, the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

This NWP is reissued as proposed.

(4) NWP 39. Commercial and Institutional Developments

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

Several commenters recommended establishing tailored PCN thresholds for NWP that are similar to the PCN thresholds in NWP 12, NWP 14, and NWP 51, which only require PCN for losses of waters of the United States greater than 1/10-acre. Due to the current requirement for PCNs for all NWP 39 activities, this NWP is underutilized and increasing the PCN threshold to 1/10-acre would incentivize project proponents to reduce impacts. A couple of commenters said that compensatory mitigation should be required for all unavoidable impacts to streams, wetlands, and special aquatic sites authorized by NWP 39. One commenter stated that commercial developments have the potential to cause significant environmental harm through habitat loss and fragmentation and should be assessed in environmental impact statements and through programmatic ESA section 7 consultations. One commenter said that commercial developments constructed in channel migration zones and floodplains, areas occupied or critical to salmon populations, should be required to obtain individual permits.

The Corps believes that this NWP should continue to require PCNs for all activities, so that district engineers can review all proposed commercial and institutional developments involving discharges of dredged or fill material into waters of the United States and determine which proposed activities can be authorized by NWP 39 and which proposed activities should require individual permits. The streamlined authorization process

provided by NWP 39 continues to incentivize project proponents to reduce losses of waters of the United States to qualify for NWP authorization instead of having to obtain individual permits for those activities, and the increased time and paperwork needed to secure those individual permits. When evaluating PCNs, district engineers determine whether proposed NWP 39 activities should require compensatory mitigation or other forms of mitigation to ensure that those activities result in no more than minimal adverse environmental effects. Compensatory mitigation requirements are determined on a case-by-case basis by district engineers. If the district engineer determines a proposed NWP 39 activity will result in more than minimal adverse environmental effects after considering mitigation proposed by the permit applicant, he or she will exercise discretionary authority and require an individual permit for the proposed activity. During the individual permit process, the district engineer will determine whether NEPA compliance will be achieved through the preparation of an environmental impact statement or environmental assessment, unless the proposed activity qualifies for a categorical exclusion. The district engineer will also evaluate the PCN to determine if the proposed activity may affect listed species or designated critical habitat, and thus require ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains.

This NWP is reissued as proposed.

(5) NWP 40. Agricultural Activities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter stated that losses of waters and wetlands up to ½-acre are not minimal. One commenter said that any impacts greater than 1/10-acre should require compensatory mitigation. Another commenter said that this NWP and other NWPs does not adequately address cumulative impacts and these activities should require individual permits. One commenter requested that the Corps require best management practices to prevent and reduce non-point source pollution associated with agricultural activities. One commenter said that all agricultural activities authorized by this NWP should go through an alternatives analysis for channelization or dam construction to support fish passage and healthy stream systems. One commenter stated that the authorization of some activities under this NWP, such as levees, is inconsistent with Federal Emergency Management Agency flood requirements or policies. One commenter said that allowing these impacts under current watershed conditions and salmon population status is excessive.

All activities authorized by this NWP require PCNs. District engineers will review each proposed activity and determine which activities will result in no more than minimal individual and cumulative adverse environmental effects and are authorized by this NWP and which activities do not qualify for NWP authorization and should require individual permits. During their reviews of PCNs, district engineers consider cumulative impacts caused by activities authorized by this NWP (see paragraph 2 of Section D, District Engineer's Decision). The Corps lacks the authority to require agricultural producers to implement best management practices to control non-point source pollution. The NWPs do not require alternatives analyses since they can only authorize activities that have no more than minimal adverse environmental effects. If a project proponent is considering channelizing a stream or constructing a dam, the district engineer will review the PCN and determine whether the proposed activity will result in no more than minimal adverse environmental effects. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. The Corps does not have the discretion to enforce flood requirements or policies adopted by the Federal Emergency Management Agency. If the district engineer determines that a proposed NWP 40 activity may affect salmon listed under the ESA, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate, before issuing an NWP verification letter.

This NWP is reissued as proposed.

(6) NWP 42. Recreational Facilities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments.

One commenter said that large recreational facilities (golf courses) or non-passive recreational facilities should require individual permits in non-tidal waters and stream channels, in channel migration zones, and waters used or in the historic range of listed species, or that directly or indirectly impact critical or essential fish habitat. Allowing these impacts under current watershed conditions and salmon population status is excessive.

This NWP requires PCNs for all proposed activities. District engineers will review all PCNs to determine whether the discharges of dredged or fill material into waters of the United States to construct or expand recreational facilities will result in no more than minimal adverse environmental effects. If the district engineer determines a proposed activity may affect ESA-listed species or designated critical habitat, she or he will conduct ESA section 7 consultation with the U.S. FWS or NMFS, as appropriate, prior to issuing the NWP verification or deciding whether to exercise discretionary authority to require an individual permit. If the district engineer reviews the PCN and determines the proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with the NMFS.

This NWP is reissued as proposed.

(7) NWP 43. Stormwater Management Facilities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments. In the first paragraph of this NWP, the Corps also proposed to add the phrase ''such as features needed'' before ''to meet reduction targets established under Total Maximum Daily Loads set under the Clean Water Act.''

One commenter supported adding the phrase ''such as features needed'' to the first paragraph to clarify that green infrastructure type of features are not just to reduce total maximum daily loads. Several commenters said that this

NWP should be reissued with no changes except for a clarifying provision related to green infrastructure as states and municipalities may require or allow green infrastructure projects to meet water quality criteria, designated uses, and compliance with post-construction stormwater requirements regardless of whether a total maximum daily load applies to the receiving water.

The Corps has added the phrase ''such as features needed'' to this NWP. The Corps agrees that states and municipalities may require, under their authorities, the construction and implementation of green infrastructure projects to meet water quality criteria, designated uses, and compliance with post-construction stormwater requirements. If the construction and maintenance of those green infrastructure projects involves discharges of dredged or fill material into waters of the United States, this NWP can be used to authorize those activities.

One commenter said that for new stormwater management facilities, best management practices are required as a general matter to prevent non-point source pollution during and after construction activities. One commenter stated that allowing the loss of ½-acre of non-tidal waters under current watershed conditions and salmon population status is excessive. This commenter said that these facilities should not be located in wetlands or intermittent or ephemeral streams adjacent to perennial streams that are occupied by salmon, especially ESA-listed species. This commenter asserted that these actions should require individual permits when located in channel migration zones, or floodplains, wetlands, and essential fish habitat.

Measures undertaken to prevent non-point source pollution during and after construction activities may be required by state or local governments, or by other federal agencies. The Corps does not have the authority to regulate non-point source pollution that may reach waters and wetlands. Except for certain maintenance activities, all activities authorized by this NWP require pre-construction notification to the district engineer. For those activities that require PCNs, the district engineer will evaluate potential impacts to salmon, and if the salmon include ESA-listed species, the district engineer will determine if the proposed activity may affect listed salmon, and engage in ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. If, during the review of a PCN, the district engineer determines the proposed activity may adversely affect essential fish habitat, she or he will initiate essential fish habitat consultation with the NMFS.

This NWP is reissued as proposed.

(8) NWP 44. Mining Activities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed. The Corps also proposed to remove the ability for district engineers to waive the 300 linear foot limit for losses of intermittent and ephemeral stream bed. Comments received on the proposed removal of the 300 linear foot limit for losses of stream bed are summarized in Section II.F of this final rule, and in that section the Corps provided responses to those comments. In addition, the Corps proposed to modify paragraph (b) of this NWP to apply the ½-acre limit to work in non-tidal navigable waters of the United States (*i.e.,* section 10 waters).

One commenter said the Corps should not reissue NWP 44 because it is in violation of Section 404(e) of the Clean Water Act. A few commenters stated that NWP 44 poses a risk of significant direct and cumulative harm and these activities should be authorized by individual permits, not an NWP. One commenter recommended requiring applicants ensure that toxic substances are not released back into waters through re-exposure from dredging.

All activities authorized by this NWP require PCNs. District engineers will review PCNs for proposed activities to ensure that those activities will result in no more than minimal individual and cumulative adverse environmental effects, and therefore comply with section 404(e) of the Clean Water Act.

One commenter said that the Corps should allow use NWP 44 in tidal waters to reduce cost and time associated with obtaining individual permits. One commenter expressed support for including activities in non-tidal section 10 waters. One commenter stated that the addition of activities in non-tidal section 10 waters needs clarification. This commenter said this may be a new requirement that is not currently regulated and thus may impact industrial mineral mining.

Mining activities in tidal waters have potential for causing more than minimal individual and cumulative effects, and from a national perspective should be evaluated under the individual permit process. However, district engineers can develop and issue regional general permits to authorize mining activities in tidal waters in areas where these activities usually result in no more than minimal adverse environmental effects. The Corps is retaining the proposed clarification in paragraph (b) of this NWP, with respect to the NWP authorizing work in non-tidal navigable waters of the United States (*i.e.,* section 10 waters). The clarification regarding work in section 10 waters was added because the Corps' definition of ''work'' at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899 includes ''without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.''

One commenter said that this NWP should not authorize activities in waters inhabited by salmon. A few commenters stated that the Corps must consider the numerous proposals for sulfide-ore copper mining in Minnesota and Wisconsin in light of unique lake-land system that is highly susceptible to mining caused pollution and degradation.

All activities authorized by this NWP require pre-construction notification. District engineers will review PCNs for proposed activities and determine whether they may affect ESA-listed species or designated critical habitat. If the district engineer determines a proposed NWP 44 activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. Proposals for mining activities in Minnesota and Wisconsin are evaluated by the Corps' St. Paul District.

This NWP is reissued as proposed.

(9) NWP 48. Commercial Shellfish Mariculture Activities

The Corps proposed a number of modifications to this NWP. The Corps proposed to change the title of this NWP from ''Commercial Shellfish Aquaculture Activities'' to ''Commercial Shellfish Mariculture Activities'' to more accurately reflect where these activities are conducted (*i.e.,* coastal waters). The Corps also proposed to remove the ½-acre limit for new activities that have direct effects on submerged aquatic vegetation in project areas that that have not been used for commercial shellfish aquaculture activities during the past 100 years. In addition to the proposed removal of that ½-acre limit, the Corps proposed to remove the definition of ''new commercial shellfish aquaculture operation'' that was adopted in 2017. Also, the Corps proposed to remove both PCN thresholds for this NWP, as well as the paragraph that identifies the additional information that permittees must submit with their NWP 48 PCNs.

The Corps changed the title of this NWP to ''Commercial Shellfish Mariculture Activities'' because the NWP only authorizes activities in coastal waters. Mariculture is the cultivation of organisms in marine and estuarine open water environments (NRC 2010). The term ''aquaculture'' refers to a broad spectrum of production of aquatic organisms. In the United States aquaculture activities encompass the production of marine and freshwater finfish, as well as shellfish (bivalve molluscs and crustaceans). Oysters, clams, mussels, and scallops are examples of bivalve molluscs (bivalves). Since aquaculture activities in the United States include both water-based and land-based activities, we use the term ''mariculture'' in NWPs 48, 55 (seaweed mariculture activities), and 56 (finfish mariculture activities) to make it clear that these NWPs only authorize activities in marine and estuarine waters.

In response to the October 10, 2019 decision of the United States District Court, Western District of Washington at Seattle in the *Coalition to Protect Puget Sound Habitat* v. *U.S. Army Corps of Engineers et al.* (Case No. C16–0950RSL) and *Center for Food Safety* v. *U.S. Army Corps of Engineers et al.* (Case No. C17–1209RSL), the Corps has made substantial revisions to the national decision document for NWP 48. The revisions addressed, to the extent appropriate, issues identified in the district court's decision. A copy of the final national decision document is available in the docket at *www.regulations.gov* (COE–2020–0002).

The national decision document for the 2021 NWP 48 provides a more thorough discussion of the direct and indirect impacts caused by commercial shellfish mariculture activities. The national decision document also uses a broader set of scientific literature to support that discussion of potential effects to various resources and the human environment. The national decision document does not focus solely on oyster mariculture; rather, it also discusses mariculture activities for other bivalve species, such as clams, mussels, and scallops. The national decision document presents a more detailed discussion of the potential impacts of commercial shellfish mariculture activities on aquatic vegetation other than seagrasses, benthic communities, fish, birds, water quality, and substrate characteristics.

The national decision document provides a more thorough discussion of how the Corps applies its two permitting authorities to commercial shellfish mariculture activities (*i.e.,* Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act). It discusses the types of activities regulated under those authorities and their potential environmental consequences. In addition, the national decision document provides a more rigorous analysis to support a finding, at a national level, that the NWP would authorize only those commercial shellfish mariculture activities that have no more than minimal individual and cumulative adverse environmental effects. The national decision document explains that division engineers retain the authority to modify, suspend, or revoke NWP 48 on a regional basis (see 33 CFR 330.5(c)). It further discusses the authority of district engineers to modify, suspend, or revoke NWP 48 on a case-by-case basis (see 33 CFR 330.5(d)) if impacts of an activity proposed for authorization using NWP 48 has more than a minimal adverse effect on the environment. A copy of the national decision document for the 2021 NWP 48 is available in the *www.regulations.gov* docket for this rulemaking action (docket number COE–2020–0002).

Commercial shellfish mariculture activities involve the production of bivalves such as oysters, mussels, clams, and scallops. These activities occur in marine and estuarine coastal waters of the United States. As discussed above, the Corps regulates commercial shellfish mariculture activities under two of its permitting authorities: Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Under Section 10 of the Rivers and Harbors Act of 1899, the Corps regulates structures and work in navigable waters of the United States. Under Section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States.

Nationwide permit 48 authorizes structures or work in navigable waters of the United States for commercial shellfish mariculture activities when DA permits are required by Section 10 the Rivers and Harbors Act of 1899. The Corps' regulations for Section 10 of the Rivers and Harbors Act of 1899 in 33 CFR part 322 define the term ''structure'' as including, ''without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other obstacle or obstruction.'' [33 CFR 322.2(b)] Commercial shellfish mariculture activities usually involve structures such as cages, racks, nets, pilings, lines, trays, tubes, ropes, and bouchots (*i.e.,* piles wrapped in rope for cultivating mussels) placed in navigable waters to cultivate bivalves.

Oysters may be cultivated using structures such as cages, trays, racks, bags, and lines. Oyster mariculture may be conducted through on-bottom or off-bottom techniques (NRC 2010). Clams are generally cultivated through on-bottom techniques because the commercially produced species are infaunal organisms that grow in the substrate of waterbodies (NRC 2010). Clam mariculture may involve the use of structures such as tubes and anti-predator netting. Mussels may be cultivated by attaching mussel brood stock or seed to ropes, which are suspended in the water column from a floating raft. Mussels may also be grown on ropes attached to pilings (bouchots) (McKindsey et al. 2011), or in cages, trays, or racks. Mussels may also be cultivated through on-bottom or off-bottom culture methods (NRC 2010). For example, mussels may be grown on ropes suspended in the water column from a raft, or via bottom culture. Scallops may be attached to ropes via monofilament lines tied through a small hole drilled into the shell (Robinson et al. 2016), a technique called ''ear hanging.''

The installation and use of structures such as racks, cages, bags, lines, nets, and tubes, in navigable waters for commercial bivalve shellfish mariculture activities in navigable waters requires DA authorization under Section 10 of the Rivers and Harbors Act of 1899. Department of the Army authorization is required under Section 10 of the Rivers and Harbors Act of 1899 for all structures and/or work in or affecting navigable waters of the United States, except for activities identified in section 322.4 of the Corps' section 10 regulations (see 33 CFR 322.3). The exceptions in section 322.4 are limited to: (a) Activities that were commenced or completed shoreward of established federal harbor lines before May 27, 1970; and (b) wharves and piers construct in any waterbody, located entirely within one state where the waterbody is a navigable water of the United States solely on the basis of its historical use to transport interstate commerce. None of these exceptions apply to structures or work for commercial shellfish mariculture activities. In the Corps' section 10 regulations, there is no *de minimis* exception from the requirement to obtain DA authorization for structures and work in navigable waters of the

United States. Any structure or work that alters or obstructs navigable waters of the United States requires section 10 authorization from the Corps. With respect to structures used for shellfish mariculture activities, those structures require section 10 authorization because they alter navigable waters of the United States even though there might be circumstances where they might not obstruct navigation.

Commercial shellfish mariculture structures may be floating or suspended in navigable waters, placed on the bottom of the waterbody, or installed in the substrate of the waterbody. The placement of mariculture structures in the water column or on the bottom of a waterbody does not result in a discharge of dredged or fill material that is regulated under section 404 of the Clean Water Act. While the presence of these structures in a waterbody may alter water movement and cause sediment to fall out of suspension onto the bottom of the waterbody, that sediment deposition is not considered a discharge of dredged or fill material because those sediments were not discharged from a point source. In general, the placement of bivalve shellfish mariculture structures on the bottom of a navigable waterbody, or into the substrate of a navigable waterbody does not result in discharges of dredged or fill material into waters of the United States that are regulated under Section 404 of the Clean Water Act.

The Corps' section 10 regulations define the term ''work'' as including, ''without limitation, any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.'' [33 CFR 322.2(c)] Under this NWP, the section 10 authorization applies to discharges of dredged or fill material into waters of the United States that are also navigable waters under Section 10 of the Rivers and Harbors Act of 1899. Commercial shellfish mariculture activities often involve work that requires authorization under Section 10 of the Rivers and Harbors Act, such as harvesting and bed preparation activities. Bed preparation activities may include tilling or harrowing activities, or the placement of shell or gravel to provide substrate suitable for the establishment and growth of bivalves via bottom culture.

Commercial shellfish mariculture activities that only require authorization under Section 10 of the Rivers and Harbors Act of 1899 are evaluated under the Corps' public interest review process at 33 CFR 320.4. The Clean Water Act Section 404(b)(1) Guidelines issued by the U.S. EPA do not apply to activities authorized by the Corps under its section 10 authority because those guidelines only apply to activities that require authorization under Section 404 of the Clean Water Act. The 404(b)(1) Guidelines do not apply to section 10 activities that may directly or indirectly impact special aquatic sites such as vegetated shallows (*i.e.,* submerged aquatic vegetation).

Section 101(a)(2) of the Clean Water Act states that ''it is the national goal 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.'' [33 U.S.C. 1251(a)(2)] In other words, one of the goals of the Clean Water Act is to promote water quality that supports the propagation of fish and shellfish, in addition to other uses of waters of the United States.

The Clean Water Act regulates discharges of pollutants into waters of the United States. See 33 U.S.C. 1311(a). Section 502(6) of the Clean Water Act defines the term ''pollutant'' as meaning ''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.'' Section 502(12) of the Clean Water Act defines the terms ''discharge of a pollutant'' and ''discharge of pollutants'' as meaning: Any addition of any pollutant to navigable waters from any point source, or any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

Point source discharges of pollutants are regulated under Sections 402 and 404 of the Clean Water Act. Under Section 402 of the Clean Water Act, the U.S. EPA authorized state agencies to regulate a variety of pollutants that may be discharged into waters of the United States via a point source. Under Section 404 of the Clean Water Act, the Corps regulates discharges of dredged or fill material into waters of the United States. Discharges of dredged or fill material into waters of the United States that require section 404 permits must comply with the Clean Water Act section 404(b)(1) Guidelines issued by the U.S. EPA at 40 CFR part 230.

The term ''pollutant'' does not include the placement of shellfish seed or bivalves at various stages of growth into jurisdictional waters, or the waste products (*e.g.,* feces or pseudofeces, ammonium) excreted by bivalves. In *Association to Protect Hammersley, Eld, and Totten Inlets* v. *Taylor Res., Inc.,* 299 F.3d 1007 (9th Cir. 2002), the court concluded that Congress did not intend that living bivalves and the natural chemicals and particulate biological matter they release through normal physiological processes, or the shells that might be separated from living bivalves from time to time, be considered pollutants under the Clean Water Act. In other words, bivalve shells and natural waste products excreted by living bivalves are not ''biological materials'' under the Clean Water Act's definition of ''pollutant'' because shells and natural waste products come from the natural growth and development of bivalves and not from a transformative human process.

The EPA's National Summary of State Information, water quality assessment and total maximum daily load (TMDL) information,[3] provides information on the causes of impairment and probable sources of impairment for the Nation's waters, including bays, estuaries, coastal shorelines, ocean waters, and near coastal waters where commercial shellfish mariculture activities may occur. Twenty-eight causes of impairment were identified for bays and estuaries. The top 10 causes of impairment for bays and estuaries are: Polychlorinated biphenyls, nutrients, mercury, turbidity, dioxins, toxic organics, metals (other than mercury), pesticides, pathogens, and organic enrichment/oxygen depletion. For bays and estuaries, the top 10 sources of impairment for bay and estuaries are: Legacy/historic pollutants, urban-related runoff/stormwater, unknown sources, atmospheric deposition, municipal discharges/sewage, unspecific non-point sources, other sources, natural/wildlife, agriculture, and industrial.

Coastal shorelines were impaired by 16 identified causes, the top 10 of which are: Mercury, pathogens, turbidity, organic enrichment/oxygen depletion, pH/acidity/caustic conditions, nutrients, oil and grease, temperature, cause unknown—impaired biota, and algal growth. The top 10 sources of impairment of coastal shorelines are municipal discharges/sewage, urban-related runoff/stormwater, ''unknown,'' recreational boating and marinas, hydromodification, industrial, unspecified non-point source, agriculture, legacy/historic pollutants, and land application/waste sites/tanks.

Ocean and near coastal waters were impaired by 17 identified causes, the

[3] *https://iaspub.epa.gov/waters10/attains_nation_cy.control* (accessed November 27, 2020).

top 10 of which are: Mercury, organic enrichment/oxygen depletion, pathogens, metals (other than mercury), pesticides, turbidity, nuisance exotic species, total toxics, pH/acidity/caustic conditions, and polychlorinated biphenyls. The top 10 sources of impairment of ocean and near coastal waters are: Atmospheric deposition, unknown sources, unspecified non-point sources, other sources, recreation and tourism (non-boating), recreational boating and marinas, urban-related runoff/stormwater, hydromodification, municipal discharges/sewage, and construction.

None of the top 10 sources of impairment of these categories of waters are directly related to commercial shellfish mariculture activities. Commercial shellfish mariculture activities require clean water to produce bivalve shellfish for human consumption. Further, the ability of bivalves to improve water quality is well understood and their presence in an aquatic ecosystem is considered to be beneficial (*e.g.,* NRC 2010).

Mariculture activities can be classified as extensive or intensive. For extensive mariculture, young organisms are allowed to grow naturally using resources (food, inorganic nutrients) available in marine and estuarine waters until they are harvested (Diana et al. 2009). In intensive mariculture, the young organisms are provided feed to promote their growth before they are harvested. Bivalve shellfish mariculture and seaweed mariculture are examples of extensive mariculture, and for such activities there is no addition of materials (*e.g.,* nutrients) through a point source that might trigger a permit requirement. However, in some cases a pesticide might be applied in waters where bivalve shellfish mariculture occurs (NRC 2010, Simenstad and Fresh 1995). The application of pesticides is not regulated by the Corps under Section 404 of the Clean Water Act, but it may be regulated by EPA or approved states under Section 402 of the Clean Water Act. As discussed in the previous paragraph, the bivalves themselves that are seeded in the waterbody, or are added to the waterbody after a limited grow out period in a nursery facility located on-shore or elsewhere, does not trigger a permit requirement the Clean Water Act because those living organisms are not considered to be pollutants under the Act.

Nationwide permit 48 also authorizes discharges of dredged or fill material into waters of the United States. The Corps' regulations define ''dredged material'' as ''material that is excavated or dredged from waters of the United States.'' [33 CFR 323.2(c)] The term ''discharge of dredged material'' is defined at 33 CFR 323.2(d)(1) as meaning ''any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.'' The term ''discharge of dredged material'' includes, but is not limited to: (1) The addition of dredged material to a specified discharge site located in waters of the United States; (2) the runoff or overflow from a contained land or water disposal area; and (3) any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation. [33 CFR 323.2(d)(1)] Some activities associated with commercial shellfish mariculture may result in a discharge of dredged material under the third instance identified above (*i.e.,* redeposit of dredged material other than incidental fallback).

Some commercial shellfish mariculture activities involve mechanical or hydraulic harvesting techniques that may or may not result in discharges of dredged material that require authorization under Section 404 of the Clean Water Act. If the bivalve harvesting activity would result in only incidental fallback of dredged material into the waterbody, a section 404 permit would not be required. (However, a section 10 permit would be required as ''work'' in navigable waters). A section 404 permit would be required for a mechanical or hydraulic harvesting activity if that activity results in a regulated discharge of dredged material by having more than incidental fallback. Some harvesting activities associated with commercial shellfish mariculture operations may result in the redeposit of dredged material other than incidental fallback within the waters of the United States. For example, dredge harvesting activities may remove sediment along with the bivalves. If the removed sediment is deposited back into the waterbody in a different location, and is more than incidental fallback, then the harvesting activity may be determined by the district engineer to result in a discharge of dredged material that requires section 404 authorization. On the other hand, if the sediment removed while harvesting the bivalves is redeposited in the same location, then it may be considered to be incidental fallback, and not require section 404 authorization.

The Corps' regulations at 33 CFR 323.2(e)(1) define ''fill material'' as meaning ''material placed in waters of the United States where the material has the effect of: (1) Replacing any portion of a water of the United States with dry land; or (2) changing the bottom elevation of any portion of a water of the United States. Examples of fill material include: ''rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States.'' [33 CFR 323.2(e)(2)] ''Fill material'' does not include trash or garbage (see 33 CFR 323.2(e)(3)). Discharges of trash or garbage may be regulated under other federal, state, or local laws and regulations. Fill material does not include the placement or release of living organisms, such as bivalve larvae and juvenile bivalves, into waters of the United States.

The term ''shellfish seeding'' is defined in Section E of the NWPs as the ''placement of shellfish seed and/or suitable substrate to increase shellfish production. Bivalve shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.'' This definition was adopted in the NWPs in 2007 (see 72 FR 11197). Other materials may be used for bivalve shellfish seeding such as nets, bags, and ropes. Shellfish seed can be produced in a hatchery. Shellfish seed can also be produced in waterbodies where bivalve larvae can attach to appropriate materials, such as shell pieces, bags, or ropes.

Placing shellfish seed on the bottom of a waterbody is not a ''discharge of fill material'' and thus does not require a section 404 permit. Placing gravel or shell on the bottom of a waterbody to provide suitable substrate for bivalve larvae to attach to is considered to be a ''discharge of fill material'' and would require section 404 authorization. The shellfish themselves, either growing on the bottom of a waterbody or in nets, bags, or on ropes, are not considered to be ''fill material'' and do not require a section 404 permit to be emplaced, remain in place, or to be removed from a waterbody.

On-bottom bivalve shellfish mariculture activities may involve placing fill material such as shell or gravel to provide suitable substrate for bivalve larvae to attach to and grow on the bottom of the waterbody. These fill activities may require section 404 authorization. The placement of structures that are used for commercial

shellfish mariculture activities, such as cages, bags, racks, tubes, and netting, does not result in discharges of dredged or fill material into waters of the United States and therefore do not require authorization under Section 404 of the Clean Water Act. As discussed above, the placement of cages, bags, racks, tubes, lines, and netting and other structures in navigable waters of the United States for the purposes of commercial shellfish mariculture activities is regulated under Section 10 of the Rivers and Harbors Act of 1899 because they can be potential obstructions to navigation.

In the 2020 Proposal, the Corps proposed to remove the ½-acre limit for new commercial shellfish mariculture activities that directly affect submerged aquatic vegetation. The Corps also proposed to remove the definition of ''new commercial shellfish mariculture activities.''

Many commenters said that the ½-acre limit for direct impacts to submerged aquatic vegetation for new commercial shellfish mariculture activities should be retained because removal of the ½-acre could cause significant and permanent losses of submerged aquatic vegetation. One commenter said that allowing new commercial shellfish mariculture activities to directly affect more than ½-acre of submerged aquatic vegetation would result in more than minimal adverse environmental effects. A couple of commenters stated that the removal of the ½-acre limit for impacts to submerged aquatic vegetation conflicts with submerged aquatic vegetation goals and restoration efforts in different states. These commenters said that many federal, state, and local agencies are working throughout the country to recover lost submerged aquatic vegetation habitat in support of water quality and ecosystem goals. Removal of the ½-acre limit would undermine the investments and progress made to date to recover these important habitats.

The Corps is removing the ½-acre limit for new commercial shellfish mariculture activities that directly affect submerged aquatic vegetation in the project area. In place of the ½-acre limit, the Corps is substituting a PCN requirement for new and existing commercial shellfish mariculture activities that directly affect more than ½-acre of submerged aquatic vegetation. This new PCN requirement accompanies the removal of the definition of ''new commercial shellfish aquaculture operation'' and will provide activity-specific review of all commercial shellfish mariculture activities that directly affect more than ½-acre of submerged aquatic vegetation. In response to a PCN, the district engineer can add conditions to the NWP authorization to require mitigation, such as best management practices or other mitigation measures, to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

Under the 2017 NWP 48, the ½-acre limit only applied to new commercial shellfish mariculture activities. After a new commercial shellfish mariculture activities was authorized by the Corps, the ½-acre limit no longer applied to the existing commercial shellfish mariculture activity. In this regard, it was less protective than the NWP 48 in this final rule, which would apply a PCN requirement to existing operations seeking reauthorization. The removal of the ½-acre limit in this final rule does not affect the authority of other federal agencies or tribal, state, or local governments to adopt and implement protection programs for submerged aquatic vegetation under their authorities.

Submerged aquatic vegetation does not have any special status under the Corps' regulations for implementing Section 10 of the Rivers and Harbors Act of 1899, which is the statute that applies to most commercial shellfish mariculture activities. Submerged aquatic vegetation is covered by a number of the Corps' public interest review factors such as conservation, general environmental conditions, fish and wildlife values, and wetlands. While vegetated shallows are special aquatic sites under the Clean Water Act Section 404(b)(1) Guidelines, the Guidelines do not prohibit discharges of dredged or fill material into vegetated shallows. A smaller proportion of commercial shellfish mariculture activities trigger the permit requirements of Section 404 of the Clean Water Act because many commercial shellfish mariculture activities do not involve discharges of dredged or fill material into waters of the United States. Impacts to submerged aquatic vegetation caused by commercial shellfish mariculture activities may also be addressed through Endangered Species Act Section 7 consultations for proposed NWP 48 activities that district engineers determine ''may affect'' listed species or designated critical habitat, including critical habitat for which submerged aquatic vegetation is a physical or biological feature. Impacts to submerged aquatic vegetation may also be addressed through the essential fish habitat consultation process when the district engineer determines a proposed NWP 48 activity may adversely affect essential fish habitat, which may include submerged aquatic vegetation beds.

Several commenters recommended that the Corps propose a revised threshold for seagrass impacts based on biological reference points. These commenters said that this is particularly important in regions where additional provisions to protect seagrasses are not in place and state laws do not impose additional restrictions on eelgrass. One commenter stated that the Corps seeks to remove an impact limitation that would otherwise incentivize responsible siting of mariculture operations and minimization of impacts to submerged aquatic vegetation.

The Corps declines to impose an additional threshold for seagrass impacts based on biological reference points because it would be impractical to establish such biological reference points at a national level for activities requiring authorization under section 10 of the Rivers and Harbors Act of 1899 and section 404 of the Clean Water Act. The threshold to require a PCN for new and existing commercial mariculture operations that impact more than ½-acre of submerged aquatic vegetation is sufficient for the purposes of ensuring that a project will have no more than a minimal individual or cumulative adverse environmental impact. If a state decides not to take measures to regulate activities in submerged aquatic vegetation within its own waters, it does not create a legal or regulatory requirement for the Corps to address such situations. The requirements of NWP 48 will continue to provide incentives for commercial shellfish mariculture operators to plan and design their activities to qualify for NWP authorization. As discussed above there are other applicable laws that can address impacts to submerged aquatic vegetation in conjunction with the Corps' NWP authorization. In addition, where necessary based on the characteristics of the regional ecosystem, division engineers can add regional conditions to NWP 48 to help ensure that activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects.

Several commenters supported removing the 2017 definition of ''new operation'' as it is not relevant to a specific date or timeline. One commenter stated that the Corps has not been able to justify why one set of rules should apply to existing commercial shellfish mariculture operators and another set of rules should apply to everyone else, including new commercial shellfish mariculture

operators. This commenter said that if there is a conservation justification for protecting eelgrass and other submerged aquatic vegetation, then limitations on impacts to submerged aquatic vegetation should apply to everyone. One commenter said that removal of this definition failed to identify what it would be replaced with and stated that there needs a definition for new commercial shellfish mariculture activities but it must not conflict with tribal treaty reserved rights to take shellfish.

The Corps has removed the definition of ''new commercial shellfish aquaculture operation'' from this NWP. The new ½-acre PCN threshold will apply to both new and existing commercial shellfish mariculture activities. All activities authorized by NWP 48 must comply with general condition 17, tribal rights.

One commenter said that the removing the distinction for new operations, with the ½-acre limit, will result in more impacts. This commenter asserted that the Corps does little to justify the proposed removal of the ½-acre limit, given that it added this limit three years ago to ensure impacts from NWP 48 would be no more than minimal. One commenter recommended adding the following definition for an ongoing or existing activity: Existing commercial shellfish aquaculture should be defined as the area under cultivation when NWP 48 was first issued in 2007 or where an operator can document that an area is part of a regular rotation of cultivation.

The ½-acre limit for new commercial shellfish mariculture activities was added to NWP 48 in 2012 (see 77 FR 10280). The ½-acre limit only applied to new commercial shellfish activities, and does not apply when those on-going activities are authorized when NWP 48 is reissued after the current NWP expires. There is no need to add a definition of on-going commercial shellfish mariculture activities, because both new and existing activities are treated the same under this reissued NWP.

One commenter stated that the Corps should identify a clear spatial delineation of what constitutes a waterbody to aid in decision-making and allow the public to determine the scope of this action. One commenter noted that the provision for ''project area'' could be subject to two differing interpretations. First, it could refer to that area where some entity or agreement specifically authorizes the operator to conduct commercial shellfish aquaculture. Second, it could be read as being that area where a legally binding agreement establishes an enforceable property interest for the operator. This commenter recommended revising the term ''project area'' to read as follows: ''The project area is an area in which the operator conducts commercial shellfish aquaculture activities, as authorized by a lease or permit or other legally binding agreement.''

The geographic scope for an NWP 48 activity is the project area, and the term project area is defined in the text of the NWP. The Corps did not change the definition of project area, and it covers both situations identified by the commenter. It is not necessary to and the Corps declines to define, at a national level, what constitutes a waterbody for the purposes of NWP 48. District engineers can identify the geographic extent of waterbodies for the purposes of NWP 48 activities.

In the 2020 Proposal, the Corps proposed to remove the pre-construction notification thresholds for this NWP because most of the direct and indirect impacts caused by the activities authorized by this NWP under its permitting authorities (*i.e.,* Section 10 of the Rivers and Harbors Act of 1899 and, when applicable, Section of the Clean Water Act) are temporary impacts. As discussed in the proposed rule, NWP 48 activities may require PCNs because of the requirements of paragraph (c) of NWP general condition 18, endangered species. Under paragraph (c) of general condition 18, pre-construction notification is required for non-federal permittees when any listed species or designated critical habitat might be affected by the proposed NWP activity or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat. In some areas of the country, commercial shellfish mariculture activities are located in waters inhabited by listed species and designated critical habitat. Division engineers may also add regional conditions to this NWP to require PCNs for some or all proposed NWP 48 activities.

Several commenters expressed concern of the removal of the PCN thresholds for new or existing shellfish mariculture activities. These commenters said the removal of the PCN thresholds will result in fewer chances to account for regional differences in submerged aquatic vegetation communities and it will make tracking of individual and cumulative environmental impacts more difficult. One commenter said that the Corps should require PCNs for all shellfish cultivation operations across the country and evaluate sediment enrichment at individual cultivation sites.

After evaluating the comments received in response to the proposed changes to the notification requirements of this NWP, the Corps determined that pre-construction notification should be required for proposed activities that directly affect more than ½-acre of submerged aquatic vegetation. The Corps has added a new PCN requirement to NWP 48 to require pre-construction notification for all NWP 48 activities that directly affect more than ½-acre of submerged aquatic vegetation. The new PCN threshold will provide district engineers the opportunity to review all new and existing commercial shellfish mariculture activities that directly affect more than ½-acre of submerged aquatic vegetation. The Corps does not agree that PCNs should be required for all shellfish mariculture activities because of potential impacts caused by temporary suspension of sediment during harvesting activities or discharges of dredged material that may occur during dredge harvesting activities utilizing hydraulic dredging equipment. The impacts caused by the suspended sediment or discharged sediment are temporary because the sediment will settle to the bottom of the waterbody after a period of time. That period of time may depend on local currents and other factors but is generally understood to be relatively short (Newell et al. 1998) and not ecologically relevant, especially in shallow waters where wave actions frequently cause sediment to be suspended in the water column.

Direct effects of commercial shellfish mariculture activities on submerged aquatic vegetation include the placement of structures such as racks, bags, and cages on the bottom of a waterbody inhabited by submerged aquatic vegetation. Direct effects of commercial shellfish mariculture activities also include harvesting activities, including mechanical and hydraulic dredging and harvesting by hand. Shading of submerged aquatic vegetation by off-bottom bivalve mariculture structures, such as floating racks, bags, and cages, is an indirect effect that would not trigger this PCN requirement. Changes in water flows caused by the use of long lines for bivalve mariculture cultivation, where slowed water flows cause sediment to fall out of suspension and accumulate on the bottom of the waterbody is another example of a potential indirect effect that would not trigger this PCN requirement. These direct and indirect effects would be caused by structures or

work regulated under Section 10 of the Rivers and Harbors Act of 1899.

Direct effects also include discharges of dredged or fill material on the bottom of a waterbody inhabited by submerged aquatic vegetation for on-bottom culture methods, such as the placement of shell or gravel to provide substrate for the bivalves to attach to and grow. Discharges of dredged or fill material into waters of the United States may smother submerged aquatic vegetation, which is a direct effect of those activities. During harvesting activities that include regulated discharges of dredged or fill material, there are likely to be direct effects to submerged aquatic vegetation if those activities occur in seagrass beds. These direct effects would trigger the PCN requirement if they directly affect more than ½-acre of submerged aquatic vegetation An example of an indirect effect that might be caused by a discharge of dredged or fill material into waters of the United States for commercial shellfish mariculture activities might be a turbidity plume that reaches areas beyond the discharge site, as suspended sediment is transported by water currents away from that discharge site. This indirect effect would not trigger the PCN requirement.

This pre-construction notification requirement will provide district engineers the opportunity to evaluate each proposed activity that will directly affect more than ½-acre of submerged aquatic vegetation and determine whether that activity qualifies for NWP 48 authorization. In response to a pre-construction notification, the district engineer may require mitigation (*e.g.,* on-site avoidance and minimization) to ensure that the authorized activity complies with the no more than minimal adverse environmental effects requirement for the NWPs (see paragraph (a) of NWP general condition 23, mitigation).

The Corps has removed the additional information requirements for PCNs from the text of NWP 48 because the information requirements of NWP general condition 32 cover the information needed for this new PCN requirement. The information requirements for NWP PCNs are listed in paragraph (b) of NWP general condition 32, pre-construction notification. Paragraph (b)(5) of NWP general condition 32 requires the PCN to include a delineation of wetlands, other special aquatic sites (including vegetated shallows, or submerged aquatic vegetation), and other waters.

One commenter supported the removal of the PCN requirements because in many instances bivalve populations have been overharvested or in some cases attacked by diseases or poor water quality. This commenter said that regulation of these activities should not impede the ability to reinvigorate these species and growing them for food production. One commenter supported of removal of the PCN threshold for commercial shellfish mariculture for activities that include a species that has never been cultivated in the waterbody as long as the NWP continues to prohibit the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody, and prohibit the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990. One commenter said that state natural resource agencies should be notified for NWP 48 activities that seek to stock a species that has never been cultivated in a waterbody, and applicable state permits be obtained before the NWP 48 authorization becomes effective for a particular commercial shellfish mariculture activity.

The addition of the PCN requirement for commercial shellfish mariculture activities that directly affect more than ½-acre of submerged aquatic vegetation should not pose impediments on food production or efforts to reinvigorate these species in waters whether they have been overharvested. The Corps has also removed the PCN threshold for indigenous species that have never been cultivated in the waterbody. While the Corps has removed the PCN threshold, it has modified the NWP to prohibit the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. State natural resources agencies can reach out to Corps districts to request coordination on proposals to cultivate indigenous species that have never been cultivated in the waterbody.

Several commenters stated the PCN requirements should not be removed because tribes require notice and collaboration with the Corps in order to protect their treaty fishing rights. These commenters said that even temporary impacts to eelgrass could result in consequences to tribe's treaty-reserved fish populations and the habitat they rely on. In addition, these commenters stated that removal of the PCN thresholds poses significant problems to assuring protection of salmon, nearshore habitat, and treaty shellfish gathering rights. One commenter recommended adding a PCN requirement for all activities within the U.S. v. Washington (Boldt) case area.

During the process for issuing and reissuing these NWPs, Corps districts have been consulting and coordinating with tribes. Corps districts and tribes can establish coordination procedures to help ensure that NWP 48 activities comply with general condition 17, tribal rights. Division engineers can also add regional conditions to this NWP, where appropriate based on the characteristics of the regional ecosystem, to ensure that the activities authorized by this NWP cause no more than minimal adverse environmental effects to specific resources, including tribal trust resources.

One commenter expressed support for the proposed reissuance of NWP 48. One commenter expressed support for the reissuance of NWP 48 because this NWP could significantly reduce the barriers to entry for emerging mariculture industries, and reduce the timeframes and costs associated with obtaining DA authorization for such activities. One commenter said that the conditions in the text of NWP 48 and NWP A should be consistent and preferably combined into one NWP for cultivating shellfish and seaweeds. One commenter stated that small businesses are supportive of the proposed changes to NWP 48, but acknowledged that there may be unfavorable litigation outcomes if the changes are finalized. However, these businesses are concerned that small businesses nationwide could be subject to unfavorable litigation outcomes where the environmental analysis and justification for this rulemaking is not sound.

Nationwide permit 48 provides a streamlined authorization process for commercial shellfish mariculture activities that result in no more than minimal adverse environmental effects, and should help reduce regulatory burdens for the mariculture industry. The text of NWPs 48 and A (now designated as NWP 55) has some similarities, as well as some differences. Some of those differences are due to NWP 55 activities potentially occurring in a broader range of waters, including deeper coastal waters more distance from the shoreline and federal waters over the outer continental shelf. Commercial shellfish mariculture activities typically occur in coastal waters new the shoreline. The national decision document for this NWP has been revised to address the 2019 decision of the United States District Court, Western District of Washington at Seattle in the *Coalition to Protect Puget Sound Habitat* v. *U.S. Army Corps of Engineers et al.* (Case No. C16–0950RSL) and *Center for Food Safety* v. *U.S. Army*

Corps of Engineers et al. (Case No. C17–1209RSL),

Several commenters stated that the Corps should not reissue NWP 48, and if the Corps decides to reissue NWP 48 it should improve its review of PCNs and require documentation of compliance with specific design and operational standards. A few commenters said that the Corps should not reissue NWP 48 as proposed for the same reasons that NWP was found by the United States District Court, Western District of Washington at Seattle to be in non-compliance with National Environmental Policy Act and the Clean Water Act. One commenter said that regional general permits should be issued in Washington State, for specific water bodies and for particular types of shellfish aquaculture.

Nationwide permit 48 authorizes a variety of commercial shellfish mariculture activities under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act, and a number of different structures can be used to cultivate bivalve molluscs. Project proponents are responsible for designing their projects and for those activities that require pre-construction notification, district engineers evaluate the direct, indirect, and cumulative adverse environmental effects caused by the proposed NWP activity. In the national decision document, the Corps has revised its NEPA analysis and its Clean Water Act Section 404(b)(1) Guidelines analysis. Regional general permits can be issued by district engineers to authorize these activities. Regional general permits can be effective in addressing regional approaches to commercial shellfish mariculture activities and the potential adverse environmental effects those activities may cause.

One commenter noted that a lack of clarity in the proposed rule may lead to permitting delays and uncertainty, both of which have negative effects on small businesses. A couple commenters said that with regards to shellfish mariculture there needs to be more support from all levels of government to consider first and foremost a food production activity now and in the future to address our seafood deficit and food security for our nation. One commenter recommended that the Corps utilize information in Endangered Species Act and essential fish habitat consultation documents issued in Washington State to support the reissuance of NWP and address environmental issues of concern under the Clean Water Act, the Rivers and Harbors Act of 1899, and the National Environmental Policy Act.

The reissued NWP 48 will provide a streamlined authorization process for commercial shellfish mariculture activities that cause no more than minimal individual and cumulative adverse environmental effects. Commercial shellfish mariculture activities may also be regulated by tribal, state, and local governments. The consultation documents issued by the U.S. FWS and NMFS in Washington State are applicable only to Washington State, and this NWP authorizes commercial shellfish mariculture activities across the country.

One commenter observed that at the national level, Congress passed the National Aquaculture Act of 1980 in response to findings that the nation has potential for significant aquaculture growth, but that this growth is inhibited by many scientific, economic, legal, and production factors. In support of the proposed reissuance of NWP 48, one commenter cited the National Shellfish Initiative's goal of increasing populations of bivalve shellfish in our nation's coastal waters—including oysters, clams, and mussels—through commercial production and conservation activities. One commenter stated that the NWP 48 should require notification to the U.S. Coast Guard.

The reissuance of NWP 48 helps support the growth of the aquaculture industry in the United States by reducing regulatory burdens on growers and providing a streamlined authorization process under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. The activities authorized by this NWP will also help increase the numbers of bivalves in the Nation's coastal waters, and the ecological functions and services those bivalve molluscs provide, especially in coast waters where bivalve shellfish populations have significantly declined as a result of overharvesting. The project proponent is responsible for securing any licenses or permits from the U.S. Coast Guard, and complying with U.S. Coast Guard requirements that may apply to structures used for commercial shellfish mariculture activities.

Several commenters supported changing the name of NWP 48 from ''commercial shellfish aquaculture activities'' to ''commercial shellfish mariculture activities.'' One commenter suggested adding modifying terms to ''aquaculture'' such as ''marine,'' ''coastal marine,'' or ''offshore'' to improve specificity and clarity. One commenter suggested clarifying that the terms ''mariculture'' and ''aquaculture'' can be used interchangeably. A couple of commenters objected to changing ''aquaculture'' to ''mariculture'' in the title and text of NWP 48. They suggested using the term ''marine aquaculture'' to more closely align with the terms used by industry. One said that using the term ''mariculture'' may result in an unintended consequence of confusing or invalidating local and regional policy and regulations. One commenter stated the term ''commercial shellfish aquaculture'' is not defined and recommended defining that term in a manner that does not conflict with tribes' treaty-secured rights to take shellfish. One commenter stated that term ''shellfish'' is not explicitly defined, and recommended adding a definition to clarify whether that term includes lobsters and conches or only bivalves.

The Corps is retaining the use of the term ''mariculture'' in this NWP. Use of the term ''mariculture'' in NWP 48, as well as NWPs 55 and 56, will not invalidate any local or regional policies or regulations. The use of the term mariculture is intended to provide clarity, to ensure that project proponents do not attempt to use NWP 48 to authorize the production of other species considered to be ''shellfish'' (*e.g.,* shrimp, crawfish) in land-based facilities and ponds. The term ''mariculture'' refers to the cultivation of species for food production, and should not interfere with a tribe's taking of shellfish from coastal waters. The Corps has modified the first paragraph of this NWP to clarify that the term ''shellfish'' refers to bivalve molluscs such as oysters, clams, mussels, and scallops.

Several commenters said that the Corps' proposal fails to properly consider that the impacts authorized by NWP 48 violate the Clean Water Act and the Endangered Species Act. These commenters stated that the impacts of commercial shellfish mariculture activities should be evaluated through environmental impact statements and through formal programmatic ESA consultations. One commenter stated that the Corps has failed to provide adequate documentary support or substantive evidence for its conclusions that permit terms and conditions would be sufficient to ensure that environmental effects would be minimal and not significant. One commenter asserted that the proposed NWP 48 violates the Section 404(e) of the Clean Water Act because it allows unlimited impacts.

Activities authorized by NWP 48 must comply with general condition 18, endangered species. Some Corps districts have developed programmatic ESA section 7 consultations that cover commercial shellfish mariculture

activities. Activities authorized by NWP 48 do not require additional NEPA compliance, since the Corps fulfills the requirements of NEPA when it issues its national decision document for the reissuance of that NWP, because that decision document includes and environmental assessment with a finding of no significant impact. Section 404(e) of the Clean Water Act does not require NWPs to have quantified acreage or other limits to ensure that authorized activities result in no more than minimal individual and cumulative adverse effects. Commenters have not provided any substantive evidence to support their opinions that all activities authorized by NWP 48 result in more than minimal adverse environmental effects and should not be authorized by an NWP. The Corps has issued a number of NWPs that do not have quantitative limits, such as NWP 27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities), NWP 31 (Maintenance of Existing Flood Control Facilities), and NWP 38 (Cleanup of Hazardous and Toxic Waste).

Several commenters said that NWP 48 activities contribute to degradation of waters of the United States by adversely affecting water quality, eelgrass, salmon, birds, herring, and flatfish and causing adverse effects from the introduction of plastics. One commenter recommended prohibiting commercial shellfish mariculture activities in or near marine protected areas or sensitive areas, such as essential fish habitat. This commenter said that the NWP should prohibit the use of plastic equipment or inputs such as pesticides, herbicides, or pharmaceuticals. This commenter also said that NWP 48 activities should require extensive documentation of compliance with design and operation standards, with routine reporting. In addition, this commenter stated that permitted activities should incorporate more rigorous operation, emergency response, and pollution standards, with swift and severe consequences for non-compliance, including revocation of permits.

The potential environmental effects caused by commercial shellfish mariculture activities are discussed in the national decision document for NWP 48. The Corps acknowledges that commercial shellfish mariculture activities may have negative, positive, and neutral effects on various environmental components, including various species. It is generally understood that the presence of bivalves in an aquatic ecosystem is beneficial. Some commenters point out various adverse environmental effects caused by commercial shellfish mariculture activities, but other acknowledge the studies and observations that identify beneficial environmental effects caused by commercial shellfish mariculture activities. If a proposed commercial shellfish mariculture activity may adversely affect essential fish habitat as a result of activity subject to the Corps' legal authority, the district engineer will conduct essential fish habitat consultation with the NMFS, and incorporate as appropriate, essential fish habitat conservation recommendations into the NWP authorization as permit conditions.

The Corps does not have the legal authority to regulate the use of pesticides, herbicides, or pharmaceuticals that may be associated with commercial shellfish mariculture activities. General condition 6 requires the use of suitable material for activities authorized by NWPs. Plastics materials may be used for commercial shellfish mariculture activities and it is the responsibility of the permittee to ensure that structures that may be made with plastics (*e.g.,* tubes for geoducks, anti-predator netting) are properly maintained (see general condition 14). The Corps has no authority to regulate plastics that may wash away from a commercial shellfish mariculture activity. The Corps does not regulate the placement of trash or garbage into waters of the United States (see 33 CFR 323.2(e)(3)). Section 13 of the Rivers and Harbors Act of 1899 (*i.e.,* the Refuse Act) has been superseded by Section 402 of the Clean Water Act (see 33 CFR 320.2(d)).

One commenter requested that the Corps change NWP 48 to remove any unintended competitive edge for wild harvest fisheries, both in terms of allowable gear and harvesting requirements. One commenter stated that they investigated direct and indirect effects of individual bottom cages on eelgrass, and found that at the current level of mariculture activity, short-term cultivation of oysters has a minimal effect on eelgrass growth, water quality, and sediment characteristics. However, if the cultivation activity expands in terms of gear and/or individual operations, it may result in measurable effects.

The Corps lacks the authority to prevent competition between commercial shellfish mariculture operators and fishers that harvest wild populations of bivalves. The Corps appreciates the information regarding the direct and indirect effects of bottom cages for oyster mariculture on eelgrass. The Corps is finalizing a new PCN threshold for commercial shellfish mariculture activities directly affecting more than ½-acre of submerged aquatic vegetation to ensure the effects noted by the commenter are evaluated by district engineers.

One commenter said that commercial shellfish mariculture activities have minimal adverse impacts, and they can have beneficial effects on habitat and water quality, and there is an extensive scientific literature that supports the identification of these benefits. This commenter discussed the structured habitat provided by commercial shellfish mariculture activities that is used by numerous species for refuge, foraging, and predator avoidance, thereby increasing species richness, abundance, and biodiversity. This commenter also said that bivalves ingest and filter suspended materials in the water column, sequestering excess nutrients as protein in their tissue. This commenter also remarked that upon harvesting these bivalve molluscs, nutrients are removed from the marine ecosystem, which improves water quality. This commenter also noted that commercial shellfish mariculture activities can also help to transfer the load of suspended materials from the water column to the benthos through a phenomenon known as benthic-pelagic coupling. In addition, this commenter said that by providing structured habitat, improving water quality, and helping to transfer the load of suspended materials from the water column to the benthos, shellfish can help mitigate adverse impacts caused by several different types of human activities and developments. This commenter stated that for these reasons, shellfish are increasingly being utilized in environmental restoration projects across the United States. The Corps acknowledges these comments on the beneficial effects of commercial shellfish mariculture activities on coastal waters. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter said that impacts from geoduck farms are insignificant (no more than minimal) for: Forage fish spawning areas; consumption of forage fish larvae; juvenile salmon; waves, currents, and sediment transport; microplastics; marine debris; impact to the benthic community; cumulative impacts; recreation and navigation; marine mammals; birds; farm preparation; predator protection netting; harvest activities; density, genetics, diseases, and parasites; and property values. This commenter remarked that

the disturbances caused by commercial shellfish mariculture activities are within the range of natural variation experienced by benthic communities in Puget Sound. This commenter also stated that differences in the structure of mobile macrofauna communities between planted areas with geoduck tubes and nets and nearby reference beaches do not persist after the geoduck tubes and nets removed during the grow-out culture phase. In addition, this commenter said that nutrients released from a typical commercial geoduck operation are low and localized effects are likely to be negligible. Finally, this commenter stated that geoduck aquaculture practices do not make culture sites unsuitable for later colonization by eelgrass. The Corps acknowledges these comments on the beneficial effects of geoduck mariculture activities on coastal waters. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter said that commercial shellfish mariculture activities have minimal impacts on birds, including foraging, noise, and the potential for net entanglement. This commenter noted that birds forage within mariculture operations, and feed on organisms growing on mariculture equipment, and the shellfish being produced. This commenter stated that noise associated with commercial shellfish mariculture activities could result in temporary displacement of birds from the immediate area, but this is a temporary impact to overall bird populations. Lastly, this commenter asserted that while predator exclusion net entanglement is a possibility for birds, it is likely to be rare and unlikely to result in significant effects to marine bird and bald eagle populations utilizing these areas. The Corps acknowledges these comments on the effects of commercial shellfish mariculture activities on birds, which have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter objected to a statement in the proposed rule regarding the placement of shell or gravel on the bottom of the waterbody for on-bottom cultivation of bivalves. The proposed rule stated that this is a permanent impact. This commenter said that the placement of gravel or shell on the bottom of the waterbody causes temporary changes, which is why shellfish farmers frequently need to place gravel or shell in the same area from time to time. According to this commenter, this temporary change has beneficial impacts to species presence and diversity, according to a programmatic biological opinion issued by the NMFS for commercial shellfish mariculture activities in Washington State. This commenter said that placement of shell or gravel on the bottom of the waterbody shifts the benthic community from polychaetes to amphipods and copepods, which are important prey items for juvenile salmon. This commenter requested that the Corps correct or clarify this statement to recognize that the placement of shell or gravel causes temporary, localized changes to the marine environment, and these changes are beneficial.

If the commercial shellfish mariculture operator places shell or gravel on the bottom of the waterbody, and does not remove the shell or gravel, then it is a permanent impact. When an NWP authorizes a temporary impact, the structure or fill has to be removed after that structure or fill is no longer needed. For a temporarily filled area, after the fill is removed several NWPs require the project proponent to restore the affected area to pre-construction elevations. The Corps acknowledges that a permanent fill may have positive, negative, or neutral environmental effects. For example, the permanent fill may be dispersed by flowing water and transported in the waterbody so that it becomes part of the benthic habitat in that waterbody. That permanent fill may provide habitat for certain aquatic organisms.

Several commenters said they agreed that placing shellfish seed on the bottom of a waterbody is not a ''discharge of fill material'' and thus does not require a section 404 permit. Regardless of that whether the placement of shellfish seed is done for commercial aquaculture, habitat restoration, or fisheries enhancement, it should not require a section 404 permit unless there is significant placement of materials for reefs/hummocks in quantities adequate to alter the depth profile and alter the bottom topography. Several commenters noted that while depositing shell with spat already attached is considered seed and regulated ''work'' under Section 10 of the Rivers and Harbors Act of 1899, the proposed NWP 48 is also defining this as fill regulated under Section 404 of the Clean Water Act. They stated that requiring section 404 authorization is an additional unnecessary burden and these activities do not result in adverse environmental impacts and in actuality have positive impacts to water quality. This method is unlike a restoration project where oyster shell is deposited in large enough quantities to create reefs and foster a permanent non-transient population. This commenter requested that the Corps make a distinction between two different activities: Sparsely placing shell on the bottom of the waterbody to catch larvae and hummock building and restoration efforts.

In the 2020 Proposal, the Corps did not state that shellfish seeding activities require authorization under Section 404 of the Clean Water Act. In addition, the Corps did not state that shellfish seeding requires authorization under Section 10 of the Rivers and Harbors Act of 1899. The placement of shell in a waterbody to construct reefs or hummocks for bivalves to settle on and grow requires Clean Water Act section 404 authorization because it raises the bottom elevation of the waterbody and is a discharge of fill material, as that term is defined at 33 CFR 323.2(e). That activity also requires authorization under Section 10 of the Rivers and Harbors Act of 1899 as a structure (*e.g.,* a reef) under 33 CFR 322.2(b) or work under 33 CFR 322.2(c).

One commenter said that placing single shellfish seeds on beds without containment structures is not regulated under Section 10 of the Rivers and Harbors Act of 1899. This commenter asserted that this activity is not subject to regulation under section 10 because it does not involve the use of structures, nor does it constitute work that alters or modifies the navigable capacity of the waters. Juvenile clams bury a few inches into the sediment and are essentially imperceptible, and single-set oysters lie on the bottom of the substrate without meaningfully altering the elevation of the seabed. This commenter said that the placement and grow-out of single set clams and oysters therefore does not require approval under Section 10 of the Rivers and Harbors Act of 1899. This commenter noted that section 10 authorization is required for activities that alter the bottom elevation of waters in a manner to impact their navigable capacity, and that shellfish seeding does not alter the bottom elevation.

In the proposed rule at 85 FR 57334, the Corps stated that on-bottom bivalve shellfish mariculture activities may involve placing fill material such as shell or gravel to provide suitable substrate for bivalve shellfish larvae to attach to and grow on the bottom of the waterbody and that these activities may require section 404 authorization. The proposed rule did not state that depositing shell with spat attached to

the shell is considered fill material for the purposes of NWP 48. Discharging shell without bivalve larvae (*i.e.,* spat) into a waterbody for the purposes of enhancing benthic habitat to attract bivalve shellfish larvae may require section 404 authorization if it meets the Corps' definition of ''fill material'' and ''discharge of fill material'' at 33 CFR 323.2(e) and (f). Under 33 CFR 323.2(f), the term ''discharge of fill material'' means the addition of fill material into waters of the United States. The term ''discharge of fill material'' does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products (33 CFR 323.2(f)), so shellfish seeding is not considered a ''discharge of fill material.'' If the placement of gravel or shell on the bottom of the waterbody to enhance the substrate of the waterbody to attract shellfish larvae is not removed upon completion of the shellfish cultivation activity, it is considered a permanent fill even though it may increase the habitat value for bivalves, crustaceans, and other aquatic organisms.

A few commenters said that predator nets, and low-profile cages to protect bottom planted seeds should not be considered navigation hazards subject to permitting requirements unless they create a vertical profile of greater than 25% of the water depth. One commenter agreed with the Corps' statements in the proposed rule that most commercial shellfish mariculture activities do not involve discharges of dredged or fill material that require Clean Water Act section 404 authorization. This commenter noted that placing living bivalve shellfish (*e.g.,* clam seed and oyster cultch) in the intertidal zone during bottom-culture activities and their natural by-products are not pollutants, citing the *Association to Protect Hammersley, Eld, and Totten Inlets* v. *Taylor Res., Inc.,* 299 F.3d 1007 (9th Cir. 2002). One commenter stated that the proposal accurately states that some commercial bivalve shellfish mariculture activities are regulated under section 10 because they include structures such as racks, cages, bags, lines, nets, and tubes, when those structures are placed in navigable waters. This commenter also said that dredging, excavation, and filling activities would also require section 10 authorization, although these activities are relatively rare.

The placement of predator nets and low-profile cages in navigable waters of the United States requires authorization under Section 10 of the Rivers and Harbors Act because those nets and cages are considered structures under 33 CFR 322.2(b) and may be obstructions to navigation. The Corps maintains its views that most commercial shellfish mariculture activities are regulated solely under Section 10 of the Rivers and Harbors Act of 1899, and a relatively small percentage are also regulated under Section 404 of the Clean Water Act because they involve discharges of dredged or fill material into waters of the United States. The Corps agrees that the placement of living bivalves into waters of the United States does not result in a discharge of a pollutant that requires authorization under Section 404 of the Clean Water Act.

One commenter said that bivalve shellfish harvesting activities do not bring commercial shellfish farming within the regulatory reach of Clean Water Act Section 404. In order for there to be a discharge regulated under Section 404 of the Clean Water Act, there must be an addition of a pollutant to a water of the United States, and that the harvesting commercial shellfish does not involve an ''addition'' for purposes of the Clean Water Act section 404. This commenter also stated that harvesting shellfish constitutes a ''net withdrawal'' of material from the water, not an ''addition.'' This commenter requested that the Corps clarify in the final rule that these commercial shellfish farming activities do not involve discharges of dredged or fill material and hence do not require Clean Water Act Section 404 authorization.

The Corps does not agree that all bivalve shellfish harvesting activities do not require authorization under Section 404 of the Clean Water Act. There may be circumstances where a bivalve shellfish harvesting activity results in a regulable discharge that requires section 404 authorization. Those circumstances depend on how the harvesting activity is conducted, and whether a particular harvesting activity results in an addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. District engineers apply the definitions of ''dredged material'' and ''discharge of dredged material'' at 33 CFR 323.2(c) and (d), respectively to determine whether a discharge requiring section 404 authorization has occurred. The Corps agrees that bivalve shellfish harvesting activities do not normally involve discharges of fill material, as that term is defined at 33 CFR 323.2(f).

One commenter said that aquaculture is not exempt from CWA permitting under Section 404(f) of the Clean Water Act. This commenter said that adding gravel or shell to bags also triggers a section 404 permit requirement even if the bags themselves do not qualify as fill material. Even for activities that do not directly result in discharge of dredge or fill material, the Corps must document secondary effects, and has the authority to impose conditions reasonably related to the purpose of section 404 permits. Another commenter stated that established shellfish farms are exempt from regulation under the Clean Water Act's farming exemption, and that the reissued NWP 48 should state that established commercial shellfish farming activities do not require CWA Section 404 permits. This commenter said that even if some shellfish farming activities include discharges of dredged or fill material, established shellfish farms are exempt from regulation under section 404(f), which exempts normal farming activities from the requirement to obtain permits under Section 402 and 404 of the Act.

Whether shellfish mariculture qualifies for a section 404(f) exemption is beyond the scope of this rulemaking. The authority for determining whether a particular activity, such as commercial shellfish mariculture activities, is eligible for the Clean Water Act Section 404(f) exemptions lies with the U.S. EPA. See the 1989 Memorandum of Agreement Between the Department of the Army and the U.S. EPA Concerning the Determination of the Section 404 Program and the Application of the Exemptions under Section 404(f) of the Clean Water Act.

One commenter stated that advanced authorization of the broad suite of commercial shellfish mariculture activities afforded by the NWP 48 is impracticable because the blanket authorization cannot take into account important details regarding local ecological conditions at the growing site and specific information about the shellfish cultivation techniques. This commenter recommended that initial authorization should be made on a case-by-case basis and should be subject to ongoing monitoring and periodic review.

Section 404(e) of the Clean Water Act does not specify how broadly or narrowly the Corps has to identify any category of activities for the issuance of a general permit, including the NWPs. Section 404(e) only requires that the activities in that category are similar in nature. Likewise, under the Corps' definition of general permit in its section 10 regulations at 33 CFR 322.2(f), there are no standards regarding how broad or narrow the category has to be. Therefore, the Corps has substantial discretion to determine the categories of activities to be

authorized by the NWPs. Nationwide permits are issued by Corps Headquarters to authorize categories of activities across the country, and there is substantial variation in aquatic resources and the functions they provide, as well as the degree to which they perform those functions. Nationwide permits require pre-construction notification for certain activities so that district engineers can assess proposed activities in the context of local ecological conditions and make a case-by-case determination as to whether proposed activities qualify for NWP authorization.

Some commenters mentioned that the scientific literature cited in the proposed rule concerned studies of eelgrass located in Washington State. These commenters stated that despite its broad distribution along the Pacific and Atlantic coasts, eelgrass is a poor choice for a model species to develop a national standard from a regional dataset. One genus should not dictate policy on an entire suite of functionally, taxonomically, and geographically distinct species. These commenters went on to say that while the individual and cumulative impacts to eelgrass meadows in Washington may be temporary, it could be irreversible in areas where environmental conditions are more impaired and submerged aquatic vegetation meadows are declining in areas such as New England, the mid-Atlantic coast, the East coast of Florida, the Gulf of Mexico, and California.

For the 2020 Proposal, the Corps considered scientific literature in coastal ecosystems located nationwide. The Corps also discussed submerged aquatic vegetation in general terms, and only made specific references to eelgrass when a particular study examined eelgrass. After the reissuance of NWP 48 in 2017, the Corps reviewed a broader range of scientific literature on the interactions between commercial bivalve shellfish mariculture activities and submerged aquatic vegetation, and found that while some permanent impacts to submerged aquatic vegetation may occur, the impacts are often temporary and submerged aquatic vegetation co-exists with bivalve mariculture activities. The Corps examined scientific literature from studies that occurred in other areas of the United States (*e.g.,* Chesapeake Bay), not just Washington State.

One commenter recommended that the Corps require mitigation for impacts to submerged aquatic vegetation at a ratio of at least 1.2:1 (mitigation area to impact area). One commenter said that when the functional value of eelgrass and shellfish are combined, and the seascape matrix of habitats are considered, it is possible that a broader ecosystem perspective would find benefits from the presence of aquaculture. This commenter also stated that commercial shellfish farming activities have minimal negative to beneficial impacts on eelgrass and supports the Corps' proposal to reissue NWP 48. One commenter remarked that interactions between seagrasses and shellfish mariculture must separately be addressed during Endangered Species Act and Essential Fish Habitat consultations for authorizations for shellfish farming activities in Washington State.

Compensatory mitigation requirements for activities authorized by the NWPs are more appropriately determined by district engineers on a case-by-case basis after reviewing PCNs. If the district engineer reviews a PCN and determines the proposed activity will result in more than minimal adverse environmental effects, he or she will notify the applicant and provide an opportunity to the applicant to submit a mitigation proposal (see 33 CFR 330.1(e)(3)). If, after reviewing the mitigation proposal, the district engineer determines the adverse environmental effects of the proposed activity will be no more than minimal, she or he will issue an NWP verification with permit conditions that require implementation of the mitigation. The Corps acknowledges that, when viewed from a seascape perspective, a district engineer may determine that the proposed shellfish mariculture will provide ecological benefits that should be factored in the district engineer's decision regarding whether the proposed activity will result in no more than minimal adverse environmental effects. If the district engineer reviews a PCN for a proposed NWP 48 activity and determines the proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS and that section 7 consultation may address potential impacts to seagrasses. If the district engineer reviews a PCN for a proposed NWP 48 activity and determines the proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with the NMFS and the NMFS may provide the district engineer with essential fish habitat conservation recommendations that may address potential impacts to seagrasses.

Several commenters stated while shellfish mariculture can provide ecosystem services, some of which are similar to seagrasses and other benthic communities, there is no meaningful effort to discuss the numerous studies regarding impacts of a variety of aquaculture practices on submerged aquatic vegetation. Allowing commercial shellfish activities in new areas that have extensive beds of submerged aquatic vegetation could impact critical habitat for ESA-listed species. A couple commenters stated that tribes in the Puget Sound region have a unique interest in assuring that both salmon and shellfish are allowed to flourish. Consultation between Corps districts, tribes, federal, and state agencies are the appropriate entities to determine how best to protect submerged aquatic vegetation. A couple of commenters said that submerged aquatic vegetation is a critical resource requiring protection and removal of that protection from NWP 48 could create conflicts with other federal or state agencies such as NOAA Fisheries. These commenters asserted that some states, recognizing the need to protect these high-quality habitats have prohibited the siting of new mariculture leases in areas where surveys indicate the presence submerged aquatic vegetation in any one of the past five years.

In the 2020 proposal and the draft decision document for NWP 48, the Corps provided a substantial discussion of the positive and negative impacts that commercial shellfish mariculture activities may have on seagrasses and other benthic organisms. Some of these impacts may be a result of activities under the Corps' legal authorities; however, bivalve shellfish mariculture activities may have impacts that are beyond the scope of the Corps' legal authorities. Under general condition 18, non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat (or species proposed for listing) might be affected or is in the vicinity of the activity, or if the activity is located in designated or proposed critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized (see paragraph (c) of general condition 18, endangered species). During the rulemaking process, district engineers have conducted consultation or coordination with tribes to identify regional conditions or coordination procedures that could be used to protect tribal trust resources and comply with general condition 17. Other federal agencies, as well as states, can develop regulations and policies to protect

submerged aquatic vegetation under their authorities.

A couple of commenters stated that the Corps thinks it is important to protect submerged aquatic vegetation in other contexts, but not under NWP 48. These commenters said that the Clean Water Act regulations provide for protection of special aquatic sites, which include ''vegetated shallows'' and that submerged aquatic vegetation beds are considered vegetated shallows. One commenter said that while the Corps states that all activities and structures must avoid submerged aquatic vegetation, but it doesn't apply that principle to commercial shellfish mariculture activities.

While the Clean Water Act Section 404(b)(1) Guidelines provide a greater degree of protection to vegetated shallows (submersed aquatic vegetation) as special aquatic sites compared to aquatic resources that are not special aquatic sites, the Guidelines do not prohibit discharges of dredged or fill material into vegetated shallows (*i.e.,* submerged aquatic vegetation beds). The 404(b)(1) Guidelines only apply to discharges of dredged or fill material. They do not apply to activities authorized under Section 10 of the Rivers and Harbors Act of 1899.

One commenter stated that submerged aquatic vegetation beds provide numerous ecosystem services including improving water quality, providing nursery habitat for commercial and recreationally significant fish and invertebrates, buffering shorelines from erosion, and sequestering carbon. Because of these additional functions performed by submerged aquatic vegetation, this commenter said that bivalve shellfish mariculture cages do not do any of these things and cannot be considered functionally equivalent habitat to submerged aquatic vegetation.

As discussed in the 2020 Proposal and the national decision document for NWP 48, it is the bivalves that perform a number of the same ecological functions as submerged aquatic vegetation, not the structures in which these bivalves are grown. However, commercial shellfish mariculture structures do provide structural habitat for a wide variety of aquatic organisms, including substrate for organisms to attach to, and some aquatic organisms feed on the attached organisms. Structures used for commercial shellfish mariculture activities can slow the movement of water, and help reduce erosion of nearby shorelines. These impacts would be considered during the review of a PCN for a new or existing shellfish mariculture activity.

One commenter noted that the argument that shellfish aquaculture activities only temporarily impact submerged aquatic vegetation is not accurate because leases issued for shellfish aquaculture vary in duration but are generally 5–20 years to ensure any investment in the enterprise is worthwhile. This commenter said that the word ''temporary'' is a highly relative and generally misleading descriptor.

It is not the duration of the lease for shellfish mariculture activities that determines whether commercial shellfish mariculture activities have temporary impacts on submerged aquatic vegetation. Commercial shellfish mariculture operators might not cultivate bivalve shellfish continuously during the period the lease is in effect. The operator may let some areas within a leased area to go fallow for a period of time, to reduce adverse effects to the benthic community. The Corps agrees that the term ''temporary'' is a relative term, but disagrees that it is misleading. What constitutes a temporary impact depends in part on how much time it takes an organism or an ecosystem to recover from a disturbance, and how resilient and resistant the species or ecosystems are to disturbances. Coastal waters are highly dynamic environments subjected to periodic disturbances, both natural and man-made.

Several commenters concurred with the Corps' view that commercial shellfish mariculture activities typically only has temporary impacts on submerged aquatic vegetation and these plants can sustain a healthy coexistence. A few commenters noted that mechanical harvesting has been found to not negatively impact native eelgrass and may even enhance it. One commenter stated that the positive ecosystem services (*e.g.,* better water quality, habitat creation, and ecosystem studies) provided by bivalve shellfish mariculture activities outweigh the temporary nature of any perceived negative impacts. The habitat created by shellfish aquaculture increases species richness and diversity of both benthic and epibenthic organisms. This three-dimensional habitat is utilized by many commercially valuable species, such as Dungeness crab and flatfishes. The Corps acknowledges these comments. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

One commenter noted that farming methods such as bottom culture propagation tends to focus on the cultivation of larger older shellfish with large time intervals between harvests, which results in short term impacts at harvest with long periods for recovery and result in no permanent losses of submerged aquatic vegetation. This commenter said that the persistence of eelgrass along the coast demonstrates that shellfish mariculture and eelgrass can coexist and have for over a century. Furthermore, commercial shellfish mariculture operators have long understood the best way to propagate eelgrass is to plant oysters, which creates optimal habitat allowing eelgrass to expand due to decreased current over the tide flats. This commenter also said that the bivalve shellfish, as filter feeders, remove large amounts of waterborne nutrients resulting in cleaner water which facilitates photosynthesis, expanding habitable ranges of eelgrass. The Corps acknowledges these comments. These beneficial effects have informed the Corps' decision to reissue NWP 48 as discussed because it will have no more than a minimal individual or cumulative adverse environmental effects.

Several commenters recommended revising the definition of mechanical harvest so that they are not classified as ''dredge or fill'' activities because it is too broad and lumps many methods together and lacks clarity. These commenters said that mechanical harvesting by dragging a metal basket along the tide flats to gently tumble harvestable oysters does not result in a discharge of dredge or fill material and should be exempt from section 404 jurisdiction. Furthermore, these commenters said that these activities do not create ditches, channels, or substantially redeposit excavated soil material and none of the harvest tools are designed to remove large quantities of material to improve the navigability of waters. These commenters said that the sediment that may be disturbed during harvest should be considered as incidental fallback under 33 CFR 323.2(d)(1).

Mechanical harvesting activities generally do not result in discharges of fill material, as that term is defined at 33 CFR 323.2(f). However, mechanical harvesting activities may result in discharges of dredged material, depending on how they are conducted. The term ''discharge of dredged material'' is defined at 33 CFR 323.2(d) to include the ''addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States.'' Some mechanical harvesting

activities may result in incidental fallback and not require section 404 authorization while other mechanical harvesting activities may result in additions of dredged material into waters of the United States that are not incidental fallback, and therefore require section 404 authorization. Mechanical and hydraulic harvesting activities that redeposit sediment in a different area of the bottom of the waterbody that the area from which the sediment was removed is considered a ''discharge of dredged material'' and therefore requires section 404 authorization. These discharges of dredged material into waters of the United States are authorized by NWP 48.

A commenter noted that in the statement ''mechanical harvesting can include grading, tilling, and dredging the substrate of the waterbody'' that the term ''grading'' does not describe shellfish culture methods. A couple of commenters suggested that shellfish mariculture harvest activities should be regulated like wild-harvest shellfisheries (*e.g.,* as they are regulated in NWP 4). This commenter said that both wild and cultured shellfish are state-managed resources, with the exception of many tidelands in Washington, and should not require additional oversight and regulation by federal authorities. This commenter also stated that harvesting activities do not involve structures and do not impact navigation in a way that should trigger regulation under the Section 10 of the Rivers and Harbors Act of 1899.

Mechanical harvesting activities may move sediment in a waterbody in a manner that is not considered incidental fallback. These activities would require section 404 authorization under the Corps' definition of ''discharge of dredged material.'' Nationwide permit 4 authorizes discharges of dredged or fill material associated with fish and wildlife harvesting, enhancement, and attraction devices and activities, including clam and oyster digging. The Corps has jurisdictional authority in Washington State for activities regulated under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. Mechanical harvesting activities generally meet the definition of ''work'' at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899, and are authorized by NWP 48.

One commenter requested that the Corps add a statement in the final rule that acknowledges that the accumulation of sediment around shellfish farming gear may be considered beneficial in certain environments, as well as provision of year-round durable, structured three-dimensional habitat. The Corps declines to add the requested statement because the potential benefits would need to be determined on a case-by-case basis, and the durability of those sediment accumulations is influenced because water movements that could cause that sediment to be re-suspended in the water column.

One commenter said that the Corps must comply with ESA Section 7 and the Magnuson-Stevens Act prior to issuing NWP 48. A few commenters stated that in all areas where submerged aquatic vegetation exists, it is designated essential fish habitat under the Magnuson-Stevens Fishery Conservation and Management Act. These commenters said that removal of the ½-acre limit for direct impacts to submerged aquatic vegetation fails to acknowledge submerged aquatic vegetation as essential fish habitat and the need for consultation with NMFS for activities that may adversely affect essential fish habitat. These commenters asserted that the Corps must consult on a nationwide programmatic basis because essential fish habitat is adversely affected by shellfish mariculture activities.

The NWP program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act is achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent the NMFS regional EFH Conservation Recommendations. If a district engineer determines a proposed NWP 48 activity may adversely affect essential fish habitat, he or she will conduct EFH consultation with NMFS. Where there is a requirement to consult on EFH, consideration of direct impacts to submerged aquatic vegetation caused by new and existing commercial shellfish mariculture activities would occur regardless of the PCN threshold of ½-acre. In response to an EFH assessment prepared by the Corps, the NMFS may provide EFH conservation recommendations to address potential impacts to submerged aquatic vegetation. As discussed in Section III.D of this final rule, the Corps has prepared a biological assessment for this rulemaking activity and determined that the issuance of the NWPs has no effect on listed threatened and endangered species and designated critical habitat, as well as species proposed for listing and proposed designated critical habitat.

One commenter stated that significant changes to NWP 48 are not appropriate until the national decision document is finalized and deemed sufficient. This commenter said the draft decision document fails to satisfy the requirements of the National Environmental Policy Act and the Clean Water Act, and that it fails to properly acknowledge the impacts of mariculture on benthic habitat, fish communities, birds, water quality and substrate characteristics. Several commenters stated that the proposed revisions to the national decision document for NWP 48 do not fairly represent the conclusions of authors of the cited literature, in some cases omitting relevant information and in others misrepresenting study results and conclusions.

The purpose of the national decision document is to provide information for the decision on whether to reissue NWP 48. The national decision document discusses the positive and negative impacts of commercial shellfish mariculture activities on benthic habitat, fish communities, birds, water quality and substrate characteristics. The Corps has considered this information and determined that NWP 48 will not have more than a minimal individual or cumulative adverse environmental effects.

One commenter said that the Corps describes no studies in its decision document to verify its claim that commercially-raised shellfish help improve water quality. One commenter noted that the Corps acknowledges throughout the environmental consequences, public interest, and 404(b)(1) Guidelines Analysis, some negative impacts, but then fails to assess them and instead focuses only on positive impacts. This commenter said that the impacts from mechanical and hydraulic dredging are barely mentioned, with no assessment of their harmful impacts to the same degree as the supposed benefits from shellfish aquaculture.

The Corps discusses, in numerous places, the water quality benefits of filter-feeding bivalves that are cultivated by commercial shellfish mariculture activities. The Corps acknowledges that commercial shellfish mariculture activities cause adverse and beneficial

environmental effects. Throughout the draft and final national decision documents, the Corps discusses the negative and positive effects of harvesting activities.

One commenter identified errors in projected use and acreage impacted over the 5-year period NWP 48 is anticipated to be in effect. This commenter notes that the draft NWP 48 decision document states that the Corps estimates this permit will be used approximately 336 times per year on a national basis, resulting in impacts to approximately 13,360 acres of waters of the United States. It then states the Corps estimates that approximately 1,680 activities could be authorized over a five-year period until the NWP expires, resulting in impacts to approximately 40,080 acres. While 1,680 is five times the annual use figure (336), five times the annual acreage figure (13,360) is 66,800. One commenter requested that the Corps provide documentation on the number of permit request over the last 10 years that exceeded the ½-acre limit, and of those activities, how many ultimately received a permit through regional or individual permit process, and what conditions were applied to those applications. One commenter stated that the Corps claims to have no duty to use any quantitative data, but has issued NWP 48 since 2007 and should be able after all these years to provide some quantitative data about loss of seagrasses, natural habitats, etc. One commenter recommended that the Corps pursue a quantitative analysis of the environmental effects of shellfish mariculture for habitat alterations, climate change, invasive species, overharvesting and exploitation, and pollution.

Nationwide permit 48 authorizes structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for both existing (on-going) and new commercial shellfish mariculture activities. Many of the activities authorized by NWP 48 are on-going activities that require reauthorization each time the current NWP 48 expires and is replaced by a reissued NWP 48. Nationwide permits can be issued for period of no more than 5 years (see Section 404(e) of the Clean Water Act). The acreage of projected impacts in the national decision document for NWP 48 includes many on-going commercial shellfish mariculture activities, many of which have been in operation for decades. These on-going commercial shellfish mariculture activities have been part of the current environmental setting for years, and it is the current environmental baseline against which the degree of severity of adverse environmental effects is assessed to determine eligibility for NWP authorization (*i.e.,* whether the individual and cumulative adverse environmental effects caused by commercial shellfish mariculture activities during the 5-year period the NWP is in effect are no more than minimal).

The Corps has revised the national decision document to correct the errors in its estimates of potential use of this NWP and authorized impacts. However, it should be noted that these are estimates of projected use over the 5-year period the NWP is anticipated to be in effect. With respect to the removal of the ½-acre limit for direct impacts to submerged aquatic vegetation caused by new commercial shellfish mariculture activities, the Corps is only required to provide an estimate of the number of activities that might occur during the period this NWP is in effect. It is not necessary to provide data on how many commercial shellfish mariculture activities were authorized by regional general permits or individual permits.

The Council on Environmental Quality's NEPA regulations at 40 CFR parts 1500–1508 do not require quantitative analyses of potential environmental impacts. With respect to the 404(b)(1) Guidelines, 40 CFR 230.7(b)(3) requires cumulative effects to be analyzed by estimating the number of discharges expected to occur under the NWP while it is in effect. The environmental impacts of authorized activities during the period the NWP is in effect is dependent on the current environmental settings in which these activities will occur, and quantitative data on those current environmental settings is not available. It should also be noted that context is important, because these activities are occurring in coastal waters that have been altered by human activities and natural processes for thousands of years, and continue to be impacted by coastal watershed land use, point source pollution, non-point source pollution, fishing activities, recreation, and other disturbances, not just commercial shellfish mariculture activities.

Several commenters stated it is unclear how mitigation can both be unnecessary and something the Corps is relying on to avoid cumulative impacts. Further, several commenters stated that the Corps relies heavily on mitigation at a district level, but fails to actually describe the possible effects (direct, indirect and cumulative) from shellfish aquaculture activities or how these unknown mitigation measures will actually avoid more than minimal adverse impacts. Any individual mitigation measures will only be attached if a permittee is required to submit a pre-construction notification, which will likely be few and far between.

For commercial shellfish mariculture activities, the Corps generally does not require compensatory mitigation because these activities do not cause losses of waters of the United States. Paragraph (a) of general condition 23 requires permittees to design their projects to avoid and minimize adverse effects, both temporary and permanent, to waters of the United State to the maximum extent practicable on the project site. Many of the NWP general conditions consist of mitigation measures to avoid and minimize impacts. When determining whether to require mitigation to ensure that a particular NWP activity results in no more than minimal individual and cumulative adverse environmental effects, the district engineer will consider the direct, indirect, and cumulative effects, as required by paragraph 2 of Section D, District Engineer's Decision. If the district engineer requires mitigation for an NWP activity, he or she will add conditions to the NWP authorization (see 33 CFR 330.1(e)(3)) that are directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (see 33 CFR 325.4(a)).

One commenter stated that the Corps said that ''standard and best management practices'' can reduce impacts but fails to explain what these are and how they will mitigate impacts. One commenter said that the Corps claims commercially-reared bivalves improve water quality but fails to assess water quality impacts by deferring to district engineers and water quality certifications under Clean Water Act section 401, but impacts to water quality must be assessed before granting NWPs. One commenter said that the Corps fails to discuss the context and intensity factors that might indicate that this proposed NWP will have a ''significant impact to the human environment'' and thus requires an environmental impact statement.

As stated in the 2020 Proposal, species-specific or regional standards and best management practices for commercial shellfish mariculture activities may be appropriate as regional conditions approved by division engineers (see 85 FR 57331). In the national decision document, the Corps has discussed potential impacts to water

quality as well as potential benefits to water quality that may result from commercial shellfish mariculture activities. In addition, the Corps has explained that cultivated bivalves are not considered a pollutant under the Clean Water Act. After considering the information in the national decision document for this NWP, including the potential benefits and detriments caused by commercial shellfish mariculture activities, there is no evidence that these activities cause a significant impact to the human environmental and thus no environmental impact statement is required.

One commenter stated the alternatives analysis is inadequate. The commenter asserts that the Corps lists the ''no action'' alternative but barely analyzes it, strangely concluding that it would somehow have more substantial adverse environmental consequences. The ''national modification'' alternative is not an alternative, but the proposed NWP 48 and the ''regional modification'' is also not an alternative because it includes no conditions or changes from the proposed NWP 48.

The national decision document discusses alternatives. In the Council on Environmental Quality's NEPA regulations that were published in the **Federal Register** on July 16, 2020, the preamble to the final rule at 85 FR 43323 states that an agency does not need to include a detailed discussion of each alternative in an environmental assessment. In the national decision document, the Corps briefly discussed the environmental consequences of each alternative.

One commenter said that the Corps should impose monitoring requirements that would ensure that NWP terms and conditions, including those resulting from subsequent exercises in discretionary authority, would be adequately policed. In response, Corps districts can conduct compliance inspections for authorized activities, to ensure that those activities are conducted in accordance with any conditions added to the NWP authorization. The Corps district will take appropriate actions to address non-compliance with permit conditions.

Several commenters approved of the reiteration and clarification that the discharge of pesticides is regulated under Section 402 of the CWA and not Section 404. They suggested that the final rule clearly state that operators may be permitted to use pesticides to control agricultural pests and predators instead of just predators. One commenter said that the statement regarding commercial shellfish mariculture operations using chemicals to control fouling organisms is incorrect because chemical use or the potential introduction of toxic materials is regulated by the Interstate Shellfish Sanitation Conference. One commenter said that commercial shellfish mariculture operators may use herbicides to control invasive, noxious weeds on commercial clam beds.

The Corps does not have the authority to control the use of pesticides, herbicides, and antifouling agents in commercial shellfish mariculture activities. Use of some of these chemicals may be regulated under other federal or state laws and regulations administered by other agencies.

One commenter said that while gear sometimes escapes from commercial shellfish farms despite growers' best efforts to ensure it remains secured, shellfish farmers do not discard equipment into the marine environment. This commenter requested that the Corps revise the national decision document to make it clear that growers are not discarding equipment, but equipment may wash away from the project site or move by other mechanisms. This commenter also said that NWP general condition 6 addresses the use of trash in the NWP program. One commenter said that the use of plastics gear for commercial shellfish mariculture activities adds plastic pollution to the ocean and beaches through plastic debris and this plastic can break down further into microplastics, which can impact wildlife, aesthetics, and food safety.

The Corps has revised the national decision document to clarify that some materials used for commercial shellfish mariculture activities may wash away from the project area. General condition 6 does not address trash or garbage that may be associated with commercial shellfish mariculture activities. General condition 6 prohibits the use of trash as fill material. Trash and garbage are not considered fill material for the purposes of section 404 of the Clean Water Act (see 33 CFR 323.2(e)(3)).

This NWP is reissued with the modifications discussed above.

(10) NWP 50. Underground Coal Mining Activities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F. In addition, the Corps proposed to the reference to integrated permit processing procedures and the requirement for written verification from the Corps before proceeding with the authorized activities.

Many commenters stated they are opposed to the default authorization if the Corps does not respond to the PCN submittal within 45 days. Numerous commenters said they support the automatic authorization if the Corps project manager does not respond to the complete PCN within 45 days. One commenter objected to the removal of PCN requirements. A few commenters said that in order to further expedite permitting for mining project, no PCN should be required for activities authorized by this NWP.

The Corps removed the requirement for the permittee to obtain written authorization before commencing the activity to be consistent with the other NWPs that have a ½-acre limit for discharges of dredged or fill material into non-tidal waters of the United States (*e.g.,* NWPs 29, 39, 40, 42, 43, 44, 51, and 52). The Corps did not propose to remove any PCN requirements from this NWP. All activities authorized by this NWP require PCNs. The Corps is retaining the PCN requirements for this NWP to provide activity-specific review by district engineers to ensure that the activities authorized by this NWP result in no more than minimal individual and cumulative adverse environmental effects.

A few commenters said that the applicability of this NWP would be reduced if the applicant must now include coal preparation and processing activities outside of the underground mine site as a single and complete project under NWP 50. One commenter stated the Corps provided no justification for the deletion of the Note regarding the use of NWP 21, coupled with NWP 50, for coal preparation and processing activities outside of the underground mine. One commenter expressed support for the removal of the integrated permitting process language. One commenter stated that NWP should state that the project proponent cannot begin the authorized activity until the activity is formally approved by the Department of Interior's Office of Surface Mining or the state. Several commenters asserted the NWP 50 should be revoked because the effects of coal mining are significant to the environment and should be evaluated under an individual permit.

Even if the Note were not removed, single and complete underground coal mining activities with coal preparation and processing activities outside the underground mine site are subject to general condition 28, use of multiple NWPs. If NWP 50 and 21 are combined to authorize a single and complete

project, the activity would be subject to the ½-acre limit. The Corps removed the language referencing integrated permit processing procedures, since those procedures have never been developed for this NWP since that text was added to the NWP in 2007 (see 72 FR 11184).

Project proponents may be required to obtain separate authorizations from the Department of Interior's Office of Surface mining or the state, but those authorizations are a separate process from the Corps' NWP authorization process. Authorization by an NWP does not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. (See item 2 in Section E, Further Information.) Division engineers can add regional conditions to this NWP to restrict or prohibit discharges of dredged or fill material into certain wetland types if those discharges are likely to result in more than minimal individual and cumulative adverse environmental effects. District engineers can also exercise discretionary authority to modify, suspend, or revoke an NWP after reviewing the PCN, to ensure that the NWP authorizes only those activities that result in no more than minimal individual and cumulative adverse environmental effects.

This NWP is reissued as proposed.

(11) NWP 51. Land-Based Renewable Energy Generation Facilities

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F.

One commenter expressed support for the PCN threshold for losses of greater than 1/10-acre of waters of the United States and does not support requiring PCNs for all activities authorized by this NWP. One commenter said that these activities should be prohibited from channel migration zones and floodplains because they are likely to directly or indirectly affect critical habitat, essential fish habitat, and habitats occupied by listed species. This commenter stated that structures built in these zones are at heightened risk to flooding and future flood dynamics associated with climate change. This commenter also said that any impacts over 1/10-acre should require mitigation.

The Corps did not propose to change the 1/10-acre PCN threshold for this NWP that was adopted in the 2017 NWP 51. Activities authorized by this NWP must comply with general condition 10, fills in 100-year floodplains. If the district engineer determines a proposed activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with NMFS. If the district engineer determines the proposed activity may affect listed species or designated critical habitat, she or he will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS. In accordance with general condition 23 and 33 CFR 330.1(e)(3), district engineers determine on a case-by-case basis whether specific activities authorized by this NWP should require compensatory mitigation or other forms of mitigation to ensure the authorized activities result in no more than minimal individual and cumulative adverse environmental effects.

One commenter recommended adding roads constructed to develop, maintain, and repair land-based renewable generation facilities to Note 1. One commenter stated that the NWP 51 makes reference to a distribution system as utility lines constructed to transfer the energy produced by a land-based renewable energy generation facility, but elsewhere in the proposed rule it refers to electrical lines as ''transmission lines'' which is an undefined term. Two commenters suggested revising Note 2 to state that NWPs C and 14 may be used to provide DA authorization for the construction, maintenance, repair, and removal or utility lines and/or road crossings. This commenter also said that the Corps should clarify that the applicant can specify which NWP it wants to use for utility lines and/or road crossings.

Note 1 only addresses electric utility lines used to transfer the electrical energy generated by these facilities to a distribution system, regional grid, or other facility. Transmission lines are part of electrical energy distribution systems to move the electricity from generation facilities to end users. Note 1 has been modified to specifically refer to electric utility lines because these land-based renewable energy generation facilities generate electrical energy. The Corps has revised Note 1 to reference NWP 57, which authorizes electric utility line and telecommunications activities. Activities authorized by NWP 51 are non-linear projects, while electric utility lines used to transport the generated electrical energy to end users and others are linear projects that are more appropriately authorized by NWP 57. Roads that extend to and from the land-based renewable energy generation facility are also linear projects, and crossings of waters of the United States for these roads are more appropriately authorized by NWP 14. This NWP is reissued with the modifications discussed above.

(12) NWP 52. Water-Based Renewable Energy Generation Pilot Projects

The Corps proposed to modify this NWP to remove the 300 linear foot limit for losses of stream bed, which is discussed above in Section II.F. The responses to comments on the proposal to remove the 300 linear foot limit are provided in Section II.F.

Many commenters said that the Corps should modify NWP 52 so that it is not limited to pilot projects, because this restriction limits project proponent's ability to utilize the NWP to facilitate the development of off-shore wind generation projects. These commenters said that the impacts are the same regardless of whether a water-based renewable energy generation project is a pilot project or a full-scale development project, and that the adverse environmental effects caused by these activities will be no more than minimal. A couple of commenters noted that as off-shore wind energy generation continues to grow it will become more crucial that these projects are able to obtain Corps authorization in a timely and efficient manner. A couple of commenters said that these projects should require individual permits and should not be authorized by an NWP.

The Corps believes that the construction of permanent water-based renewable energy generation facilities should be authorized by individual permits instead of an NWP because of the potential for permanent activities to result in more than minimal adverse environmental effects. District engineers can develop regional general permits to authorized permanent water-based renewable energy generation facilities.

One commenter stated that the ½-acre limit and the requirement for PCNs for all proposed activities should be retained. One commenter recommended changing the PCN threshold to require PCNs for losses of greater than 1/10-acre of waters of the United States. A couple of commenters said that Note 1 should be revised to reflect authorization of transmission lines by NWP C rather than NWP 12.

The Corps is retaining the ½-acre limit and the requirement that all authorized activities require PCNs. The Corps has revised Note 1 to reference electric utility lines and NWP 57, which authorizes electric utility line and telecommunications activities.

Several commenters stated that these activities should not be authorized western Washington State without tribal consent in areas with tribal treaty fishing rights. These commenters said

that allowing floating solar panels up to ½-acre in size in navigable waters adds additional obstructions to tribal fisherman trying to exercise their fishing rights. One commenter stated that floating solar panels, if installed, need proper monitoring requirements with the ability to have the projects removed if the injuries to fish reach a certain threshold. One commenter said that pilot projects for experimental purposes should include a requirement for robust information gathering to inform decision makers of ecological impacts of these energy generating structures.

Division engineers can add regional conditions to this NWP to help ensure compliance with general condition 17, tribal rights. During this rulemaking process, Corps districts have been consulting and coordinating with tribes to identify regional conditions and coordination procedures to help ensure compliance with general condition 17. The Corps disagrees with imposing long-term information gathering requirements to monitor the ecological impacts that might be caused by these activities. The information in PCNs should be sufficient for district engineers to determine whether the adverse environmental effects caused by the authorized activities are no more than minimal.

This NWP is reissued with the modifications discussed above.

(13) NWP 55. Seaweed Mariculture Activities

The Corps proposed this new NWP as NWP A, to authorize structures in navigable waters of the United States, including federal waters over the outer continental shelf, for seaweed mariculture activities. In the first sentence of this NWP, the Corps added ''and estuarine'' to make this NWP consistent with proposed new NWP B for finfish mariculture activities with respect to the waters in which these two NWPs may be used to authorize activities under Section 10 of the Rivers and Harbors Act of 1899. The omission of ''and estuarine'' in the proposed NWP A was a drafting error.

The Corps removed the phrase ''and work'' from this NWP because this NWP only authorizes structures, and this NWP does not authorize any of the operational aspects of seaweed mariculture activities. The operation of a seaweed mariculture facility does not constitute ''work'' as that term is defined at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899. Section 322.2(c) defines ''work'' as ''any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.'' After the seaweed mariculture structure is installed, subsequent operations to produce seaweed do not physically modify navigable waters of the United States in a manner that would be considered ''work'' under the Act.

Several commenters expressed support for the issuance of new NWP A. One commenter suggested combining NWPs 48 and A into one NWP instead of issuing separate NWPs. One commenter said that issuing NWP A would reduce barriers to entry for seaweed mariculture activities. Another commenter supported the issuance of NWP A because kelp and seaweed are winter crops and would help provide year-round revenue sources for coastal commercial communities. A few commenters expressed support for NWP A because growth of marine plants improves water quality and provides ecosystem services.

The Corps is keeping NWPs 48 and proposed new NWP A separate because NWP 48 activities occur primarily in nearshore waters and NWP A can be used to authorize activities in both nearshore waters and federal waters on the outer continental shelf. The Corps acknowledges the economic benefits of providing an NWP to authorize seaweed mariculture activities that result in no more than minimal adverse environmental effects, as well as the ecological benefits that may be provided by the cultivated seaweeds, such as water quality benefits through the assimilation of nutrients and habitat benefits for some aquatic species.

Several commenters said they support the inclusion of multi-trophic species production in NWP A. One commenter supported including multi-trophic species production as long as it is voluntary and not a requirement of the NWP. One commenter said that multi-trophic activities should not be authorized under an NWP until an industry standard has been established. A few commenters stated multi-trophic activities should be authorized under by individual permits to provide an appropriate level of environmental review. One commenter said PCNs including that multi-trophic activities should be coordinated with states. A few commenters asserted that the text of NWP A should clarify that multi-trophic activities do not include finfish cultivation. One commenter stated that multi-trophic species mariculture could attract protected species and result in greater risk of entanglement. A few commenters said that the NWPs are appropriate only for activities with more predictable outcomes and should not be used for experimental industries.

The Corps has retained multi-tropic mariculture activities in this NWP, to provide authorization for mariculturists that want to grow seaweeds and bivalves on the same structures. Conducting multi-tropic mariculture activities is optional, and a grower can choose to only cultivate seaweeds. District engineers will review PCNs for proposed NWP A activities to ensure that those activities will result in no more than minimal individual and cumulative adverse environmental effects. If the district engineer reviews a PCN and determines that the adverse environmental effects will be more than minimal after considering any mitigation proposed by the applicant, he or she will exercise discretionary authority and require an individual permit. The Corps does not believe it is necessary to require coordination of proposed multi-tropic mariculture activities with states, but district engineers can informally coordinate PCNs with states if they believe it is appropriate to do so. If a mariculturist wants to grow finfish as part of a multi-trophic mariculture operation, she or he should use NWP B (which, as discussed below, is issued in this final rule as NWP 56), which authorizes multi-trophic mariculture activities involving finfish, seaweeds, and/or bivalves. There may be some risk of entanglement or other forms of adverse impact in lines used for seaweed mariculture activities, and that risk will be evaluated by district engineers during the PCN review process. If the risk of entanglement applies to ESA-listed species, the district engineer will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS as appropriate. Multi-trophic mariculture activities have been conducted for a number of years in other countries (Largo et al. 2016, Troell et al. 2009).

Several commenters said NWP A should not be issued because these activities will result in more than minimal individual or cumulative adverse environmental effects. Several commenters stated NWP A should not be issued because the long-term cumulative impacts are unknown. Many commenters expressed concern with the issuance of an NWP authorizing seaweed mariculture activities because of the relative unknown impacts and risks associated with these activities. One commenter said that the social, economic, and environmental impacts from seaweed mariculture are unknown. One commenter said that the cumulative impact from the varying scale of aquaculture systems cannot

sufficiently be addressed under an NWP. Many commenters stated that there is not sufficient information available to inform whether NWP A would cause no more than minimal impacts. A few commenters said that the Corps has not demonstrated that NWP A complies with the Clean Water Act Section 404(b)(1) guidelines.

The Corps has issued this NWP after considering information on its relatively small, if not beneficial, impact on marine ecosystems and including mechanisms (*e.g.,* PCNs required for all proposed activities) to ensure that it authorizes only those seaweed mariculture activities that result in minimal individual and cumulative adverse environmental effects. In response to a PCN, district engineers will apply the 10 criteria listed in paragraph 2 of Section D, District Engineer's Decision to determine whether the proposed activity can be authorized by NWP 55, with or without additional permit conditions. Division engineers may modify, suspend, or revoke this NWP on a regional basis in accordance with the procedures at 33 CFR 330.5(c). The Clean Water Act Section 404(b)(1) Guidelines do not apply to activities authorized by this NWP because it only authorizes structures or work in navigable waters of the United States under Section 10 of the Rivers and Harbors Act of 1899. It does not authorize activities under Section 404 of the Clean Water Act.

Several commenters said that NWP A would impact tribal rights and treaty protected fishing grounds. One commenter requested additional information and formal government-to-government consultation on proposed new NWP A. One commenter objected to the issuance of NWP A because it does not include required mitigation measures. One commenter stated that mitigation measures should be considered for ESA-listed species and tribal cultural and fishing issues. One commenter suggested adding minimization measures to NWP A that are currently in place in states that are already practicing seaweed mariculture operations.

Activities authorized by NWP A must comply with general condition 17, tribal rights. During the rulemaking process for the issuance of this NWP, district engineers have been conducting consultation and coordination with tribes to identify regional conditions and coordination procedures to facilitate compliance with general condition 17. In response to a PCN, a district engineer can require mitigation measures to help ensure that the authorized activity results in only minimal individual and cumulative adverse environmental effects. During the development of this NWP, the Corps did not identify any mitigation measures that should be added to this NWP, other than the general conditions that apply to all NWPs. Mitigation measures for ESA-listed species are more appropriately identified during the ESA section 7 consultation process. If states have developed mitigation measures for seaweed mariculture activities, division engineers can consider adding those mitigation measures as regional conditions to this NWP.

Several commenters said that NWP A should include a PCN requirement. One commenter expressed support for requiring PCNs for new seaweed mariculture operations. One commenter said that PCNs should not be required if existing permitted bivalve shellfish farms want to add seaweed into their operations. One commenter stated that the U.S. Coast Guard be notified before issuing an NWP A verification. One commenter recommended requiring the PCN to include information identifying the proposed location of operations to review competing stakeholder uses. One commenter said that all PCNs for these activities must identify all gear specifications, production duration, stocking and harvesting times, and gear modifications related to avoiding or mitigating protected species interactions. Many commenters stated that PCNs for NWP A activities should require documentation of compliance with specific design and operational standards. One commenter said PCNs required for these activities should include information the performance of anchoring systems during severe weather events to minimize damage or loss. One commenter said that PCNs for these activities should state which commercial fisheries activities (wild or mariculture) might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the proposed activities.

Proposed new NWP A requires PCNs for all proposed activities. Project proponents may be required to notify the U.S. Coast Guard or comply with U.S. Coast Guard requirements for marking or lighting these structures. It is not the responsibility of the Corps to notify the U.S. Coast Guard of these activities. Some Corps districts have developed local coordination procedures with the U.S. Coast Guard. Paragraph (b)(2) of general condition 32 requires the PCN to include the location of the proposed activity. The Corps does not have the authority to regulate production duration and stocking and harvesting times. If the project proponent wants to modify the seaweed mariculture structures that are regulated under Section 10 of the Rivers and Harbors Act of 1899, he or she must notify the district engineer to request a modification of the NWP verification. Corps district regulatory staff do not have the legal authority or technical expertise to evaluate design or operational standards, or the structural integrity of the seaweed mariculture structures. It is the responsibility of the permittee to properly design the seaweed mariculture structures and ensure that they are properly maintained in accordance with general condition 14, proper maintenance. The Corps declines to require the PCN to identify which commercial fisheries species might be affected by the proposed seaweed mariculture activity because impacts to EFH are already considered when district engineers review PCNs and conduct EFH consultation with NMFS when they determine proposed NWP activities may adversely affect EFH.

Many commenters said that seaweed mariculture activities should require individual permits. Several of these commenters stated that individual permits for these activities are appropriate because the public notice process would allow ample coordination with the affected public. A few commenters said that there is insufficient industry standardization within mariculture systems to issue an NWP for these activities and these activities should require individual permits. A few commenters said that individual permits should be required for these activities to allow proper environmental review and coordination with state natural resource agencies.

The Corps believes that there are seaweed mariculture activities requiring authorization under Section 10 of the Rivers and Harbors Act of 1899 that will cause only minimal individual and cumulative environmental effects (see 33 CFR 322.2(f)) and are appropriate for authorization by NWP. If a district engineer reviews a PCN for a proposed seaweed mariculture activity and determines that the adverse environmental effects will be more than minimal after considering mitigation proposed by the applicant, he or she will exercise discretionary authority and require and individual permit for the proposed activity. In addition, division engineers have the authority to modify, suspend, or revoke this NWP on a regional basis in response to concerns for the aquatic environment or for any factor of the public interest (see 33 CFR 330.1(d)). The development of industry

standards is not a prerequisite for NWP authorization, and many activities that have long been authorized NWP do not have any industry standards.

A few commenters stated that NWP A should require agency coordination under paragraph (d) of NWP general condition 32. One commenter said that NWP A PCNs should be coordinated with federal and state natural resource agencies of adjacent states and that applicable state permits must be obtained prior to the Corps issuing an NWP verification for seaweed mariculture activities. Many commenters said that seaweed mariculture activities should be coordinated with state resource agencies and the public.

The activities authorized by this NWP may require consultation or coordination with the U.S. FWS or NMFS. Consultation with the U.S. FWS and/or NMFS is required for proposed activities that the district engineer determines ''may affect'' listed species or designated critical habitat. Essential fish habitat consultation with the NMFS is required for any proposed activity that the district engineer determines ''may adversely affect'' essential fish habitat. Corps districts may develop informal coordination procedures with state resource agencies. Activities authorized by NWPs do not involve coordination with the public. Coordination with the public is only require for activities authorized by standard individual permits.

One commenter said that seaweed mariculture activities authorized by NWP A should be limited to small scale projects. One commenter recommended adding a ½-acre limit to this NWP. One commenter stated that seaweed mariculture facilities for biofuels production are in the range of over 1,000 hectares and issuing an NWP to authorize seaweed mariculture activities at that scale would not sufficiently consider the environmental risks. One commenter said that the necessary spatial arrays required for seaweed mariculture would cause conflicts from multiple existing offshore uses.

The Corps does not agree that this NWP should be limited to small-scale project or activities less than ½-acre in size. If a project proponent submits a PCN for a large-scale seaweed mariculture activity, and the district engineer determines the proposed activity will result in more than minimal individual and cumulative adverse environmental effects, he or she will exercise discretionary authority and require an individual permit for the proposed activity. During the evaluation of the PCN, the district engineer will evaluate potential conflicts in resource uses, in accordance with the public interest review factors identified in 33 CFR 320.4(a).

Many commenters stated that the seaweed species to be grown should be the same indigenous genetic stock as found in the waters of the proposed seaweed mariculture activity. One commenter said that the terms and conditions of the proposed NWP address the introduction of non-native species but not the role that mariculture may play in the role of further spreading invasive or aquatic nuisance species. One commenter stated that NWP A should impose rigorous operation emergency response standards. One commenter stated that NWP A should have clear requirements for removing derelict structures.

The Corps has modified this NWP to state that it prohibits the cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody. Invasive or aquatic nuisance species can spread or be introduced into new areas through a variety of mechanisms, and the Corps does not have the authority to prevent the spread or introduction of those species through those other mechanisms. General condition 13 requires, to the maximum extent practicable, the removal of temporary structures from navigable waters after their use has been discontinued. For permanent structures, the Corps has added a provision to this NWP to require the permittee to remove these structures from navigable waters of the United States when those structures will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

One commenter recommended requiring the siting of NWP A activities at least 200 meters away from corals, seagrass beds, mangroves, critical habitat, and migration pathways. A few commenters asserted that seaweed mariculture activities are known to impair water quality, and special aquatic sites such as coral, seagrass, and mangroves are especially susceptible to water quality impacts. A few commenters said that seaweed mariculture facilities should not be permitted near sensitive habitat areas or near marine protected areas. One Commenter remarked that seaweed mariculture activities could result in economic impacts to the region where these activities are located by interfering with commercial and recreational fishing activities. One commenter said that operations of seaweed mariculture activities could result in aesthetic impacts to the region. One commenter expressed concerns with potential impacts on navigation and public uses of the waterbody that may be caused by seaweed mariculture activities. One commenter stated that seaweed mariculture facilities should be distant from areas used by the public. One commenter said that NWP A should be revised to recognize that some state boundaries may extend beyond three nautical miles from shore.

Based on the characteristics of regional ecosystems, division engineers can add regional conditions to this NWP to site NWP A activities specific distances from aquatic resources or areas that may warrant additional protection, such as corals, seagrass beds, mangroves, critical habitat, and migration pathways. Seaweed mariculture activities cultivate macroalgae that take up nitrogen and phosphorous and other nutrients from the water column and generally are understood to improve water quality. Organic matter may be sloughed off of the cultivated seaweeds, which can provide nutrients for benthic communities. The seaweed grown at seaweed mariculture facilities can provide economic benefits such as biofuels, food ingredients, and pharmaceuticals. When reviewing PCNs, district engineers will evaluate potential conflicts in use of navigable waters, such as fishing, recreational, and military uses, as well as potential impacts to aesthetics in the project area. Activities authorized by this NWP must comply with general condition 1, navigation. Navigable waters are available for a variety of public uses, as well as various types of activities authorized for private use. Activities authorized for private use often involve structures that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899, which may include structures for seaweed mariculture activities. The variability in state boundaries for the purposes of identifying the territorial seas does not warrant any specific changes to NWP 55.

One commenter stated that shellfish farming activities are known to spread pathogens and the proposed NWP would not sufficiently address environmental concerns for offshore systems. A few commenters said seaweed mariculture facilities should not be permitted to use pesticides, herbicides, or pharmaceuticals. One commenter said that existing shellfish mariculture facilities permitted under NWP 48 should continue to be

authorized under NWP 48 rather than authorized by NWP A. One commenter stated it would be more appropriate if seaweed was included under NWP 48 because bivalves are typically the primary cultivated species.

The Corps does not have the authority to take actions to control the spread of pathogens. Pathogens can spread through a variety of mechanisms in open systems such as oceans and estuaries. In addition, the Corps does not have the authority to regulate the use of pesticides, herbicides, and pharmaceuticals that might be used in seaweed mariculture activities. In this final rule, the Corps has issued separate NWPs for commercial shellfish mariculture activities and seaweed mariculture activities. Under NWP A bivalves can be grown with seaweeds are part of a multi-tropic mariculture activity.

A few commenters said that proposed new NWP A would have impacts on ESA-listed species and designated critical habitat. One commenter stated that ESA Section 7 consultation should be mandatory for all seaweed mariculture projects. One commenter said that incidental take permits under the ESA should be obtained before district engineers issue NWP verifications for these activities. A few commenters said that NWP A activities should have severe consequences for non-compliance, including revocation of the NWP authorization.

Activities authorized by this NWP must comply with general condition 18, endangered species. District engineers will review PCNs for proposed seaweed mariculture activities and if the district engineer determines the proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS or NMFS as appropriate. If the district engineer initiates section 7 consultation with the U.S. FWS or NMFS, the NWP verification cannot be issued until that consultation is completed. District engineers will also take appropriate actions to address non-compliance with the conditions in NWP A.

Proposed new NWP A is issued as NWP 55, with the modifications discussed above.

(14) NWP 56. Finfish Mariculture Activities

The Corps proposed this new NWP as NWP B, to authorize structures and work in navigable waters of the United States, including federal waters over the outer continental shelf, for finfish mariculture activities.

The Corps removed the phrase ''and work'' from this NWP because this NWP only authorizes structures, and this NWP does not authorize any of the operational aspects of finfish mariculture activities. The operation of a finfish mariculture facility does not constitute ''work'' as that term is defined at 33 CFR 322.2(c) for the purposes of Section 10 of the Rivers and Harbors Act of 1899. Section 322.2(c) defines ''work'' as ''any dredging or disposal of dredged material, excavation, filling, or other modification of a navigable water of the United States.'' After the finfish mariculture structure is installed, subsequent operations to produce finfish do not physically modify navigable waters of the United States in a manner that would be considered ''work'' under the Act.

Some commenters supported the issuance of this NWP and some commenters opposed issuance of this NWP. A couple of commenters said that this NWP does not authorize activities that are similar in nature. Many commenters said that finfish mariculture activities should require individual permits to give the public an opportunity to review proposed activities. One commenter stated that finfish mariculture activities could result in significant cumulative impacts on marine wildlife and the environment, which cannot be properly assessed and mitigated. One said that finfish mariculture activities in estuarine waters should require individual permits because of the high risk of water quality impacts, animal escapes, and habitat damage.

This NWP authorizes structures in navigable waters of the United States for finfish mariculture activities. A category of activities for an NWP is based on the general characteristics and uses of the permitted activity. A category of activities is not based on potential configurations of the regulated activities, or the size of those activities. Concerns about the size of authorized activities and potential adverse environmental effects can be addressed in part by addition quantitative limits on the NWP. The Corps believes there are finfish mariculture activities that can result in no more than minimal individual and cumulative adverse environmental effects and are appropriate for NWP authorization. In addition, the NWP regulations at 33 CFR part 330 include numerous provisions that allow district engineers to exercise discretionary authority to require individual permits for activities when the determine those activities will cause more than minimal adverse environmental effects. Division engineers have the authority to modify, suspend, or revoke an NWP on a regional basis (see 33 CFR 330.5(c)). District engineers have the authority to modify, suspend, or revoke an NWP authorization on a case-by-case basis (see 33 CFR 330.5(d)). The potential individual and cumulative adverse environmental effects caused by finfish mariculture activities will be assessed by district engineers when they review PCNs for proposed activities. For some of the adverse environmental effects identified by commenters, the Corps lacks the authority to regulate the particular activities that are the cause of those effects.

Several commenters recommended the development and implementation of project-specific permit conditions to ensure that authorized activities will have no more than minimal individual or cumulative adverse environmental effects. Several commenters requested that NWP B include conditions limiting the amount of feed, pesticides, herbicides, pharmaceuticals that can be released in project waters. A couple of commenters suggested NWP B require specific design and operation standards, including depth and current velocity guidelines for net pen siting class size. A commenter said that the geographic variability of aquatic environments and their ecological functions would be problematic when characterizing project impacts of finfish mariculture activities on a national scale.

Project-specific conditions are more appropriately identified by district engineers when they review PCNs for proposed NWP B activities. If a proposed activity is authorized by NWP B, the district engineer will add appropriate conditions to the NWP authorization to help ensure that the adverse environmental effects are no more than minimal, individually and cumulatively. Permit conditions must be directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable (see 33 CFR 325.4(a)). Potential permit conditions addressing finfish mariculture operations, such as amount of feed, pesticides, herbicides, pharmaceuticals that can be released in project waters are beyond the scope of the Corps' legal authority, because the Corps does not have the authority regulate discharges of feed, pesticides, herbicides, and pharmaceuticals into navigable waters, including federal waters on the outer continental shelf. District engineers will review PCNs for proposed NWP B activities, which will include information on the design and size of the proposed structures. During

the evaluation of PCNs, district engineers consider the current environmental setting and the ecological functions currently being provided by aquatic resources in the vicinity of the proposed activity.

A couple of commenters said that notification to the U.S. Coast Guard should be required for all proposed finfish mariculture projects to ensure that structures are not placed within restricted zones, shipping safety fairways, federal channels, traffic separation schemes or within U.S. EPA- or Corps-designated open water dredged material disposal areas. The Corps believes it is the project proponent's responsibility to notify the U.S. Coast Guard of the proposed activity, if such notification is required by law or regulations.

One commenter stated that the availability of an NWP for finfish mariculture activities could be beneficial in promoting the business of finfish mariculture in areas where it is currently difficult to gain approval. The commenter added that growing seasons should be extended to allow for more jobs and tax revenue. One commenter suggested adopting location specific terms (freshwater, marine, offshore) and dropping the term ''activity'' and instead use ''practice''

The Corps proposed this NWP to provide authorization under Section 10 of the Rivers and Harbors Act of 1899 for structures used for finfish mariculture activities. Project proponents may be required to obtain other federal, state, and local authorizations required by law or regulation. This NWP does not have any limitations related to growing seasons. The Corps believes it has provided sufficient specificity regarding which types of waters this NWP can be used in (*i.e.,* marine and estuarine waters), including the use of term ''mariculture'' instead of the broader term ''aquaculture.'' The Corps' authorization is limited to the installation of structures in navigable waters of the United States, which is why the term ''activity'' is used. The Corps does not regulate the operation of the finfish mariculture facility during the production of finfish, and the activities associated with production activities such as feeding, handling, and administering antibiotics, therapeutics, and other chemicals.

Regarding multi-trophic mariculture projects, one commenter stated that the activity is still considered experimental, with potential for adverse environmental impacts and a lack of proven success at commercial sales, and would therefore not be suitable for authorization under a NWP which should only be utilized for projects with predictable outcomes. The Corps understands that multi-trophic mariculture activities have been practiced in other countries (Largo et al. 2016, Troell et al. 2009), so it is not an experimental approach. It is intended to cultivate different tropic levels to help reduce nutrient loads to surrounding waters.

Many commenters stated that applicants should be required to clarify the species to be farmed as well as provide information on broodstock source and quantity. Several commenters said that PCNs should include project-specific details regarding configuration, structures, techniques, proposed production quantities, densities, spacing, and containment systems. One commenter recommended that the PCN include a decommissioning plan.

The Corps has added text to this NWP to prohibit the cultivation of aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 and the cultivation of nonindigenous species unless that species has been previously cultivated in the waterbody. The Corps only regulates the structures used for finfish mariculture activities, and their configuration in the waterbody. The Corps does not have the authority to regulate the techniques used to produce finfish, or how many finfish are produced over a specific period of time. If the project proponent wants to cease using the authorized structures for finfish mariculture activities, those structures must be removed. General condition 13 requires, to the maximum extent practicable, the removal of temporary structures from navigable waters after their use has been discontinued. For permanent structures, the Corps has added a provision to this NWP to require the permittee to remove these structures from navigable waters of the United States when those structures will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

A few commenters said that all finfish mariculture activities should require PCNs so that district engineers can evaluate consistency with environmental standards, impacts to navigation, commerce, fishing, and other resource use conflicts. One commenter suggested that the applicant should be required to disclose in the PCN the intended use of acoustic deterrent devices. Many commenters suggested that a higher level of detail should be required for finfish mariculture activity PCNs. A few commenters said the PCN should include a site analysis incorporating available spatial information including depth, wave climate, current velocity, substrate type, and proximity to any hard-bottom habitats. A couple of commenters stated that applicants should be required to provide detailed site maps, indicating the project location in relation to ecologically important marine/estuarine areas. One commenter said that applicants should be required to disclose the proposed activity's proximity to other mariculture or commercial fishing operations.

All activities authorized by this NWP require PCNs. The Corps does not have the authority to regulate the use of acoustic deterrent devices, so it would be inappropriate to require disclosure of the use of such devices in PCNs for proposed NWP B activities. The information requirements for PCNs in paragraph (b) of general condition 32 are intended to provide the information necessary for the district engineer to determine whether a proposed activity qualifies for NWP authorization without an excessive amount of paperwork. The Corps declines to require the suggested information for NWP B PCNs because it is not needed to assist the district engineer in the determination of NWP eligibility.

A few commenters said that the PCN should include a detailed statement on avoidance and minimization measures regarding the following impacts: Attraction and entanglement of wild fish, sharks, mammals, and seabirds; effects of chemicals, antifoulants, feed, and waste on water quality, habitat, and marine life; physical effects of all structures on habitat and marine life; displacement, disruption and risks to existing fishing activities; economic impacts to fishing industries; and spatial conflicts with other ocean users. A few commenters said that the applicant should be required to provide prevention, monitoring, and response plans that address escapement of cultured adults, progeny, and gametes; release of antimicrobials; disease transmission to wild stocks; release of nutrients; chemical pollution; structural failures; entanglement of fishing gear and marine species; small vessel strikes; and marine debris.

The Corps does not agree that the suggested information is necessary for PCNs for proposed NWP B activities to assist in the district engineer's determination regarding whether the proposed activity regulated by the Corps (*i.e.,* the placement of structures in navigable waters of the United States for finfish mariculture activities) is expected to result in no more than

minimal individual and cumulative adverse environmental effects. Much of the suggested information relates to operational aspects of finfish mariculture operations, which the Corps does not have the authority to regulate or control.

One commenter stated that under NWP review, there is potential for an applicant to begin work within 45-days of submitting a PCN, even if the permittee has not received a written response from the district engineer. The commenter said that the 45-day default authorization should not occur and that the proposed activity cannot proceed until the district engineer issues a written verification.

After the Corps district receives a PCN, the prospective permittee cannot begin the activity until either: (1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or (2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer (see paragraph (a) of general condition 32). If the permittee was required to notify the Corps pursuant to general condition 18 that listed species or designated critical habitat (or species proposed for listing) might be affected or are in the vicinity of the activity, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or that any consultation required under Section 7 of the Endangered Species Act has been completed. The Corps declines to add a provision to NWP B to require the project proponent to receive written authorization from the Corps prior to commencing the authorized activity.

A couple of commenters expressed concern that structure placement within estuarine habitats may result in reduced current, velocity, altering circulation patterns, and consequently changing substrate characteristics. One commenter stated that the addition of artificial structures and moorings, and changes to seabed alter topography and hydrodynamics. Some commenters voiced concerns regarding the use of NWPs for emerging finfish mariculture activities, due to potential impacts on water quality, habitat, and wild species, requesting that activities in the area be reviewed through the individual permit process.

The Corps acknowledges that structures placed in navigable waters may reduce water velocities to some degree and alter sediment transport and coastal erosion and deposition processes. District engineers will review proposed NWP B activities and determine whether it minimizes the impacts where practicable pursuant to general condition 23. Division and district engineers have discretionary authority to modify, suspend, or revoke NWP authorizations to further condition or restrict the applicability of an NWP when they have concerns for any factor of the public interest (see 33 CFR 330.1(d)).

Many commenters said that construction of finfish mariculture operations should be prohibited within a specific proximity to marine protected areas, submerged aquatic vegetation, reef communities, habitats with significant important to existing aquatic communities, migration pathways, at specific water depths, and those areas subject to chronic oxygen and nitrogen depletion. A few commenters stated that finfish mariculture activities should be prohibited from areas identified as being prone to hypoxia or otherwise ecologically sensitive. Several commenters said that increases in finfish mariculture projects would have the potential to damage the commercial fishing industry by either decreasing the need for wild fishing or by causing adverse impacts to the health and habitat of wild fished species. One commenter stated that finfish mariculture could have the potential to adversely impact local economies by pushing out responsible, small-scale seafood producers and crop growers.

Several commenters expressed concern with spatial conflicts, specifically with fishing, fishery research cruises, and long-term ocean monitoring stations which occupy much of state and federal waters. Additional potential conflicts identified by commenters included gear entanglement, displacement from traditional fishing areas, navigational safety, and income loss. Many commenters raised concerns about project siting requirements, with one commenter suggesting that the Corps should be required to perform a spatial siting analysis prior to issuance of an NWP verification to ensure the proposed activity does not interfere with existing fisheries operations, research projects, or affect federal marine protected areas, and essential fish habitat.

Impacts regarding navigation are localized and therefore it is more efficient for district engineers to evaluate potential impacts in their review of PCNs. Finfish mariculture operators have, absent any potential exceptions, the same rights to use navigable waters as other users such as fishers, recreational users, researchers, and commercial users as long as they obtain all required federal, state, and local authorizations. In addition to the authorization under Section 10 of the Rivers and Harbors Act of 1899, finfish mariculture operators may be required to obtain other federal, state, or local authorizations. The Corps does not have the authority to conduct spatial planning for finfish mariculture activities. If the district engineer determines a proposed NWP B activity may adversely affect essential fish habitat, he or she will conduct essential fish habitat consultation with NMFS. Activities in marine protected areas may be require authorizations from the federal or state agency that has management responsibilities for those areas.

A couple of commenters stated that structures could cause interference with access to treaty protected fishing grounds for tribal fisherman. Several commenters said that these activities could impact recreational activities by closing off areas of navigable waters that would otherwise be used for boating, fishing, tourism, and other water-related activities. A few commenters stated that finfish mariculture activities would close off or privatize areas currently used by the commercial fishing industry. One commenter stated that finfish mariculture activities could have the potential to adversely impact local economies by pushing out responsible, small-scale seafood producers and crop growers.

Activities authorized by NWP B must comply with general condition 17, tribal rights. District engineers will review PCNs for proposed NWP B activities and assess potential impacts to navigation, including boating, fishing, tourism, and other water-related activities that use those navigable waters. There are a variety of activities (*e.g.,* piers, port facilities, marine hydrokinetic devices) authorized by the Corps in navigable waters under its section 10 authorities that preclude or restrict use by others. The potential economic impacts of finfish mariculture activities on local businesses and residents is outside the Corps' control and responsibility.

A couple of commenters said that finfish mariculture activities should raise farmed species that live in or adjacent to the body of water, to minimize the introduction of disease from species relocated from other regions. Another commenter suggested using only species native to the ecosystem where the finfish mariculture activity is located. One commenter requested the establishment of

exclusion zones, using assessments that consider not just the immediate area, but potential impacts to nearby waters as well. One commenter said that by requiring siting of finfish mariculture outside of known migratory pathways, predation from wild species may be minimized, entanglements may be reduced, and potential fish spills from net/cage damage by predatory species may also be reduced. One commenter suggested siting finfish mariculture activities in deep, open waters to minimize the effects of nutrient and sediment dispersal from the project site, which may cause increases in nitrogen and phosphorous levels, as well as increases in phytoplankton and algae. Several commenters said that finfish mariculture activities should not be authorized in estuarine waters to minimize adverse effects to water quality. A few commenters stated that the PCN review process does not provide for adequate planning and would eliminate project-specific public notice and comment period that would facilitate responsible site selection.

The Corps does not have the authority to specify which species are cultivated at a finfish mariculture structure authorized by the Corps under section 10 of the Rivers and Harbors Act of 1899. In addition, the Corps does not have the authority to establish mariculture exclusion zones in navigable waters. Siting requirements on finfish mariculture activities may be imposed by other federal, state, or local government agencies.

Many commenters expressed concerns regarding potential impacts to existing habitat, specifically coral reef systems, mangroves, and submerged aquatic vegetation that could be caused by increases in nutrient and sediment dispersal from the finfish mariculture operation. One commenter said that net pen structures and their associated anchoring systems have the potential to increase available habitat, supporting biodiversity, similar to engineered artificial reefs. In addition, this commenter said that the structures would prevent trawling of the benthic ecosystem within the footprint of the facility, further protecting species.

When reviewing PCNs for proposed NWP B activities, district engineers will evaluate potential impacts on habitats in the vicinity of the proposed finfish mariculture structures. The Corps acknowledges that finfish mariculture structures can provide structural habitat that benefits some aquatic species, as well as providing some refuge from predators and fishers.

Several commenters expressed concerned with the potential entanglement of wild fish and marine mammal species, stating that NWP review would not allow for adequate evaluation for potential impacts. One commenter discussed the potential for illegal extermination of predator species such as sea lions by operators of finfish mariculture facilities. A few commenters raised concerns regarding the use of acoustic deterrent devices, which they said are not consistently useful and have been known to cause deleterious impacts to non-target species. Other commenters stated that these activities would have the potential to attract and concentrate predators, which may lead to entanglements or vessel strikes. One commenter said that risks and impacts to protected species are minimized by existing federal requirements for operations, including the use of improved technologies and regular maintenance, such as line-tightening, which has been shown to prevent accidental entanglement. A few commenters stated that this NWP must prohibit gear types known to cause harm to marine species. One commenter said that finfish mariculture structures should be removed from waters during peak seasons for protected species.

If the district engineer determines that a proposed finfish mariculture activities may affect listed species or designated critical habitat, he or she will conduct ESA section 7 consultation with the U.S. FWS and/or NMFS. The operator of the finfish mariculture facility may also need to obtain authorization under the Marine Mammal Protection Act. The ESA section 7 consultation may result in permit conditions added to the NWP authorization to minimize the risk of entanglement of listed species. The Corps does not have the authority to regulate the management of predator species at a finfish mariculture facility, or the use of acoustic deterrent devices. The use of acoustic deterrent devices would be addressed through the ESA section 7 consultation process and/or the Marine Mammal Protection Act authorization process, if applicable.

One commenter said that finfish mariculture operations should only be stocked with eggs, larvae, or juveniles from pen-raised lineages, in order to avoid the need for wild capture. Another commenter stated that the cultivated species should have the same indigenous genetic stock as individuals of the species in the waters where the proposed finfish mariculture activity is located. The Corps does not have the authority to impose requirements on the stocking of finfish mariculture facilities, or which genetic stocks are cultivated.

Many commenters stated concerns with the potential for accidental fish escapements by individual species because the introduction of non-native species may spread pathogens and parasites to wild species, increase competition to at-risk communities, and cause genetic degradation among existing fish populations. Several commenters discussed the 2017 escape of over 200,000 non-native Atlantic salmon in the Puget Sound as a result of finfish mariculture operations, with some commenters requesting that these activities require individual permits, and other commenters stating that regional conditions should be implemented to ensure structural integrity of facility structure and prevent escape recurrences. One commenter said that although the Corps lacks the authority to regulate finfish escapes, it can require structures installed in navigable waters to be constructed to a standard where escape risks can be mitigated. One commenter stated that applicants should be required to report escape events to the Corps and that the Corps should maintain a database to monitor events and better prevent them in the future. A few commenters said that a universal standard should be developed that specifies requirements for the proposed finfish mariculture facilities and related features that would meet challenges posed by severe weather, and prevent potential escapements.

The Corps does not have legal authority to regulate the potential escapement of cultivated finfish. The Corps acknowledges that finfish mariculture activities have the potential to facilitate the spread of pathogens and parasites, but the Corps does not have the authority to regulate or control those occurrences. General condition 14 requires proper maintenance of authorized structures and fills. The project proponent is responsible for designing and constructing the finfish mariculture structures so that they have an appropriate degree of structural integrity. Since the Corps does not have the authority to address potential fish escapes, there would be no useful purpose served by requiring the operator to report escapes to the Corps, or for the Corps to maintain a database to track escape events.

One commenter said that all mariculture operations should be considered point sources under the Clean Water Act and be required to obtain discharge permits. This commenter also said that routine disease testing and other water quality monitoring should also be mandated. One stated that effects to water quality within the local environment from other sources would have the potential to

cause impacts to cultured species and subsequently economic returns of the finfish farm, suggesting that maintenance of the facility would be in the best interest of the operation and thus encourages management operations that support the local environment. Some commenters said that finfish mariculture activities can cause changes to benthic community composition beneath and adjacent to structures because of excess feed, feces, and antifoulant accumulation. A couple of commenters stated that finfish mariculture projects should be held to the same regional water quality standard as offshore seafood processors. Several commenters expressed concern with the ingredients utilized in fish feed, which one commenter said often contains toxic heavy metals like cadmium and zinc and recommended that feed formulation and efficiencies be standardized and managed in order to lessen adverse environmental impacts. Another commenter suggested that finfish mariculture operators should be required to publish reports with the complete traceability of all mariculture feed products. One commenter asserted that permittees be required to provide proof that the finfish mariculture operations would not contribute to hypoxia in receiving waters.

Some finfish mariculture operations may require authorization under Section 402 of the Clean Water Act for discharges from finfish mariculture operations. Section 402 of the Clean Water Act is administered by the U.S. EPA or states with approved programs. The Corps lacks the authority to require disease testing and water quality monitoring. Water quality monitoring may be required by states in estuaries and the territorial seas. The Corps acknowledges that finfish mariculture activities can have effects on benthic communities. The Corps does not have the authority to regulate the production of finfish after the mariculture facility is constructed.

Several commenters expressed concerns about the potential effects of the use of antimicrobials, pesticides, and anti-foulants, and the introduction of excess feed and fish waste in project waters. These commenters stated that use of these materials could lead to degradation of water quality, risking public health, and increase organic nutrient loads leading to eutrophication, causing widespread damage to wildlife. A few commenters said that industrial finfish mariculture operations may cause adverse impacts to public health, as the antibiotics, pesticides, and other chemicals that are heavily used to prevent disease and parasites in farmed species could accumulate in fish tissues to be consumed by the public. One commenter stated that these issues have influenced other countries like Canada, Argentina and Denmark, to move away from industrial finfish mariculture.

The Corps does not have the authority to regulate the use of antimicrobials, antibiotics, pesticides, anti-foulants and other chemicals, how feed is provided to the cultivated finfish, or the composition of that feed and its potential effects on water quality. Water quality concerns may be addressed through state or federal water quality standards under the Clean Water Act, or state laws.

A couple of commenters said that ESA section 7 consultation should be mandatory for all proposed finfish activities and that all applicants should be required to obtain an incidental take permits for potential effects to listed species. One commenter stated that NOAA would be the appropriate agency to provide expertise in reviewing and assigning specific permit terms in regard to site selection, conflicts between aquaculture projects, marine resources, other ocean users, and wild-capture fisheries. A couple of commenters said that individual finfish mariculture projects should be coordinated with state natural resource agencies to identify regional and site-specific concerns, needs analyses, and project-specific conditions.

All activities authorized by this NWP require PCNs. If the district engineer reviews a PCNs and determines that any proposed activity may affect listed species or designated critical habitat, he or she will conduct ESA section 7 with the U.S. FWS and/or NMFS as appropriate. Incidental take permits are issued under Section 10(a)(1)(B) of the ESA, not section 7(a)(2). The Corps declines to add a provision to this NWP requiring coordination with state natural resource agency, whose legal authorities are highly variable and generally do not apply in federal waters.

One commenter questioned the Corps' reliance on general condition 23 to minimize project impacts. Another commenter said that all NWP B applicants should be required to provide a mitigation plan. Several commenters voiced concern over the risk for breakage of anchored mooring systems for finfish mariculture structures during significant weather events, which increases risks to navigational safety and marine debris. Additional concerns regarding marine debris were voiced by another commenter, who suggested that operators may dispose of solid waste into waters rather than through appropriate methods. One commenter recommended requiring agency coordination for proposed NWP B activities under paragraph (d) of general condition 32.

General condition 23 provides the mitigation requirements for the NWPs. District engineers can require the project proponent to submit a mitigation plan if, after reviewing a PCN, the district engineer determines that mitigation is necessary to ensure the authorized activity will cause no more than minimal individual and cumulative adverse environmental effects. The project proponent is responsible for designing and constructing the finfish mariculture facility so that it complies with applicable engineering standards, and will maintain structural integrity within the appropriate parameters of sea and weather conditions, and potential predatory behavior by large vertebrates. The Corps does not believe that agency coordination under paragraph (d) of this NWP is necessary for these activities.

One commenter asserted that the draft decision document for NWP B did not meet NEPA requirements, stated that it lacked adequate discussion on purpose and need, which the public needs for consideration of the scope of reasonable alternatives. One commenter said that an environmental impact statement should be required for approval of NWP B, claiming that the Corps failed to adequately discuss how potentially significant impacts will be mitigated below the level of significance in the draft decision document. One commenter stated the Corps failed to address potential adverse cumulative impacts at a regional level where specific locations recently identified by NOAA are more likely to be impacted.

The national decision document for this NWP was revised to address the requirements for environmental assessments in the Council on Environmental Quality's NEPA regulations that were published in the **Federal Register** as a final rule on July 16, 2020 (85 FR 43304). A section on purpose and need was added to the national decision document. The Corps made a finding of no significant impact. Therefore, an environmental impact statement is not required for the issuance of this NWP. The national decision document considers the cumulative effects expected to occur as this NWP is used during the 5-year period it is anticipated to be in effect, and it is a national analysis since the geographic scope of the national decision document is the United States. Division engineers consider cumulative effects of NWP activities on a regional basis.

One commenter stated that the minimal effect determination is conclusory, as no quantitative impact limits, general conditions, or regional conditions have been specified and the impact section did not provide discussion on any foreseeable or unknown impacts. One commenter said that the Corps' minimal effects determination should provide estimates for the anticipated size of mariculture operations to be permitted under NWP B and potential impacts of those operations based on known impacts of net pen finfish mariculture.

The Corps did not provide a minimal effects determination in the draft national decision document, so the commenter cannot say that it is conclusory. The NWPs are not required to have quantitative impact limits, and the proposed NWP general conditions were provided in the proposed rule. The regional conditions have not been finalized by division engineers. The draft decision document discusses reasonably foreseeable impacts. The Corps is not required to consider speculative impacts. The Corps did provide estimates of the impacts that may occur during the 5-year period this NWP is anticipated to be in effect.

Proposed NWP B is issued as NWP 56, with the modifications discussed above.

(15) NWP 57. Electric Utility Line and Telecommunications Activities

The Corps proposed this new NWP as NWP C, to authorize discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for electric utility line and telecommunications activities.

Many commenters expressed support for the proposal to issue a separate NWP for electric utility line and telecommunications activities. They said that the creation of this new NWP for electric utilities represents a tailored approach to regulated industries and effectively addresses differences in how the various types of utilities are constructed, installed, maintained, and removed. Many commenters supported retaining the basic structure of the 2017 NWP 12 for proposed new NWP C, as well as continuing the longstanding definition of ''single and complete'' project, providing authorization for temporary structures, fills, and work, and imposing the same acreage limits. One commenter supports the Corps' proposal to include the list of structures and fills in NWP C, including utility lines, substations, foundations for towers poles and anchors, access roads, temporary structures, fill, and work for remediation of drilling fluid returns from horizontal directional drilling, and temporary structures, fill, and work including temporary mats for utility line and telecommunications activities.

The Corps is issuing NWP C to authorize discharges of dredged or fill material into waters of the United States and structures and work in navigable waters of the United States for electric utility line and telecommunications activities. For the text of NWP C, the Corps has retained a structure similar to the structure of NWPs 12 and D, and there are some differences in the specific text of NWPs 12, C, and D to address differences in utility line sectors. The Corps is also retaining the regulatory approach for authorizing single and complete linear projects, where each separate and distant crossing of waters of the United States may be covered by its own NWP authorization. The corps is also retaining the ½-acre limit for each separate and distant crossing of waters of the United States and for the construction, maintenance, or expansion of substations for electric utility and telecommunications lines. The Corps is also including the authorization of temporary structures and fills, as well as DA authorization for remediation activities requiring DA authorization that may be needed to address inadvertent returns of drilling fluids, consistent with NWPs 12 and D.

Many commenters stated that they expect court challenges to oil and gas pipeline activities to continue, and therefore support the issuance of a separate NWP for electric utility line and telecommunications activities. By creating a separate NWP for these activities, it is the hope of these commenters that these electric infrastructure activities will not be disrupted by future NWP 12 litigation.

The Corps acknowledges that the issuance of NWP C can help reduce regulatory uncertainty for entities that construct and maintain electric utility lines and telecommunications lines. Past litigation on NWP 12, especially for oil or natural gas pipelines, has caused concerns about the availability of NWP authorization for electric utility lines and telecommunication lines and their ability to serve people living in the United States.

Several commenters noted that proposed NWP C is important as the scale of electrical energy generation from renewable energy sources increases. These commenters said there will be a need for additional electric transmission facilities to convey the electricity from the generation facilities to the end users. Several commenters stated that proposed NWP C will satisfy Section 404(e) of the Clean Water Act by authorizing activities that have no more than minimal adverse environmental effects, while continuing to allow for timely and efficient authorization of these activities. These commenters said that the techniques used to construct, maintain, and repair most electric transmission lines generally result in fewer impacts to waters of the United States compared to the techniques used to construct other types of utility lines. Several commenters requested that the Corps not issue proposed NWP C, stating that the activities authorized by this NWP would cause significant adverse impacts in violation of Section 404(e) of the Clean Water Act. These commenters said individual permits should be required for these activities.

The Corps also appreciates the potential for new NWP C to support electric energy generation from renewable energy generation facilities, including activities authorized by NWPs 51 and 52. The Corps believes that the conditions for NWP C, including the reviews of PCNs for certain activities authorized by NWP C and the ability of division and district engineers to modify, suspend, and revoke NWP C authorizations, will help ensure that activities authorized by NWP C result in no more than minimal individual and cumulative adverse environmental effects.

A few commenters noted that the issuance of NWP C would allow the Corps to incorporate industry-specific standards, appropriate regional conditions, and best management practices tailored to each utility line NWP. A few commenters said that proposed NWP C is important because the process of applying for and obtaining an individual permit is time consuming, expensive, and subject to regulatory uncertainty. These commenters said that increased costs and burdens that result from the individual permitting process can affect not only the members, but the amount of costs that are passed on to consumers and indirectly borne by the rural public. One commenter stated that the availability of NWPs authorizing the construction, maintenance, repair, and removal of utility lines and associated facilities is essential to the expansion of necessary infrastructure to remote areas in the United States.

In this final rule, the Corps discusses suggestions for best management practices and national standards that commenters provided in response to the 2020 Proposal. The Corps acknowledges that the issuance of NWP C will further the objective of the NWP program,

which is to regulate with little, if any, delay or paperwork certain activities having minimal impacts (33 CFR 330.1(d)).

One commenter stated that fiber optic lines should be specifically added to the definition of electric utility line and telecommunication line. One commenter recommended retaining the following provision in proposed NWP C: ''there must be no change in pre-construction contours of waters of the United States.'' One commenter said that the integrity of power lines in their service area could be severely compromised if vegetation management must be stopped while they obtain individual permits for this necessary and routine activity. Vegetation along electric utility rights of way must be maintained to prevent trees or other vegetation from bringing down power lines and, during dry conditions, preventing power lines from contributing to wildfires.

The Corps has added fiber optic lines to the definition of electric utility line and telecommunication line. The requirement that NWP C activities associated with the construction, maintenance, repair, and removal of electric utility lines and telecommunications lines result in no change in pre-construction contours in waters of the United States do not compromise vegetation management because most vegetation management is conducted above the soil surface. In situations where vegetation management involves the removal of plants and their roots, the project proponent can regrade the soil surface so that there are no changes in pre-construction contours of waters of the United States, including jurisdictional wetlands. The Corps acknowledges that vegetation management is important for safe, reliable operation of electric utility lines and telecommunications lines, and for managing fire risks. However, the Corps does not have the legal authority to require vegetation management activities to manage fire risks. State and local governments may possess that authority.

A few commenters recommended removal of the following sentence from the preamble to the proposed rule: ''The wooden poles used for overhead electric transmission lines can be up to 27 inches in diameter, and these poles are usually inserted into the soil surface by digging a hole, with some soil disturbance in the vicinity of the installed pole.'' These commenters said that utility poles are specified based on class and height, not diameter. In addition, these commenters noted that round treated wood utility poles can be greater than 27 inches in diameter. Lastly, these commenters said that treated wood utility poles can be provided not only as ''round poles'', but also as ''laminated rectangular poles.'' These commenters recommended adding the following sentence to the final rule: ''The wooden poles used for overhead electric transmission lines can be up to 40 inches in diameter or up to 90 inches on any side for rectangular poles.''

The Corps cannot remove sentences from documents that have already been published in the **Federal Register**, and it sees no need to remove this text because it only served as background information for the proposed rule, including the proposal to issue three separate NWPs for different sectors of utility line activities. The Corps acknowledges that this sentence is incomplete, and appreciates the additional clarification provided by the commenter.

A few commenters noted that, although the preamble recognizes the wide array of structure types for utility lines, the language of proposed NWP C appears to assume a limited design configuration for structures to support aerial transmission lines. These commenters said that the requirement for separate footings for each tower leg incorrectly suggests that such lines only utilize lattice tower type structures with multiple legs per structure, which is not the case. Therefore, these commenters recommended that the Corps eliminate this language from the final NWP C to accurately reflect the wide array of structure types that are used to support aerial utility and telecommunication lines. One commenter recommended revising the text as follows: ''This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication line structures, towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary.''

The text of NWP C provides substantial flexibility in authorizing discharges of dredged or fill material into waters of the United States associated with the installation of structures used to support aerial transmission lines. The text of the NWP acknowledges that single poles may be used for overhead transmission lines, and there is flexibility for authorizing discharges of dredged or fill material into waters of the United States for footings that support other types of structures used for aerial transmission lines, including lattice tower types structures. For foundations for overhead electric utility line or telecommunication line towers, poles, and anchors, the Corps is retaining the text of the NWP as proposed.

One commenter supports the Corps' proposal to use the ½-acre limit in proposed NWP C. One commenter stated that it remains unclear when associated facilities are authorized by multiple NWPs, whether the ½-acre limit will be applied to multiple NWPs or if only one NWP will be selected to authorize the associated facilities.

The Corps has retained the ½-acre limit for losses of waters of the United States for each single and complete project authorized by NWP C. General condition 28 addresses the use of multiple NWPs to authorize a single and complete project and that general condition applies to utility line crossings that may involve different types of utility lines authorized by NWPs 12, C, and/or D, where the acreage limit for each single and complete project continues to be ½-acre.

One commenter objected to the inclusion of substation facilities in this NWP, because substations can usually be constructed in uplands. One commenter said the proposed text for foundations for overhead electric utility line or telecommunications lines towers, poles, and anchors should be revised.

The Corps is retaining substations in this NWP because there are likely circumstances where it is not feasible or practicable to site a substation in uplands. This NWP provides DA authorization for discharges of dredged or fill material into waters of the United States for the construction, maintenance, or expansion of electric utility line and telecommunications substations as long as the loss of waters of the United States does not exceed ½-acre.

One commenter stated that the Corps should end the practice of considering timber and other mats used for temporary access and construction as resulting in discharges of dredged or fill material into waters of the United States and as part of the filled area for the PCN thresholds. Some Corps districts count matting toward the PCN threshold for permittees, requiring permittees to submit a PCN if the discharge will result in the loss of greater than 1/10-acre of waters of the United States.

The Corps believes that the decision on whether timber mats or mats constructed of other materials that are used during construction, maintenance, repair, or removal of electric utility lines and telecommunication lines result in discharges of dredged or fill material

into waters of the United States and thus require DA authorization is more appropriately made by district engineers on a case-by-case basis. Such decisions should be made by district engineers after considering the definitions of ''discharge of dredged material'' and ''discharge of fill material'' at 33 CFR 323.2(d) and (f). The use of temporary matting does not constitute a ''loss of waters of the United States'' or count towards the 1/10-acre PCN threshold for losses of waters of the United States as long as the timber matting is removed after completion of the authorized work and the affected area restored to pre-construction elevations.

A few commenters stated that applicants should have to produce containment and clean up contingency plans as a best management practice to address inadvertent returns of drilling fluids during horizontal directional drilling activities. The Corps does not have the authority to require project proponents to develop containment and contingency plans for horizontal directional drilling activities that do not involve discharges of dredged or fill material into waters of the United State or cross navigable waters and require section 10 authorization. The NWP authorizes regulated activities that may be necessary to remediate inadvertent returns of drilling fluids to provide timely responses to such events and help reduce potential adverse effects to the aquatic environment that may occur as a result of these inadvertent returns.

Several commenters supported the two PCN thresholds for proposed NWP C. They stated that limiting the PCN requirements for this NWP to these two PCN thresholds will reduce burdens on the regulated public, simplify NWP C, eliminate redundancy, and focus the PCN requirements on activities that have a substantive potential to result in more than minimal adverse environmental effects. One commenter stated that the proposed PCN requirements add an administrative burden to the Corps and reduce certainty for projects. Many commenters opposed having only two PCN thresholds and requested that NWP C have the same seven PCN thresholds as the 2017 NWP 12.

In the 2020 Proposal the Corps proposed two PCN thresholds for this NWP: (1) For activities that require section 10 authorization, and (2) for discharges that result in the loss of greater than 1/10-acre of waters of the United States. In response to the proposed rule, the Corps received comments recommending the addition of other PCN thresholds that were removed from NWP. For summaries of the comments on the five PCN thresholds that were in the 2017 NWP 12 but removed from the 2021 NWP 12, and the Corps' responses to those comments, interested persons should read the section in this final rule on the reissuance of NWP 12.

One commenter supported the proposal to require PCNs for losses of greater than 1/10-acre of waters of the United States. One commenter recommended requiring PCNs for mechanized land clearing of forested wetlands in the electric utility line right-of-way where greater than 1/10-acre of forested wetland is subjected to mechanized land clearing, instead of requiring PCNs for any amount of mechanized land clearing in forested wetlands. One commenter asked why activities that result in changes in pre-construction contours, but do not result in permanent losses of waters of the United States cannot be permitted by NWP C while activities that do not result in a change to pre-construction contours, but result in up to 1/10-acre of permanent loss of waters of the United States can be permitted by this NWP.

The Corps did not propose to require PCNs for discharges of dredged or fill material into waters of the United States associated with mechanized land clearing of forested wetlands in the utility line right of way. If, for a proposed electric utility line or telecommunications line, the applicant proposes to conduct mechanized land clearing of forested wetlands in the right-of-way for the electric utility line or telecommunications line, a PCN is required if the project proponent will be unable to restore the disturbed wetlands to pre-construction elevations and the activity involves a discharge of dredged or fill material that results in the loss of greater than 1/10-acre of waters of the United States. Nationwide permit C authorizes discharges of dredged or fill material into waters of the United States that result in permanent losses of waters the United States, as long as that loss does not exceed 1/2-acre for each single and complete project.

One commenter opposed the requirement to submit a PCN for activities that require authorization under Section 10 of the Rivers and Harbors Act, regardless of the amount of loss. The Corps has retained this PCN threshold so that district engineers have the opportunity to review these activities and ensure that the authorized activities cause no more than minimal adverse effects to navigation.

Several commenters objected to allowing multiple segments of the same pipeline to qualify for NWP authorization, stating it is a violation of Section 404(e) of the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, and other legal requirements for rigorous and transparent environmental reviews and safeguards. A few commenters noted that while electric and telecommunication lines do not pose the same risks of spills and leaks as oil and gas pipelines, they still allow for greater than minimal impacts by authorizing large electric lines and telecommunications lines under the guise of ''single and complete projects.''

Considering separate and distant crossings of waters of the United States to be linear projects that can be authorized by separate NWPs is a long-standing practice that has been codified in the Corps regulations at 33 CFR 330.2(i) since 1991 (see 56 FR 59110). This practice does not violate Section 404(e) of the Clean Water Act, NEPA, or the ESA. The Corps complies with NEPA when it issues the national decision document for the issuance of an NWP, because that decision document includes an environmental assessment. Activities authorized by NWP C and other NWPs must comply with general condition 18, endangered species. The Corps acknowledges that some spills or leaks may occur from equipment associated with electric utility lines and telecommunications lines, including equipment at substations, but the Corps does not have the authority to regulate such spills or leaks.

A few commenters stated that is that it is unclear how the Corps will evaluate what constitutes a ''project'' under these NWPs for the purposes of determining whether a project exceeds the 1/2-acre limit or results in a loss of more than 1/10-acre in order to trigger the requirement for an individual permit. A few commenters requested additional details regarding what measures will be used to ensure that projects under these NWPs are not improperly divided into smaller sections to avoid an individual permit requirement. Several commenters state that the ''single and complete project'' concept should not apply to the installation of new electric utility line and telecommunication activities. Some commenters said a new electric utility line or telecommunications line should be subject to analysis under NEPA for the entire project, including a cumulative review of all temporary and permanent impacts to waters of the United States from the utility line crossings, access roads, substations, temporary work pads, etc.

The Corps has long-standing practice and experience evaluating single and

complete projects when applying the ½-acre limit and the 1/10-acre PCN threshold for losses of waters of the United States. District engineers have the discretion to determine which regulated activities constitute ''single and complete linear projects'' and ''single and complete non-linear projects'' in accordance with the Corps' regulations and the definitions in Section F of these NWPs. When an NWP C activity requires a PCN, paragraph (b)(4)(i) of general condition 32 requires the applicant to include in the PCN and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. Furthermore, paragraph (b)(4)(ii) of general condition 32 requires the applicant to include in the PCN the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by NWPs but do not require PCNs). The district engineer uses this information to evaluate the cumulative adverse environmental effects of the proposed linear project. Activities authorized by NWP do not require additional NEPA compliance, because the Corps satisfies the requirements of NEPA when it issues the national decision documents for the NWPs.

One commenter stated that a PCN should be required for any new or expanded electric utility line project, and there needs to be an overall limit in acreage of waters of the United States lost as a result of activities authorized by this NWP. A few commenters said that proposed NWP C should include the 250-mile PCN threshold proposed for NWP 12. These commenters asserted that not adding the 250-mile PCN threshold allows for very large projects to be built without a PCN and, therefore, bypass other federal requirements that are triggered by the section 404 process such as the requirements of Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act. One commenter asked whether temporary impacts and impacts that involve conversion from one wetland type to another (*e.g.,* forested wetland to herbaceous) are counted as part of the 1/10-acre PCN notification threshold. These commenters recommended revising the definition of ''loss of waters of the United States'' to include permanent conversion of wetland types.

The Corps does not agree that PCNs should be required for any expansion of electric utility line projects. The information required by paragraphs (b)(4)(i) and (ii) of general condition 32 provides the Corps with information similar to the 250-mile PCN threshold that was added to NWP 12, but the Corps does not believe that the 250-mile PCN threshold is necessary for NWP C because it authorizes projects with typically smaller footprints of discharges of dredged or fill material. Activities authorized by NWP C must comply with general condition 18, endangered species, and general condition 20, historic properties. Temporary impacts are not considered a ''loss of waters of the United States.'' A permanent conversion of wetland type is generally not considered a ''loss of waters of the United States'' because the affected area is still a wetland, and vegetation management activities such as cutting and mowing vegetation or using herbicides are not regulated by the Corps under its permitting authorities.

One commenter stated that Corps districts should maintain consistency with the number of thresholds that trigger the need for a PCNs expressed in the proposed rule. This commenter noted that some Corps districts have already proposed regional conditions that will undercut the changes in the proposed rule. This commenter said that differences in PCN thresholds across Corps districts could complicate NWP C by increasing confusion and inefficiencies.

Division engineers have the authority to approve regional conditions for this NWP based on the characteristics and other factors regarding the ecosystems in their respective regions, including regional conditions that add PCN thresholds. Division engineers can add regional conditions to replace PCN thresholds that were removed from an NWP, if the division engineer determines that PCN threshold is necessary to ensure that the activity has no more than minimal or cumulative adverse environmental effects. Regional conditions are an important mechanism for tailoring the NWP program to address specific resource concerns in a particular geographic area.

Several commenters opposed including Note 2 in NWP C. These commenters said that Note 2 is inconsistent with the requirements of Section 404(e) of the Clean Water Act and that it would allow activities that have more than minimal adverse environmental effects to proceed. One commenter said that proposed Note 2 would explicitly allow the cobbling together of multiple NWPs to authorize high impact pipelines and associated infrastructure that have greater potential for harmful spills, leaks, and the discharges that accompany them. As discussed above in response to comments on the Corps' definition of ''single and complete project'' at 33 CFR 330.2(i), Note 2 is consist with that regulation and this long-standing practice.

One commenter recommended clarifying and rephrasing the following sentence found in Note 3: ''Aerial electric utility lines or telecommunication lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i). The Corps believes that no additional clarification is necessary for Note 3 because it only points to a specific provision of the Corps' regulations to serve as a reminder to project proponents that want to construct electric utility lines or telecommunications lines over navigable waters of the United States.

A few commenters recommended including the term ''and other temporary structures'' in the text of Note 4. These commenters suggested changing Note 4 to state that access roads and other temporary structures such as work pads, temporary utility poles, and pulling and tension pads, used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Note 4 specifically addresses access roads, and the Corps believes it would be inappropriate to address other temporary structures in this note. Temporary structures are addressed in a separate paragraph in the text of NWP C.

A few commenters recommended that if the Corps includes specific best management practices (BMPs) in the final NWP C, it should indicate that the BMPs should be implemented ''where appropriate and practical'' and recognize that implementation of certain BMPs may not be required in all circumstances. These commenters noted that there are a wide range of minimization, avoidance, and management measures deployed to reduce impacts to aquatic environments, some are unique to the electric and telecommunication utility lines. However, it would be difficult to include many of these BMPs as national requirements for all uses of NWP C because their implementation, while

frequent, is site-specific and may not be feasible or useful for minimizing impacts in all scenarios. A few commenters stated that the Corps should not adopt additional national BMPs or other restrictions, and said that such practices should be addressed at the regional level and tailored to local environments, which will allow for greater flexibility. A few commenters said that adding additional BMPs or standards to this NWP would result in redundant requirements to manage on these projects without providing additional benefits.

The Corps agrees that BMPs should be implemented where appropriate and practical, and that it would be more appropriate and efficient to add BMPs to this NWP either through regional conditions added to the NWP by division engineers or activity-specific conditions added to the NWP by district engineers. During its review of the suggested BMPs, the Corps determined that many of these BMPs that are appropriate to apply nationwide would not be appropriate for the NWP at a national level, but they may be appropriate on a region level. The proposed text of NWP includes some BMPs (*e.g.,* requiring no changes in preconstruction contours of waters of the United States, requiring the top 6 to 12 inches of the trench in wetlands to normally be backfilled with topsoil from the trench, removal of temporary fills upon completion of the work).

Many commenters said that the placement of temporary matting in jurisdictional wetlands should continue to be a BMP for proposed NWP C activities to minimize adverse environmental effects. Several commenters recommend requiring the use of low-ground pressure equipment, such as heavy equipment that has been specially designed to spread the weight of the equipment over a larger area, which helps avoid permanent impacts by reducing compaction of wetland soils. One commenter said that use of wattles (*i.e.,* erosion and sediment control devices used to minimize erosion on construction sites) is a general accepted practice to reduce water flow velocities and prevent sediment from flowing into jurisdictional waters. The Corps believes these BMPs are more appropriately applied on a case-by-case or regional basis, in consideration of the characteristics of the affected ecosystems, instead of a national basis.

One commenter stated that the Corps should continue to clearly outline performance criteria within jurisdictional areas because it provides the flexibility needed to facilitate the improvement and development of construction practices that could better protect aquatic resources. One commenter recommended adding a requirement that directional drilling under waters of the United States should be a national standard. One commenter suggested the addition of a BMP to require district engineers to distribute relevant PCNs to state agencies involved in the regulatory oversight or environmental review of projects authorized by the new NWP C. With this NWP, the Corps outlines certain performance criteria (*e.g.,* removal of temporary fills, uses of temporary mats) within jurisdictional waters. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter suggested a BMP where the project proponent tries to cut only vegetation that exceeds a height of 12 feet and allows all low-growing trees and shrubs to remain in place. This commenter said that a benefit of this BMP is that it allows roots to remain in place providing soil stabilization in and around jurisdictional waters. One commenter noted that non-mechanized clearing is preferred consistent with the Corps' regulations at 33 CFR 323.2(d) along with hand clearing, low ground pressure equipment and mats, to minimize and avoid additional impacts to the jurisdictional water or wetland beyond conversion are significantly minimized or avoided. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter said that vibratory plowing is preferred over trenching methods for burying both distribution and fiber optic lines because vibratory plowing under most conditions does not create incidental addition of material. One commenter recommended requiring that material resulting from trench excavation may be temporarily side cast into waters of the United States for very short periods of time well within the limitation of three months, and is not placed in such a manner that it is dispersed by currents or other forces. In addition, this commenter suggested requiring side-cast material to be protected so it does not discharge offsite or into jurisdictional waters during rainfall events. The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis.

One commenter remarked that while burying utilities is an important climate adaptation strategy to address wildfire impacts, such activities should be undertaken in an ecologically responsible fashion, and recommended prohibiting NWP C activities within or under coastal zone waters and wetlands. The Corps does not agree that NWP C activities should be prohibited in coastal zone waters and wetlands.

A few commenters provided the following list of various practices its members implement to help ensure that electric utility line construction and maintenance activities will have no more than minimal adverse environmental impacts:

- Avoiding surface waters when embedding structures (footings, poles, etc.), stockpiling materials, and setting up work areas. Locating poles and tower foundations outside of surface waters to the extent practicable. Where practicable, poles or structures are sited in uplands so that the infrastructure ''spans'' and thereby avoids the aquatic environment.
- When it is not possible to span an aquatic environment, poles or structures are installed in a manner to maintain conductor clearance consistent with North American Electric Reliability Corporation (''NERC'') and other guidelines to ensure safe and reliable operation.
- Installing mats before placing or driving equipment over wetlands or streams.
- Constructing roads with pervious materials and limiting width and elevation, so long as access is safe.
- Relying on low water crossings and appropriately sized culverts.
- Designing site plans to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids when installing electric utility lines under streams or other waters via directional drilling.
- Locating stockpile and work areas outside of surface waters.
- Performing frequent inspections of environmental and safety measures and construction activities.
- Marking waters of the United States near work areas with flagging or perimeter fencing
- Deploying mats prior to driving over or placing heavy equipment on wetlands.
- Installing stormwater BMPs to prevent erosion of hillsides adjacent to construction areas.
- Where practicable, trench material is side casted onto uplands or onto filter cloth, mats, or some other semi-permeable surface in vegetated wetlands.

• Site plans are designed to address the prevention, containment, and cleanup of sediment or other materials caused by the inadvertent returns of drilling fluids when installing electric utility lines under streams or other waters via directional drilling. In the event of an inadvertent return of drilling fluids, the agency is notified, and the remediation plan is implemented.

• Where permanent access is not required, avoidance measures are deployed to minimize impacts to jurisdictional waters to the maximum extent possible.

• Where permanent roads are required, they are typically limited in width and elevation to the minimum necessary for safe access and constructed with pervious materials.

• Stockpiles and work areas are generally established outside of surface waters.

• Timber mats are typically installed prior to placing or driving equipment over wetlands or streams.

• Frequent inspections of environmental and safety measures and construction activities are performed. Monitoring during and after construction to avoid unauthorized discharges to surface waters.

• Construction personnel, contractors, and personnel who operate and maintain the electric utility and telecommunication lines are trained to understand and comply with permit requirements and conditions.

Several commenters suggested the following BMPs for proposed NWP C based on Avian Powerline Interaction Committee documents. Their recommended BMPs include:

• Avian Protection Plan (APP) Guidelines.

• Suggested Practices for Avian Protection on Power Lines.

• Reducing Avian Collisions with Power Lines: State of the Art in 2012.

• Region 6 Guidance for Minimizing Effects from Power Line Projects Within the Whooping Crane Migration Corridor (available at *https://puc.sd.gov/commission/dockets/electric/2019/el19-003/memo.pdf.*)

The Corps believes the recommended BMPs are applied more appropriately and effectively on a case-by-case or regional basis instead of a national basis. The Corps has been administering NWP 12 since it was first issued in 1977 without extensive BMPs at the national level and has found that the current approach with the BMPs that are already in the text of the utility line NWPs (*i.e.,* NWPs 12, 57, and 58) is effective.

A few commenters stated that the proposed NWP C will allow for increased impacts to rivers and wetlands. One commenter said that mechanized land clearing in forested and scrub-shrub wetlands for utility line installation should not be authorized under NWP C and that individual permits should be required for those activities. One commenter said that individual permits should be used to authorize the entire electric utility line project when one crossing does not meet the limits for NWP C. One commenters states that it is not clear how temporal and cumulative impacts will be considered when evaluating facilities proposed to be authorized by NWP C or by multiple NWPs. A few commenters recommend that the Corps adopt a policy of early consultation with Indian tribes and other actors on these types of projects, above the timeline required by the NHPA section 106 process. One commenter recommended that the Corps require prior consent on projects impacting tribes.

The proposed NWP C will not result in increased impacts to rivers and wetlands because it has the same limits as the NWP 12 that was issued in 2017 and in several prior reissuances of the NWPs. The activities authorized by this NWP must comply with 33 CFR 330.6(d), which addresses the use of NWPs with individual permits. During the PCN review process, district engineers evaluate the individual and cumulative effects of the activities authorized by an NWP (see paragraph 2 of Section D, District Engineer's Decision). For Corps districts consult with tribes when necessary for activities authorized by this NWP and other NWPs. Issuance of an NWP verification by a district engineer does not require prior consent from tribes.

Several commenters expressed concern about the impacts that electric utility lines may have on migratory avian populations from collisions with power lines. These commenters said that the Corps needs to analyze the potential harm to bird populations from its permitting of utility lines pursuant to this proposed NWP. These commenters said that national programmatic ESA section 7 consultation should be initiated for the issuance of this NWP, to allow the Services to work with the Corps to establish national BMPs. Another commenter stated that the Corps should consider voluntarily performing ESA Section 7 consultation on the issuance of this NWP to provide regulatory certainty.

The national decision document has been revised to discuss potential impacts of electric utility lines on migratory birds. General condition 19 addresses compliance with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. That general condition states that the permittee is responsible for ensuring that the activity authorized by an NWP complies with both of these acts, and that the permittee is responsible for contacting the appropriate office of the U.S. FWS to determine whether any incidental take permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act. Compliance with the ESA for this rulemaking is discussed in Section III.D of this final rule.

One commenter emphasized that safety must remain paramount when constructing, maintaining, repairing, and replacing above-ground and below-ground electrical utility lines. The commenter suggested that the Corps reference safety standards as a means of ensuring that electric utility activities are conducted safely. One commenter said that the proposal also describes the two methods by which underground electric transmission cables are installed: Trenching and backfilling or horizontal directional drilling. This commenter remarked that members may also utilize conventional boring to install electric utility lines, and asked that the Corps acknowledge that conventional boring is another method used for installation of underground electric transmission cables.

The Corps does not have the authority to require and enforce safety standards that apply to the construction, maintenance, repair, and replacement of above-ground and below-ground electrical utility lines. Safety standards and requirements may be imposed by other federal agencies, or state and local government agencies. This NWP authorizes activities that may involve directional boring, as long as those activities involve discharges of dredged or fill material into waters of the United States or cross navigable waters of the United States.

Proposed new NWP C is issued as NWP 57, with the modifications discussed above.

(16) NWP 58. Utility Line Activities for Water and Other Substances

The Corps proposed this new NWP as NWP D, to discharges of dredged or fill material into waters of the United States, and structures and work in navigable waters of the United States, for utility line activities for water and other substances, such as potable water, sewage, stormwater, and wastewater.

Several commenters stated that they support the issuance of new NWP D for water, wastewater, and stormwater utility lines because of the national legal

uncertainty of oil and gas pipeline projects. Many commenters said they support the issuance of NWP D because it streamlines the permitting process, clarifies the PCN requirements, separates activities based on the utility types, and ensures the activities will cause no more than minimal adverse environmental effects. Several commenters stated they were opposed to the issuance of NWP D and recommend withdrawing NWP D because it authorizes activities that cause significant adverse impacts, and these activities should require individual permits. These commenters stated, that at a minimum, additional PCN requirements should be added to the proposed NWP.

The activities authorized by NWP D will generally result in no more than minimal individual and cumulative adverse environmental impacts, and certain activities require pre-construction notification to the district engineer. District engineers will review PCNs for proposed NWP D activities, and may add permit conditions, including mitigation requirements, to the NWP authorization to help ensure that the authorized activities cause no more than minimal adverse environmental effects. District engineers can also exercise discretionary authority and suspend or revoke the NWP authorization for proposed activities that will result in more than minimal adverse environmental effects. The Corps believes that the two PCN thresholds in proposed NWP D will provide district engineers with the opportunity to review utility line activities for water and other substances that have the potential to cause more than minimal adverse environmental effects.

Several commenters expressed opposition to allowing multiple segments as ''single and complete projects'' of the same pipeline qualify for NWP authorization because it violates the Clean Water Act's minimal impact limitation, the National Environmental Policy Act, the Endangered Species Act, and other legal requirements for rigorous and transparent environmental reviews and safeguards. In addition, several of these commenters stated the authorizing multiple segments as single and complete projects does not capture cumulative effects.

The use of NWPs to authorize separate and distant crossings of waters of the United States for utility lines and roads as single and complete has been in the Corps' NWP regulations at 33 CFR 330.2(i) since 1991. The National Environmental Policy Act is a procedural statute that does not prohibit any specific regulatory approaches or mandate specific outcomes. Activities authorized by NWP D must comply with general condition 18, endangered species. The requirements of paragraph (b)(4) of general 32 help ensure that district engineers have information regarding the crossings of waters of the United States that require PCNs or do not require PCNs, so that the cumulative adverse environmental effects can be assessed during the review process.

Several commenters stated opposition to the removal of the five PCN requirements from the 2017 NWP 12 because they believe the Corps will no longer receive notice of activities that cause more than minimal adverse effects, nor will other federal and state natural resource agencies be able to review and provide comments. Many commenters opposed the removal of the non-PCN requirements for right-of-way mechanized land clearing through forested wetlands because this activity causes fragmentation and a loss/conversion of wetland type and associated functions. The commenters requested addition of a requirement for the submittal of a PCN for land clearing associated with utility line rights-of-way within wetlands so that the Corps and interested stakeholders can ensure impacts are appropriately avoided and mitigated. A few commenters stated that the 500 linear foot PCN threshold from the 2017 NWP 12 should be added to NWP D. One commenter said that the PCN requirement for temporary access roads should be retained. One commenter stated that a PCN should be required when the proposed activities would run parallel with a stream bed.

The removal of the five PCN thresholds from NWP 12 are discussed in the preamble discussion of NWP 12 and the same reasoning applies to the removal of these PCNs from NWP 58. That preamble discussion includes responses to comments, and that discussion will not be repeated in this section of the preamble. The Corps declines to add the suggested PCN thresholds because this NWP requires restoration of temporary fills to pre-construction elevations. If utility line activities associated with the suggested PCN thresholds result in a permanent impact that causes the loss of greater than 1/10-acre of waters of the United States, then PCNs are required.

A few commenters said there needs to be an overall acreage limit on authorized impacts for this NWP, including a maximum acreage for non-PCN forest clearing activities, and a maximum length of impervious surface roads before a PCN is required. One commenter stated that the Corps needs to provide sound, scientific evidence that the removal or omission of any of the PCN thresholds from the 2017 NWP 12 would not harm river, stream, or wetland hydrologic functions.

The activities authorized by this NWP are subject to a 1/2-acre limit for each single and complete project. There was no PCN requirement for temporary access roads in the 2017 NWP 12 and the Corps continues to believe that it is not necessary to ensure no more than a minimal individual or cumulative adverse environmental effects. Pre-construction notification thresholds are established for proposed activities requiring DA authorization that have the potential to cause more than minimal adverse environmental effects. Pre-construction notifications are informed by science and the Corps experience in administering the NWP program. In this instance, the Corps has determined it can remove the respective PCN requirements without risking more than a minimal individual or cumulative adverse environmental effects.

Some commenters said that the reduction of the PCN thresholds will simplify NWP D and would not cause a negative impact on the environment. One commenter asserted that permanent access roads should be authorized under NWP 14, not NWP D. One commenter recommended adding a requirement for horizontal directional drilling under waters of the United States, as a national standard under NWP D. One commenter recommended adding a provision to NWP D requiring containment and clean up contingency plans.

The Corps declines to add a requirement for the use of horizontal directional drilling because that technique is not always practical or feasible for utility lines that convey water and other substances. The use of horizontal directional drilling is more appropriately determined on a case-by-case basis after considering the characteristics of the proposed utility line activity, including site characteristics. The Corps does not have the authority to require containment and cleanup contingency plans for the construction, expansion, maintenance, or repair of utility line activities for water and other substances.

One commenter stated that the Corps should define a ''stand-alone project'' as a utility line project that includes all crossing within a major watershed as evaluated together as single and complete, since the cumulative impacts are to one system. The commenter said that an alternative approach would be to require a cumulative analysis for all proposed NWP D activities. Several

commenters requested clarification of the status of ongoing, non-oil and gas utility projects verified under the 2017 NWP 12, specifically whether they will continue to be authorized under the 2017 NWP 12 until the March 18, 2022 expiration date, or if they will need to be reverified.

The Corps declines to add a definition of ''stand-alone project'' to this NWP. When reviewing PCNs for proposed NWP activities, district engineers evaluate the crossings of waters of the United States that require PCNs and the information provided on other crossings in accordance with paragraph (b)(4) of general condition 32. They will determine whether the proposed utility line for water and other substances will result in no more than minimal individual and cumulative adverse environmental effects. The grandfathering provisions for these NWPs, including the transition from 2017 NWP 12 to the 2021 NWP 12 and new NWPs 57 and 58, is discussed in Section I.D. of this final rule.

A few commenters requested that the Corps broaden the definition of the term ''utility line'' so that it includes other types of man-made conveyances, such as canals and other linear conveyances that are subject to Clean Water Act section 404 jurisdiction and can transport water. One commenter requested the addition of specific waterline ancillary facilities including, but not limited to pump plants, siphons, and tunnels to the text of this NWP. One commenter said that the Corps should clarify whether this NWP authorizes utility line activities that convey substances that are unclear as to whether they included in the definition of ''oil or natural gas pipeline'' in NWP 12, such as hydrogen and power-to-gas (*i.e.,* hydrogen combined with carbon dioxide to create methane, or renewable natural gas). One commenter recommended further defining the term ''other substances'' in this NWP.

The Corps declines to add canals and ditches to the activities authorized by this NWP. Canals and ditches can be authorized by other NWPs, if the construction of those ditches involves discharges of dredged or fill material into waters of the United States or structures or work under Section 10 of the Rivers and Harbors Act of 1899. Substations for utility lines for water and other substances can include pump plants and siphons. Tunnels may be authorized if they a considered utility lines. Utility lines constructed to convey hydrogen or carbon dioxide can authorized by NWP D, but utility line activities constructed to convey renewable natural gas should be authorized by NWP 12. In general, ''other substances'' includes substances not conveyed by utility lines authorized by NWPs 12 and 57. The Corps has added ''products derived from oil or natural gas'' to be consistent with the definition of ''oil or natural gas pipeline'' in NWP 12, and to clarify that regulated activities associated with pipelines that carry substances derived from oil or natural gas should be authorized by NWP 12, not NWP D.

One commenter said that Note 4 should refer to the General Bridge Act of 1946 instead of Section 9 of the Rivers and Harbors Act of 1899. The Corps has made this change to Note 4.

One commenter requested clarification on how temporal and cumulative impacts will be considered when evaluating activities authorized by NWP D. This commenter recommended conducting a separate analysis for temporal and cumulative impacts on streams, wetlands, and other waters. A few commenters recommended changing the provision condition that states ''there must be no change in pre-construction contours of waters of the United States'' to ''there must be no change in pre-construction contours which results in permanent losses of waters of the United States.'' One commenter requested clarification on the measures the Corps will take to ensure that the activities authorized by NWP D are not improperly divided into smaller sections to avoid an individual permit.

Temporal and cumulative impacts will be evaluated using the 10 criteria identified in paragraph 2 of Section D, District Engineer's Decision. The Corps declines to change the text regarding the requirement for no changes in pre-construction contours, because that has been a BMP that has helped ensure that most utility line activities result in temporary impacts. The Corps applies the definitions of ''single and complete linear project'' to NWP D activities and to other NWPs that authorize utility lines to determine which activities can be authorized by an NWP and which activities require individual permits. The Corps also implements 33 CFR 330.6(d), which addresses the use of individual permits with NWPs.

Several commenters stated that BMPs should be site-specific and imposed as special conditions, if necessary, and not standardized in the text of NWP D. One commenter said that the inclusion of standards and BMPs would likely impede the objective of the NWP program by causing delays and increasing paperwork. This commenter asserted that attempting to establish national standards could cause conflicting requirements between the NWP and Clean Water Act Section 401.

The Corps agrees that most BMPs are site-specific and should be identified for specific utility line activities. Best management practices may also vary by region and by aquatic resource type. Best management practices that are necessary to ensure that activities authorized by NWP D have no more than minimal adverse environmental effects are more appropriately identified by district engineers and required through activity-specific conditions added to the NWP authorization or through the section 401 water quality certification process.

One commenter said that the Corps should adopt a policy of early consultation with the tribes and other interested parties for these types of projects over and above the NHPA section 106 process to avoid litigation, and other costly delays. This commenter also requested the Corps require consent on projects impacting tribes. One commenter recommended evaluating the direct, indirect, and cumulative effects on treaty reserved resources, including anadromous salmonids and their habitat to fully understand the potential extent of resource impacts.

The Corps consults with tribes when necessary to ensure that activities authorized by an NWP comply with general condition 17, tribal rights. As part of this rulemaking, Corps districts have consulted and coordinated with tribes to identify regional conditions and coordination processes to ensure protect tribal rights, as well as tribal trust resources. Activities authorized by NWPs do not require prior consent from tribes.

One commenter said that the Corps should end the practice of counting temporary impacts associated with matting for moving heavy machinery over a wetland, as a loss of greater than 1/10-acre, which triggers a requirement to submit a PCN. One commenter stated the Corps districts should maintain consistency with the PCN thresholds and should not be allowed to add regional conditions to this NWP that undercuts the reduction in PCN thresholds in this NWP. This commenter said that regional conditions cause confusion and inefficiencies, especially if the linear infrastructure crosses into multiple Corps districts.

The determination regarding whether the use of matting during utility line activities authorized by NWP D causes a loss of waters of the United States that may require a PCN is more appropriately made by district engineers on a case-by-case basis. Division engineers can add regional conditions to

this NWP that replace PCN thresholds that were removed, if they determine those PCN thresholds are necessary to ensure that this NWP authorizes only those activities that have no more than minimal adverse environmental effects. Regional conditions are intended to address regional differences in aquatic resource functions, so there may be some inconsistency that must be dealt with, especially for utility lines that run through multiple states or Corps districts.

One commenter said that water mains are known to exceed the non-oil and gas pipeline diameters, identified in the preamble as 3 to 24 inches, as they may be 6 feet or wider. This commenter stated the Corps did not provide a robust analysis of the lengths of the various utility line, nor did they provide the total national mileage for these lines, as they could be quite long and have similar types of impacts as oil or gas pipelines. A few commenters recommended removing natural gas pipelines (*i.e.* residential lines), hydrogen transport lines for clean energy solutions, and local, intrastate utility lines operated as an independent municipally-owned distribution system from NWP 12, because they are typically similar or smaller in size with respect to materials, location, installation footprint, and constructed along with water and wastewater pipelines.

The intent of the preamble discussion in the 2020 Proposal regarding the proposal to issue separate NWPs for oil or natural gas pipelines, electric utility lines and telecommunications lines, and utility lines for water and other substances was to illustrate some of the differences among those utility line sectors. The discussion of pipeline diameters has no relevance to the text of these NWPs, or to the conditions that apply to those NWPs. Utility line activities authorized by NWP D can be used to convey hydrogen, and for local distribution of water, sewage, wastewater, and other substances.

One commenter expressed concerns regarding the proposed issuance of NWP D to authorize utility line activities that carry wastewater. This commenter stated that distribution systems for wastewater reuse applications should be assumed to carry highly toxic and potentially hazardous substances that would degrade soils and groundwater if leaked or spilled. One commenter said that allowing activities under NWP D within or under coastal zone waters and wetlands will impermissibly degrade water quality, which is inconsistent with Section 404(e) of the Clean Water Act. One commenter stated that the NWP should be modified to require access roads to be built in accordance with local or state standards.

Prior versions of NWP 12 have authorized utility line activities that carry wastewater, so this is not a new issue for the NWP program. General condition 14 requires proper maintenance of activities authorized by NWPs, so utility lines carrying wastewater should minimize the potential for leaks and spills. The Corps does not have the authority to regulate leaks or spills from utility lines. Leaks and spills are more appropriately addressed through federal, state, and local laws that are administered by other federal agencies, or state or local government agencies. This NWP can be used to authorize utility line activities for water and other substances in coastal zones. Local and state governments are responsible for ensuring that access roads are constructed in accordance with their standards.

Proposed NWP D is issued as NWP 58 with the modification discussed above.

H. Responses to Comments on the Nationwide Permit General Conditions

GC 1. *Navigation.* The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 2. *Aquatic Life Movements.* The Corps did not propose any changes to this general condition. One commenter noted that some project proponents bury the bottom portion of larger culverts to allow fish passage and create a natural bottom for habitat. One commenter expressed support for the Corps' retention of the existing definition given the wide variability of geomorphic and hydrologic settings in which NWP activities are conducted. One commenter stated that the Corps' preference for bottomless culverts, one-barrel culverts, or bridges should be explained. Another commenter said that in the absence of special concerns, such as endangered species, there should not be a preference for bottomless culverts. One commenter remarked that the text of this general condition is insufficient without specific monitoring and enforcement protocols to ensure that effects of NWP activities on aquatic life movements are no more than minimal.

The Corps acknowledges that burying the bottom portion of a larger culvert and creating a natural bottom for habitat is an acceptable approach for complying with this general condition. The Corps appreciates the commenter's support for providing flexibility in this general condition for addressing variations in the geomorphic and hydrologic settings in which NWP activities are conducted. The preference for bottomless culverts is based on the ability of bottomless culverts to facilitate the continuity of aquatic life movements, including during low-flow conditions. The general condition does not mandate the use of bottomless culverts. Bottomless culverts can be beneficial to a wide variety of aquatic species, not just endangered or threatened species. Bottomless culverts can provide connectivity for a wide variety of species, including aquatic species that provide important ecosystem functions and services, and aquatic species that have economic and recreational value. District engineers retain the authority to conduct compliance inspections to ensure that permittees comply with this general condition. In most circumstances, compliance monitoring is sufficient to determine compliance with this general condition, instead of requiring monitoring and data collection over a period of time.

The general condition is adopted as proposed.

GC 3. *Spawning Areas.* The Corps did not propose any changes to this general condition. One commenter expressed support for the Corps' reissuance of this general condition without changes. The Corps appreciates the support for the reissuance of this general condition. The general condition is adopted as proposed.

GC 4. *Migratory Bird Breeding Areas.* The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 5. *Shellfish Beds.* The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 6. *Suitable Material.* The Corps did not propose any changes to this general condition. One commenter stated that the condition should be refined to align with state water quality standards, specifically relative to nutrients and nutrient loading. Concerns about compliance with applicable state water quality standards or requirements are more appropriately addressed through the water quality certification requirements for proposed discharges of dredged or fill material into waters of the United States. The general condition is adopted as proposed.

GC 7. *Water Supply Intakes.* The Corps did not propose any changes to this general condition. One commenter expressed support with reissuance of

the GC without change. The Corps acknowledges this commenters support for the reissuance of this general condition. The general condition is adopted as proposed.

GC 8. *Adverse Effects from Impoundments.* The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 9. *Management of Water Flows.* The Corps did not propose any changes to this general condition. The Corps did not receive any comments on this general condition. The general condition is adopted as proposed.

GC 10. *Fills Within 100-Year Floodplains.* The Corps did not propose any changes to this general condition.

A few commenters stated that the Corps should prohibit the use of NWPs and many other activities in 100-year floodplains and high-risk hurricane evacuation zones because of increasing risks of climate change and sea level rise. One commenter stated that the Corps' requirement in the condition to comply with FEMA-approved state or local floodplain management requirements is insufficient to ensure that authorized activities have no more than minimal adverse environmental effects and comply with the Clean Water Act, the Endangered Species Act, and the National Environmental Policy Act. One commenter said that ''high impact'' NWPs should be prohibited from use in floodplains and that individual permits should be required for those activities. this commenter also stated that this general condition should be revised to prohibit the use of certain NWPs to authorize discharges of dredged or fill material into waters of the United States that result in permanent above-grade fills in mapped 100-year floodplains or floodways, in order to comply with Executive Order 11988, Floodplain Management.

The Corps does not have the authority to regulate activities in 100-year floodplains or high-risk hurricane evacuation zones, except for discharges of dredged or fill material into waters of the United States that may be located within those floodplains or evacuation zones. The primary responsibility for determining zoning and land use matters, including development activities in 100-year floodplains and high-risk hurricane evacuation zones, lies with state, local and tribal governments (see 33 CFR 320.4(j)(2)). This general condition is consistent with the item 2 of Section E, Further Information, which states that the NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law. State and local governments are the entities that have primary responsibility for regulating land uses within floodplains and other areas.

Under the discretionary authority provision at 33 CFR 330.1(d) and other provisions of the NWP regulations at 33 CFR part 330, division and district engineers can further condition or restrict the applicability of an NWP for cases where they have concerns for the aquatic environment under the Clean Water Act section 404(b)(1) Guidelines or for any factor of the public interest. There are two public interest review factors related to floodplains in the Corps' public interest review regulations at 33 CFR 320.4(a)(1) that could be used as a basis for exercising discretionary authority: Floodplain values and flood hazards.

Nationwide permit activities, including discharges of dredged or fill material into waters of the United States within floodplains, comply with the Endangered Species Act through the requirements of NWP general condition 18. The National Environmental Policy Act is a procedural statute, and does not mandate any substantive floodplain management requirements. The Corps complies with NEPA requirements when it prepares the national decision documents for the issuance, reissuance, or modification of NWPs, and discusses potential impacts to flood hazards and floodplain values in its public interest review evaluation. The proposed NWPs, including general condition 10, are consistent with E.O. 11988, Floodplain Management, with respect to the Corps' authority to regulate specific activities that may occur in floodplains (*i.e.,* discharges of dredged or fill material into waters of the United State). In each national decision document for the final NWPs, the Corps considered potential impacts to floodplain values and flood hazards.

The general condition is adopted as proposed.

GC 11. *Equipment.* The Corps did not propose any changes to this general condition. One commenter expressed support for reissuance of the general condition with no change. The Corps appreciates this commenter's support for the reissuance of this general condition without change.

The general condition is adopted as proposed.

GC 12. *Soil Erosion and Sediment Controls.* The Corps did not propose any changes to this general condition. One commenter stated that the condition should be modified to reference specific erosion control standards or specifications that must be followed, particularly for projects that exceed an acre of land disturbance. Specific soil erosion and sediment control requirements vary among state and local governments and other entities, and are more appropriately determined on a case-by-case basis for specific NWP activities. Therefore, it would be inappropriate to establish national standards for erosion control.

The general condition is adopted as proposed.

GC 13. *Removal of Temporary Structures and Fills.* The Corps proposed to modify this general condition to apply to temporary structures. A few commenters expressed support for the addition of temporary structures to this general condition. A few commenters objected to the addition of temporary structures to this general condition, stating that their removal may cause more harm than leaving them in place because temporary structures are not all alike. One commenter requested a definition of ''temporary.'' In contrast, another commenter supported leaving the definition of ''temporary'' to the district engineer's discretion. One commenter requested that the Corps add preamble language to the final rule that states that the removal of structures should occur after they have fulfilled their intended purpose. This commenter further stated that the project proponent should determine when the structure has fulfilled its intended purpose.

What constitutes a temporary structure should be determined on a case-by-case basis. Therefore, the Corps declines to define ''temporary'' for the purposes of this general condition. The Corps has changed the text of this general condition as it relates to temporary structures. The general condition now states that temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. The Corps recognizes that it might not be feasible to completely remove the structure after its use has been discontinued. For example, it might not be feasible to remove an entire piling from navigable waters after it is no longer needed, but the project proponent could remove that portion of the piling that extends above the bottom of the waterbody so that it no longer is an obstruction at the water surface. The Corps also acknowledges that attempting to remove a temporary structure in its entirety has the potential to cause more substantial adverse environmental effects than leaving a portion of the structure in place.

The general condition is adopted with the modifications discussed above.

GC 14. *Proper Maintenance.* The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 15. *Single and Complete Project.* The Corps did not propose any changes to this general condition. One commenter expressed support for reissuance of this general condition with no change. The general condition is adopted as proposed.

GC 16. *Wild and Scenic Rivers.* The Corps did not propose any changes to this general condition. No comments were received on this general condition.

The general condition is adopted as proposed.

GC 17. *Tribal Rights.* The Corps proposed to modify this general condition to restore the text that was in the general condition for the 2012 NWPs and prior NWPs to eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity. The proposed changes to this general condition are also intended to clarify that the identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity. The proposed changes to this general condition were also intended to avoid any confusion between tribal consultation policies, tribal rights, and the requirements of the Corps' permitting authorities.

Many commenters objected to the proposed changes to general condition 17 and many commenters expressed support for the proposed change. Many commenters stated that the 2017 general condition's use of the ''no more than minimal effects on'' standard is clearer than the ''impair'' standard the Corps proposes to revert to because the ''no more than minimal adverse effects'' standard used throughout the NWPs. One commenter stated that ''impair'' is a clearer standard. Many commenters asserted that use of ''no more than minimal effect'' threshold in the general condition is consistent with Section 404(e) of the Clean Water Act and would not be confusing to retain in the general condition. Several commenters remarked that a minimal effect determination is well established in guidance and regulation and use of the word ''impair'' provides no additional clarity.

The Corps is returning the text of this general condition to the text that was in the 2012 NWPs and prior NWPs to eliminate any confusion about the applicable standards that apply when considering potential impacts to tribal treaty rights when consulting with tribes, and when determining the applicability of an NWP for a proposed activity. By using the word ''impair'' instead of ''no more than minimal adverse effects on'' the general condition will be clearer that the NWPs do not change existing tribal trust duties of the Corps, or the rights of tribes. Rather, the proposed changes to the general condition will serve as a guide to users when undertaking tribal consultations regarding the application of an NWP to a particular activity, and when developing protocols regarding tribal notification that build upon the existing Department of Defense, Army, and Corps tribal consultation policies. The Clean Water Act section 404(e) requirement that no activity authorized by an NWP may cause more than minimal adverse effects remains applicable in the context of potential effects to tribal rights, resources, or lands.

Many commenters said that the change in language would result in less protection for tribal rights and resources and is inconsistent with the Corps' trust obligations. Many commenters stated that the Corps provides no rationale for the proposed change considering its rationale for changing the language in 2017. A few commenters stated that tribes should receive copies of PCNs for all activities that occur on tribal lands or off-reservation areas where treaty rights are exercised. One commenter stated that the tribes should be allowed to make the ''no more than minimal effect'' determination.

The change in the text of this general condition will not result in less protection for tribal rights and resources. The rationale for the proposed change was provided in the preamble to the 2020 Proposal (see 85 FR 57350). The 1998 Department of Defense American Indian and Alaska Native Policy continues to apply to the NWPs and other DA permits. The district engineer is authorized to determine whether a proposed NWP activity will result in no more than minimal individual and cumulative adverse environmental effects.

Many commenters said they are opposed to removing ''tribal lands'' and its definition from the suite of protected resources. Many commenters expressed opposition to removing ''protected tribal resources'' and its definition from the suite of protected resources. Many commenters stated that the proposed wording would only protect tribal treaty rights and not all tribal rights. A few commenters suggested that the definition of tribal rights be moved to the text of general condition 17. One commenter said that the change in general condition 17 would not affect the Corps' tribal trust responsibilities. One commenter recommended that the Corps delete unnecessary definitions and should only retain definitions for ''tribal rights'' and ''tribal lands'' as they pertain to general condition 17.

Protection of tribal lands will continue through the implementation of the 1998 Department of Defense American Indian and Alaska Native Policy. ''Protected tribal resources'' is an ambiguous term and removal of that term from the general condition will result in a clearer, more enforceable general condition with less risk of disputes and litigation concerning whether particular resources are protected tribal resources. The Corps is retaining the definition of ''tribal rights'' in the ''Definitions'' section of these NWPs (Section F). The Corps is also retaining the definition of ''tribal lands'' in Section F of the NWPs.

Many commenters said that ''identification of a potential effect to a tribal right does not mean that a district engineer must exercise his or her discretionary authority to require an individual permit for a proposed activity,'' is contrary to statutory authority and the Corps' trust obligations. One commenter encouraged the Corps to engage prospective applicants for projects that have a greater potential to affect tribal rights in an optional pre-application meeting with the tribes prior to submittal of an NWP verification request. One commenter said that the general condition should include a statement requiring the Corps to conduct meaningful consultation with potentially impacted tribes in accordance with tribal protocols.

District engineers have the final decision-making authority as to whether a proposed NWP activity that requires DA authorization qualifies for NWP authorization. District engineers can coordinate with tribes to help make these decisions, including whether a proposed NWP activity complies with general condition 17. If a district engineer holds a pre-application meeting with a project proponent, he or she has the discretion to invite tribal representatives to attend the meeting. When conducting government-to-government consultation with tribes, district engineers endeavor to conduct meaningful consultation with tribes.

One commenter suggested revising general condition 17 to read as follows: ''No NWP activity may cause more than

minimal adverse effects to tribal rights, including treaty rights, protected tribal resources such as ceded territory, any sacred/cultural site/landscape or tribal lands, as determined by any concerned tribe(s).'' Another commenter recommended revising this general condition to read as follows: ''No activity or its operation may cause adverse effects on tribal rights (including, but not limited to, reserved water rights and treaty rights), protected tribal resources, or tribal lands.'' As discussed above, the Corps is adopting the proposed text of general condition 17.

Several commenters said that the change in language does not support the Corps' rationale for the NWPs in light E.O. 13783, ''Promoting Energy Independence and Economic Growth.'' A few commenters stated that the change in language would violate E.O. 13175. One commenter suggested that the condition should include a statement requiring the project proponent to obtain consent from potentially impacted tribes for the NWP activity. One commenter requested a definition of ''impair.'' One commenter suggested that the Corps provide an approved list of tribal entities. One commenter suggested that the Corps provide guidance and processes relative to consultation and timelines.

General condition 17 was not discussed in the report issued by the Office of the Assistant Secretary of the Army (Civil Works) in response to E.O. 13783. This change in the text of general condition 17 does not violate E.O. 13175. The Corps continues to consult with tribes on proposed NWP activities when such consultation is warranted. The district engineer determines whether a proposed activity requiring DA authorization qualifies for NWP authorization, and consent from potentially impacted tribes is not required for that determination. The Corps does not believe it is necessary to develop an approved list of tribal entities. Corps districts are aware of the tribes they may need to consult with. The Bureau of Indian Affairs may be the appropriate entity to develop and maintain such a list. The Corps Regulatory Program follows a number of existing Department of Defense, Army, and Corps tribal consultation policies. Information on these tribal consultation policies are available at: *https://www.usace.army.mil/Missions/Civil-Works/Tribal-Nations/*.

This general condition is adopted as proposed.

GC 18. *Endangered Species.* The Corps proposed to modify this general condition to make changes to be consistent with the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) Endangered Species Act (ESA) section 7 consultation regulations that were published in the **Federal Register** on August 27, 2019 (84 FR 44976). Those regulations amended the definition of ''effects of the action'' at 50 CFR 402.02 by removing the term ''indirect effects.''

Several commenters supported the proposed changes to ensure that general condition 18 aligns with the current ESA implementing regulations at 50 CFR part 402. A few commenters suggested that the Corps incorporate the new ESA section 7 regulation definitions directly into the general condition rather than by referencing provisions in the Code of Federal Regulations. These commenters also suggested adding a definition for ''action area'' to the text of the general condition.

The Corps believes that it is more appropriate to reference the current ESA section 7 regulations in the general condition rather than copying the text of the applicable provisions into the general condition itself. During the process of determining whether a proposed NWP activity ''may affect'' listed species or critical habitat, the Corps will utilize the definition of ''action area'' at 50 CFR 402.02 and there is no need to provide the definition of that term in the text of general condition 18.

Several commenters objected to the removal of ''direct effects'' and ''indirect effects'' definitions from the general condition and asserted that ESA section 7 consultation compliance will not be achieved without the analysis of the effects and/or would cause significant adverse impacts to endangered species. One commenter expressed opposition to the proposed change to general condition 18 because he or she is opposed to the 2019 amendments to the U.S. FWS's and NMFS's ESA section 7 regulations. One commenter stated that the Corps must seek concurrence from the U.S. FWS or NMFS for any ''no effect'' determination.

The terms ''direct effect'' and ''indirect effect'' are no longer used in 50 CFR part 402. When the district engineer evaluates a PCN for a proposed NWP activity to determine whether the proposed activity ''may affect'' listed species or critical habitat, he or she applies the definition of ''effects of the action'' at 50 CFR 402.02, as well as the U.S. FWS's and NMFS's regulations for identifying activities that are reasonably certain to occur (50 CFR 402.17(a)) and identifying the consequences caused by the proposed action (50 CFR 402.17(b)). The ESA section 7 consultation handbook issued by the U.S. FWS and NMFS in 1998 states that a federal agency is not required to obtain written concurrence from the U.S. FWS or NMFS for its ''no effect'' determinations.

One commenter stated that clarification is needed as to what is meant by non-Federal permittees that require pre-construction notification under paragraph (c) of this general condition. A few commenters said that the general condition only requires project proponents to submit a PCN if a proposed activity might affect a species or its critical habitat, which ignores the Corps responsibility to conference on species proposed for listing. These commenters suggested revising this general condition to include proposed species. Several commenters requested clarification of the term ''in the vicinity'' in paragraph (c) of this general condition. One commenter said that the Corps inappropriately relies on information contained in the PCN to make its effect determinations and must independently verify the potential for a listed species to be affected.

Generally speaking, a non-federal permittee is a permittee that is not a federal agency. There may be limited circumstances where a non-federal agency might be considered as having ESA section 7 obligations similar to those of a federal agency. For example, the Federal Highway Administration may assign a state Department of Transportation the responsibility for complying with non-NEPA environmental statutes such as the ESA.

The Corps has modified paragraph (c) of this general condition to be consistent with 33 CFR 330.4(f)(2), which states non-federal permittees shall notify the district engineer if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. The Corps also added ''critical habitat proposed for such designation'' to paragraph (c). These changes are necessary for species proposed for listing and critical habitat proposed for such designation because section 7(a)(4) of the ESA requires agencies to confer with the U.S. FWS or NMFS on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 of the ESA or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. The Corps has modified the first sentence of paragraph (c) as follows: ''Non-federal permittees must submit a pre-construction notification to the district

engineer if any listed species or designated critical habitat (or species proposed for listing or critical habitat proposed for such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.'' The Corps has added ''species proposed for listing'' and ''critical habitat proposed for such designation'' where appropriate in other sentences in this paragraph.

When reviewing a PCN for a proposed NWP activity that might affect species proposed for listing or critical habitat proposed for such designation, or is located in critical habitat proposed for such designation, the district engineer will evaluate the effects of the proposed NWP activity on the species proposed for listing or the critical habitat proposed for designation. If the district engineer determines that the proposed NWP activity is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat, he or she will initiate a conference with the U.S. FWS and/or NMFS in accordance with 50 CFR 402.10. If the district engineer determines that a conference is necessary, he or she will notify the non-federal applicant within 45 days of receipt of a complete PCN. The activity is not authorized by NWP until the district engineer has notified the project proponent that the requirements of ESA section 7 have been satisfied

The Corps added ''or conference'' to the second to last sentence of paragraph (c) to address situations where the district engineer conducts an ESA section 7 conference with the U.S. FWS or NMFS for a proposed NWP activity that may affect a species proposed for listing or proposed critical habitat. The Corps also modified paragraph (d) of this general condition to state that as a result of a conference with the U.S. FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

The Corps is adding ''or critical habitat proposed for such designation'' to this general condition to ensure that these NWPs do not authorize any activities that are likely to result in the destruction or adverse modification of proposed critical habitat. The general condition already prohibits the use of NWPs for any activity that is likely to jeopardize the continued existence of species proposed for listing. The prior exclusion of proposed critical habitat was an administrative oversight.

The term ''in the vicinity'' for the purposes of paragraph (c) of this general condition cannot be defined at a national level. What constitutes ''in the vicinity'' can vary substantially by species, environmental setting, the medium in which the species lives (*e.g.,* water, air, or in the ground), and other factors. When reviewing a PCN, the district engineer makes an independent determination of whether the proposed activity ''may affect'' listed species or designated critical habitat and thus requires ESA section 7 consultation. The district engineer relies in part on information in the PCN, but he or she will also utilize other information, including local knowledge of the area, and the species and the habitats in which the listed species lives in.

One commenter said general condition 18 should require PCNs for activities authorized by NWPs 3, 12, 13, 14, 21, 39, 44 and 48. One commenter stated that the Corps must not rely solely on permittees submitting PCNs to comply with its ESA obligations. One commenter suggested revising the general condition to state that the ESA section 7 consultation for an NWP activity will cover the entire project, to clarify that the entire action area must be examined and not just the activities on lands under the Corps' jurisdiction.

All activities authorized by NWPs 21, 39, and 44 require PCNs to district engineers. The district engineers will review those proposed activities and determine whether ESA section 7 consultation is required. Activities authorized by NWPs 3, 12, 13, 14, and 48 require PCNs under specific circumstances, and district engineers will review those PCNs to identify proposed activities that ''may affect'' listed species or designated critical habitat. For those activities that do not require PCNs under the text of those general permits, paragraph (c) applies when the project proponent is a non-federal permittee. If any listed species or designated critical habitat might be affected or is in the vicinity of the proposed NWP activity, or if the proposed NWP activity is located in designated critical habitat, then the project proponent is required to submit a PCN so that the district engineer can determine whether the proposed activity ''may affect'' listed species or designated critical habitat. When determining the scope of the ESA section 7 consultation, the district engineer applies the U.S. FWS's and NMFS's regulations at 50 CFR part 402, including the definitions of ''action area'' and ''effects of the action.''

One commenter recommended that the Corps adhere to the 45-day review time to determine whether a proposed NWP activity ''may affect'' or will have ''no effect'' on listed species. Alternatively, this commenter suggested that the review period not exceed 90 days under any circumstances. One commenter expressed support for the use of regional programmatic ESA section 7 consultations to satisfy the requirements of general condition 18.

Paragraph (c) of general condition 18 already requires the district engineer to notify the non-federal applicant within 45 days of receipt of a complete PCN whether the proposed activity will have ''no effect'' in listed species or designated critical habitat or where it ''may affect'' listed species or designated critical habitat and require section 7 consultation with the U.S. FWS and/or NMFS. If the district engineer has to conduct section 7 consultation with the U.S. FWS or NMFS, the consultation process may take longer than 90 days. Formal section 7 consultations conclude within 90 days after initiation unless the timeframe is extended in accordance with the section 7 regulations at 50 CFR 402.14(e). For informal consultations, the U.S. FWS and NMFS are required to provide written concurrence or non-concurrence with the federal agency's ''may affect, not likely to adversely affect'' determination within 60 days, unless an extension occurs (see 50 CFR 402.13(c)(2)). The Corps cannot issue the NWP verification until the section 7 consultation is completed and the applicant cannot proceed without receiving a verification from the Corps as provided for in paragraph (a)(2) of general condition 32 because compliance with ESA cannot be waived. The Corps will continue to utilize regional programmatic consultations for the NWPs, and work with the U.S. FWS and NMFS to develop new regional programmatic consultations.

One commenter suggested changing paragraph (g) of general condition 18 to advise project proponents to only use the U.S. FWS's IPaC website at (*http://ww.fws.gov/ipac*) because other websites are usually outdated. This commenter also recommended requiring project proponents to append the IPaC output document to their consultation package. One commenter requested that the text of the general condition be modified to include specific instructions on the process for ESA Section 7 consultation where the Corps has limited regulatory authority, such linear projects where the Corps' jurisdiction is limited to crossings of jurisdictional waters and

the crossings are separated by upland areas.

Project proponents should be allowed to use whatever information that can help them determine whether the PCN threshold in paragraph (c) of general condition 18 is triggered. The U.S. FWS's IPaC tool is just one tool that might provide useful information to prospective permittees. There may be other tools, such as databases and websites managed by state and local governments and non-governmental organizations that may be helpful in determining whether a proposed NWP activity might affect listed species, if listed species are in the vicinity of a proposed activity, or if the activity is located in designated critical habitat. This includes listed species under the jurisdiction of the NMFS, which are not included in IPaC. The Corps does not believe that there should be a requirement to the output from IPaC in the PCN because not all listed species are included in that information system.

For linear projects, such as various types of utility line activities authorized by NWPs 12, 57, and 58, the Corps applies the ESA section 7 regulations at 50 CFR part 402, including the definition of ''effects of the action'' and other provisions in determining whether a proposed NWP activity ''may affect'' listed species or designated critical habitat, and for initiating ESA section 7 consultation for those proposed activities where the district engineer makes a ''may affect'' determination. If ESA section 7 consultation is required for activities authorized by NWPs 12, 57, and 58, the Corps and U.S. FWS and/or NMFS work together on a comprehensive review of the overall project in accordance with the definition of ''effects of the action'' and other provisions of 50 CFR part 402, including the 2019 amendments the U.S FWS and NMFS made to those regulations (see 84 FR 44976). For ESA section 7 purposes where the Corps has a limited regulatory role under the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, the Corps, with the assistance of the permit applicant, can provide the U.S. FWS or NMFS with a biological assessment that evaluates the larger project as a whole but that clearly distinguishes between areas and effects subject to the Corps' jurisdiction and areas and effects outside of its jurisdiction. If the proposed activity requires formal ESA section 7 consultation, the U.S. FWS and NMFS can issue an incidental take statement for a biological opinion where, in accordance with ESA section 7(b)(4)(iv) they can assign responsibility of specific terms and conditions of the incidental take statement to the Corps, the applicant, or both taking into account their respective roles, authorities, and responsibilities (see 84 FR 44977).

A few commenters said that it is likely activities are occurring that are not in compliance with general condition 18 because the Corps does not require PCNs for all activities. One commenter stated, with regard to ESA-listed species, PCNs should not only include the immediate area, rather the entire area impacted by NWP activities, which must be consulted on programmatically with the U.S. FWS. This commenter provided an example of studies have shown that pollutants and sediments can impact critically imperiled mussels up to 10 river miles from the impact location and said that ESA section 7 consultations should include the evaluation of 10 river miles of potential effects from the NWP impact location and analyses of cumulative effects as well.

In order to obtain NWP authorizations, project proponents must comply with all terms and conditions of the NWPs (see 33 CFR 330.1(c)), including general condition 18. If a project proponent does not comply with the requirements of general condition 18, including the PCN requirements in paragraph (c) of that general condition, the activity is not authorized by an NWP. When determining whether a proposed NWP activity may affect listed species or designated critical habitat, the district engineer applies the regulations issued by the U.S. FWS and NMFS at 50 CFR part 402, including the definition of ''effects of the action'' and other provisions the determine the scope of the ESA section 7 consultation and analysis of effects or consequences

This general condition is adopted with the modifications discussed above.

GC 19. *Migratory Birds and Bald and Golden Eagles.* The Corps proposed to revise the wording of this general condition to clarify that members of the regulated public should determine for themselves, with the assistance of the U.S. Fish and Wildlife Service, what ''take'' permits, if any, they might require under the Migratory Bird Treaty Act or the Bald and Golden Eagle Protection Act. This General Condition makes clear that Project Proponents are responsible for complying with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, including obtaining any ''take'' permits that may be required under the U.S. Fish and Wildlife Service's regulations issued under those statutes.

Several commenters expressed support for making no changes to this general condition. One commenter noted that even though the Solicitor's Opinion has been vacated, the Corps should move text from the preamble to the general condition if reforms to the Migratory Bird Treaty Act are finalized by the administration before the final NWPs are issued. One commenter said that applicants should be encouraged to coordinate with wildlife agencies. Several commenters stated that reference to the Solicitor's Opinion in the preamble should be stricken because it was recently vacated by a federal district court.

The text of the general condition is sufficient to address the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act without moving text from the preamble of the proposed rule to the general condition. Project proponents can coordinate their proposed projects with federal and state wildlife agencies. There is no need to strike the text that was in the preamble to the 2020 Proposal because it was background used to solicit public comment, and it was current at the time the proposal was published in the **Federal Register**.

This general condition is adopted as proposed.

GC 20. *Historic Properties.* The Corps proposed to modify paragraph (c) of this general condition to state that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts. The Corps also proposed to modify paragraph (d) of this general condition to inform non-federal permittees that if pre-construction notification is required under paragraph (c) of this general condition, then he or she shall not begin the NWP activity until the district engineer has determined the proposed activity has no potential to cause effects to historic properties or has completed NHPA section 106 consultation. Paragraph (d) requires the district engineer to notify the non-federal applicant within 45 days of receipt of a complete PCN whether NHPA section 106 consultation is required.

Several commenters expressed support for the proposed changes to this general condition. A few commenters suggested adding language to the general condition to require disclosure of the qualifications of the person who would make an effect determination for the purposes of Section 106 of the National Historic Preservation Act (NHPA). That individual would need to satisfy the Secretary of the Interior's Standards for Professional Qualifications in Archaeology and Historic Preservation.

The Corps does not believe it would be appropriate to add text to this general condition to require disclosure of the qualifications of people making effects determinations for the purposes of section 106 of the NHPA. Effect determinations may be made by a variety of agency officials, including Corps district staff.

Many commenters stated that this general condition does not comply with the NHPA and does not satisfy the Corps Section 106 obligations with regards to the NWPs as it unlawfully delegates its Section 106 responsibilities to non-federal permittees and establishes a review process that is not consistent with the Advisory Council on Historic Preservation's (ACHP's) regulations at 36 CFR part 800. A few commenters said that this general condition should not reference Appendix C to 33 CFR part 325, because Appendix C has been determined by the federal courts, the ACHP, and other federal agencies to be unlawful. One commenter expressed support for the Corps' reliance on Appendix C and its interim guidance, stating that they are generally consistent with the ACHP's regulations.

This general condition does not delegate the Corps' section 106 responsibilities to permit applicants. The responsibility for making effect determinations under section 106 of the NHPA for NWP activities falls to the district engineer. For non-federal permittees, paragraph (c) of general condition 20 requires the submission of a PCN for a proposed activity that might have the potential to cause effects to historic properties. The Corps' regulations for complying with section 106 of the NHPA are found at Appendix C to 33 CFR part 325. Appendix C remains in effect as a counterpart regulation to 36 CFR part 800, and no federal court has invalidated Appendix C.

A few commenters objected to this general condition, saying that it encourages applicants to consult with State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs) and tribes. These commenters said that the Corps cannot delegate its tribal consultation obligations to applicants. One commenter stated that the proposed changes to general condition 20 will impact Native American cultural resources.

Paragraph (c) of this general condition encourages permit applicants to seek assistance from SHPOs, THPOs, and designated tribal representatives to help ensure compliance with this general condition. Seeking assistance is not equivalent to conducting consultation. Section 106 consultation remains the responsibility of the Corps. The requirements of general condition 20, plus the changes being made in this final rule, will ensure that section 106 consultation occurs for NWP activities that have potential to cause effects to Native American cultural resources that meet the definition of ''historic property'' in Section F, Definitions.

Several commenters said that the proposed change to paragraph (c), which states that the district engineer's identification efforts for historic properties shall be commensurate with potential impacts, should be further revised for clarity. A few commenters expressed opposition to this proposed change to paragraph (c) and requested that it be removed in the final rule. Several commenters stated that the text in paragraph (c) should make clear that the evaluation is only associated with the extent of the Corps' jurisdiction. One commenter said that the proposed change gives the Corps justification to decline to identify certain historic properties if the district engineer determines that the property or properties will not be impacted by the proposed activity. A few commenters opined that the Corps fails to evaluate areas outside its jurisdiction, particularly with linear projects, with is contrary to current regulations.

The change to paragraph (c) regarding the district engineer's identification efforts for historic properties is consistent with the ACHP's regulations at 36 CFR 800.4(b)(1) regarding the level of identification efforts. Section 800.4(b)(1) states that the federal agency should take into account the ''magnitude and nature of the undertaking and the degree of federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects.'' When evaluating an NWP PCN, the district engineer will identify the permit area in accordance with the criteria in paragraph 1(d) of Appendix C to 33 CFR part 325. The Corps will evaluate direct and indirect effects caused by the proposed NWP activity. If an historic property is not directly or indirectly affected by the proposed NWP activity, the Corps does not have the authority to prevent effects to historic properties caused by activities outside of its control and responsibility.

One commenter recommended that the Corps adhere to the 45-day review time or as an alternative change paragraph (c) of this general condition so that the district engineer's review of the PCN does not exceed 90 days. One commenter stated that language requiring an applicant to continue to wait beyond 45 days if they have not heard back from the Corps creates the potential for an indefinite delay. This commenter suggested adding a requirement for the district to establish a deadline for notifying the applicant on whether NHPA section 106 consultation is required.

Paragraph (d) of general condition 20 states that for non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete PCN whether NHPA section 106 consultation is required. The section 106 consultation process may take longer than 45 days. The NWP verification cannot be issued and the project applicant cannot proceed with the proposed activities under Corps jurisdiction until the section 106 consultation process has been completed.

A few commenters said that Corps districts often override the permittees' determination as to whether a PCN is required for a proposed activity under paragraph (c). One commenter recommended modifying or revising paragraph (a) of general condition 20 in a manner consistent with paragraph (a) of general condition 18 to focus on the threshold that triggers the requirement for section 106 consultation, rather than determinations made by district engineers once a PCN is submitted. One commenter recommended timely review of scopes of work and requested that the Corps make final determinations regarding scopes of review and not allow any revisions to those determinations.

For an NWP activity, it is ultimately the district engineer's responsibility to determine compliance with section 106 of the NHPA. As additional information is revealed during the review of a PCN or during section 106 consultation, it may be necessary to change the scope of review to ensure compliance with the requirements of section 106 of the NHPA. The Corps has modified paragraph (a) of this general condition to state that ''no activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.''

One commenter said that clarification is needed on who are the non-federal permittees that need to submit PCNs under paragraph (c). One commenter remarked that the terms ''might have the potential to cause'' and ''potentially

eligible'' are vague terms and that Corps districts are applying these requirements inconsistently and more expansively than appropriate. One commenter said that the ''might have the potential'' standard is a higher threshold than the threshold set forth in the ACHP's regulations at 36 CFR part 800.

As a general matter, a non-federal permittee is a permittee that is not a federal agency. There may be limited circumstances where a non-federal agency might be considered as having NHPA section 106 obligations similar to those of a federal agency. For example, the Federal Highway Administration may assign a state Department of Transportation the responsibility for complying with non-NEPA environmental statutes such as the NHPA. The purpose of the ''might have the potential to cause effects'' threshold in paragraph (c) of this general condition is to require submittal of PCNs for proposed NWP activities that might have a possibility of causing effects to historic properties, so that the district engineer can determine whether section 106 consultation is required for a proposed NWP activity. ''Potentially eligible'' is another threshold that is intended to provide an opportunity for further review to determine whether a historic property is present. These thresholds cannot be precisely defined, and involve some degree of subjectivity.

One commenter stated that paragraph (b) of this general condition improperly designates other federal agencies as the lead with respect to Section 106 without their agreement. This commenter further noted that this might be problematic given the proposal not to require PCNs from federal permittees for proposed activities that might have the potential to cause effects to historic properties.

Other federal agencies have their own obligations to comply with section 106 of the NHPA. If a proposed NWP activity being undertaken by another federal agency requires a PCN, paragraph (b) of this general condition requires the federal permittee to submit appropriate documentation demonstrating compliance with the requirements of section 106. After reviewing that documentation, the district engineer may notify the federal permittee that additional section 106 consultation may be necessary. Non-federal and federal permittees have different thresholds under this general condition because their responsibilities under section 106 are different.

This general condition is adopted with the modifications discussed above.

GC 21. *Discovery of Previously Unknown Remains and Artifacts.* The Corps did not propose any changes to this general condition. One commenter recommended reissuance of the general condition with no additional restrictive provisions.

This general condition is adopted as proposed.

GC 22. *Designated Critical Resource Waters.* The Corps did not propose any changes to this general condition. One commenter recommended revising this general condition to include state designated critical resource waters rather than deferring to Corps district engineers to designate certain waters at a later date. One commenter recommended adding proposed new NWPs C and D to the list of NWPs in paragraph (a) of this general condition. This commenter also suggested adding proposed new NWPs A and B to the list of NWPs in paragraph (b) of this general condition. Two commenters said that if the Corps removes the PCN requirements for federal permittees, federal agencies should still be required to submit PCNs for proposed activities in designated critical resource waters.

After providing notice and an opportunity for public comment, the Corps is continuing to require the long-standing practice of allowing district engineers to add specific waters to this general condition. States that want waters of particular environmental or ecological significance to be subjected to this general condition should provide their recommendations to the appropriate district engineer for consideration. Since NWP 12 has been in paragraph (a) of this general condition since it was first adopted in 2000 (65 FR 12872), for consistency the Corps has added new NWPs 57 and 58 to this general condition. New NWPs 55 (seaweed mariculture activities) and 56 (finfish mariculture activities) require PCNs for all activities, so it is unnecessary to add these NWPs to the list of NWPs in paragraph (b) of this general condition. In addition, the Corps is retaining PCN requirements for federal permittees.

This general condition is adopted with the modifications discussed above.

GC 23. *Mitigation.* The Corps proposed to modify paragraph (d) of this general condition to establish a threshold for requiring compensatory mitigation for losses of stream bed that is similar to the threshold for wetlands in paragraph (c) of this general condition. The Corps proposed to add a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification, unless the district engineer determines on a case-by-case basis that compensatory mitigation should not be required because other forms of mitigation would be more environmentally appropriate and issues an activity-specific waiver of this requirement.

A few commenters expressed support for the changes to this general condition. One commenter objected to the proposed changes and recommended that this general condition be reissued with no changes. One commenter stated that compensatory mitigation should not be required when compensatory mitigation is required by other federal or state laws, rules, or regulations. Another commenter said that the Corps should focus on improving consistency between districts on when compensatory mitigation is required for NWP activities.

Changes to this general condition are necessary to address the removal of the 300 linear foot limit for losses of stream bed under NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. District engineers impose compensatory mitigation requirements on specific activities authorized by NWPs to ensure that those activities result in no more than minimal individual and cumulative adverse environmental effects. If a proposed NWP activity is regulated by another federal agency or a state, tribal, or local agency, and that agency requires compensatory mitigation for that proposed activity, the district engineer may consider those compensatory mitigation requirements before determining whether additional compensatory mitigation is required for that activity. The Corps should not be imposing duplicative compensatory mitigation requirements when the resource concerns are already being addressed by another federal, tribal, state, or local agency. The Corps believes that federal and state regulatory programs should complement rather than duplicate one another (see 33 CFR 320.1(a)(5). Since aquatic resources can vary substantially across the country, different Corps districts may establish different compensatory mitigation requirements.

One commenter disagreed that project proponents design projects to minimize losses of waters of the United States to qualify for NWP authorizations to avoid the cost of providing compensatory mitigation to offset the authorized losses. One commenter said that other forms of mitigation used for NWP activities should include best management practices, minimization measures, activities that result in improvement of wetland and stream habitat, and actions that improve water quality. Another commenter disagreed

that best management practices and other forms of mitigation are more environmentally preferable forms of mitigation, and that best management practices should be implemented during the design, construction, and operations stages of a project.

The data the Corps collects on the impacts to waters of the United States authorized by the NWPs shows that 82 percent of verified impacts authorized by NWPs in 2018 are less than 1/10-acre (see Figure 5.1 of the Regulatory Impact Analysis for this final rule). During 2018, only 5% of the verified impacts authorized by NWPs resulted in impacts to 0.25 acre to 0.5 acre. For those NWPs that have a qualitative limit in acres, a 1/2-acre limit is the most common acreage limit. The small percentage of verified NWP activities that impact between 0.25 and 0.5 acre compared to the much larger percentage of verified NWP activities that impact less than 1/10-acre demonstrates the reduction of impacts (*i.e.,* minimization) that is incentivized by general condition 23. District engineers determine the compensatory mitigation requirements for specific NWP activities, and can require forms of mitigation other than compensatory mitigation to ensure that the authorized NWP activity results in no more than minimal individual and cumulative adverse environmental effects. The use of other forms of mitigation is consistent with the watershed approach to compensatory mitigation described in the Corps' regulations at 33 CFR 332.3(c). The use of best management practices and other forms of mitigation may be effective at reducing adverse environmental effects so that compensatory mitigation is not necessary to ensure that an NWP activity results in only minimal individual and cumulative adverse environmental effects.

A couple of commenters said that compensatory mitigation cannot legally be used to make minimal adverse effects determinations and that Section 404(e) of the Clean Water Act does not state that mitigation will be considered to ensure activities would cause only minimal adverse environmental effects. These commenters objected to the use of compensatory mitigation to allow more impacts to waters and wetlands. One commenter stated that the Corps has not provided any scientific or factual evidence to conclude that compensatory mitigation helps ensure that NWP activities do not result in more than minimal adverse environmental effects. A couple of commenters said that compensatory mitigation does not adequately or fully replace wetland or stream bed losses. Several commenters said they do not support the use of mitigation as a means to allow more impacts and justify findings of no more than minimal adverse environmental effects.

The use of compensatory mitigation and other forms of mitigation to ensure that activities authorized by an NWP result in no more than minimal individual and cumulative adverse environmental effects is codified in the Corps' NWP regulations at 33 CFR 330.1(e)(3). Section 404(e) of the Clean Water Act does not prescribe how the Corps is to ensure that the categories of activities authorized by general permits such as the NWPs will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment. Therefore, the Corps has discretion on how to comply with the requirement in the statute. Wetlands can be restored to improve the degree of ecological functions they provide (*e.g.,* NRC 2001), to offset wetland losses authorized by the NWPs and other types of DA permits. Streams can also be restored to increase the degree of ecological functions they provide (*e.g.,* Wohl et al. 2015), which can also be used to offset losses of stream functions caused by activities authorized by NWPs and other types of DA permits.

One commenter stated that this general condition should require compensatory mitigation for all losses of wetlands, special aquatic sites, and stream beds authorized by an NWP, not just those losses exceeding 1/10-acre that require PCNs. One commenter said that current compensatory mitigation requirements only replace, not improve, aquatic resources, and to protect tribal treaty rights, the Corps should require improvements of aquatic resources to ensure the successful recovery of salmon.

Compensatory mitigation and other forms of mitigation are only required by district engineers when it is necessary to ensure that NWP activities result in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)), and the Corps has determined that 1/10-acre is an appropriate threshold with respect to wetland mitigation. Compensatory mitigation can be provided through the restoration, enhancement, establishment, and protection of aquatic resources to offset losses of those functions caused by activities authorized by the NWPs and other types of DA permits. A compensatory mitigation credit is a unit of measure (*e.g.,* a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site (see 33 CFR 332.2). Compensatory mitigation required for NWP activities can help improve aquatic resources that may assist in the successful recovery of salmon.

One commenter said the Corps relies too heavily on mitigation banks and in-lieu fee programs to provide compensatory mitigation despite a large body of scientific evidence that concluded that wetland banks are ineffective and poorly monitored. A couple of commenters stated that mitigation banks and in-lieu fee programs do not replace lost functions and values at impact sites. One commenter said that the Corps relies on unrealized mitigation requirements to allow significant environmental harm to occur under the NWP program and that previous reports from the National Research Council and the Government Accountability Office have shown that mitigation under the NWP program has not proven successful and therefore, does not compensate for lost wetlands.

Regulations for the establishment and use of mitigation banks and in-lieu fee programs to provide compensatory mitigation for activities authorized by the NWPs and other forms of DA authorization were issued by the Corps in 2008 (see 73 FR 19594). The 2008 rule establishes establish performance standards and criteria for the use of permittee-responsible compensatory mitigation, mitigation banks, and in-lieu programs to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The 2008 mitigation rule incorporated many of the recommendations made by the National Research Council in its 2001 titled ''Compensating for Wetland Losses Under the Clean Water Act'' to improve the ecological outcomes of wetland compensatory mitigation projects. The 2005 Government Accountability Office report titled ''Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring'' also included recommendations for improving the Corps' oversight and outcomes of compensatory mitigation projects performed by permittees, mitigation banks, and in-lieu-fee program sponsors, and the Corps incorporated those recommendations in the 2008 mitigation rule.

One commenter said the NWP program should not be used to authorize activities that requiring compensatory mitigation and that project proponents should have to apply for individual

permits for activities requiring compensatory mitigation. One commenter stated that using mitigation to reduce impacts below a threshold of significance violates the National Environmental Policy Act.

The use of compensatory mitigation for NWP activities is an important tool for authorizing activities that have no more than minimal individual and cumulative adverse environmental effects by NWP. Requiring individual permits for any NWP activity that requires compensatory mitigation would not provide any additional environmental protection because the ecological outcomes of compensatory mitigation projects is more dependent on site selection, planning, and implementation, as well as monitoring and adaptive management to address deficiencies in the compensatory mitigation project that impede the ecological success of that project. The type of DA authorization used to authorize a regulated activity is not linked to the ecological outcomes of compensatory mitigation projects. Under the Council on Environmental Quality's regulations for implementing the National Environmental Policy Act, mitigation can be used to reduce project impacts so that they are not significant (see 40 CFR 1501.6(c)).

A couple commenters recommended that an economic analysis be performed to evaluate the economic effects of the proposed changes to this general condition, to assess the costs of the additional time and resources needed to overhaul stream credit programs, evaluate losses to mitigation providers and contractors, and the capacity to determine if the Corps can reasonably implement the proposed changes.

The changes to this general condition do not require an overhaul of stream credit programs. Compensatory mitigation credits, including stream credits, can be quantified in acres, linear feet, functional assessment units, or other suitable metrics of particular resource types (see 33 CFR 332.8(o)(1)). The preamble to the 2008 mitigation rule states that district engineers retain the discretion to quantify stream impacts and required compensatory mitigation in terms of area or other appropriate units of measure (see 73 FR 19633). This discretion also applies to the issuance of the NWPs by Corps Headquarters, to determine appropriate units of measure for efficient administration of the NWP program. Existing inventories of stream credits can be used to provide compensatory mitigation for losses of stream bed authorized by these NWPs. For those current inventories of stream credits quantified in linear feet or other linear metrics, the permittee and mitigation provider can engage in discussions to determine how many linear feet of stream credits are roughly proportional to the area of stream bed filled or excavated as a result of an activity authorized by an NWP. Each mitigation bank and in-lieu fee project has an approved mitigation plan, and that mitigation plan can be used to estimate how many linear feet of stream credits might be used to offset a specified number of acres or square feet filled or excavated as a result of an NWP activity. Over the years, there have been numerous changes to the Corps Regulatory Program, and each of those changes require some adjustment by Corps personnel, permit applicants, consultants, contractors, mitigation providers, and other people.

One commenter recommended NWPs and/or regional conditions authorizing the use of compensatory mitigation, mitigation banks, and/or in-lieu fee programs be withdrawn. One commenter said that this general condition should be modified to state that out-of-kind mitigation is prohibited for losses of designated critical resource waters identified in general condition 22.

Division engineers can add regional conditions to the NWPs to establish lower thresholds for stream compensatory mitigation, and for the use of mitigation banks, in-lieu fee programs, and permittee-responsible mitigation for activities authorized by NWPs. Out-of-kind mitigation may be beneficial to designated critical resource waters. Therefore, the Corps declines to make the recommended change to general conditions 22 or 23.

Several commenters said that this general condition should be modified to require applicants to take all practicable steps to avoid and minimize effects to waters of the United States. One commenter stated that avoidance and minimization of waters of the United States during the planning and siting phases of project development are not appreciated or considered by regulatory agencies.

Paragraph (a) of general condition 23 already requires the NWP activity to be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site). A description of the mitigation measures being undertaken by the project proponent, including avoidance and minimization on the project site, in the PCN can assist the district engineer in his or her decision whether the proposed activity qualifies for NWP authorization.

One commenter expressed support for allowing the district engineer to waive compensatory mitigation requirements for wetland losses if she or he makes an activity-specific determination that other forms of mitigation would be environmentally preferable. One commenter requested the Corps identify, at a national level, the minimum amount of compensatory mitigation required to offset resource losses. Several commenters said that compensatory mitigation should be required consistently for all NWPs with areal and linear thresholds.

The Corps has retained the ability of district engineers to waive compensatory mitigation requirements for wetland losses when they determine that the proposed activity, without wetland compensatory mitigation, will result in no more than minimal individual and cumulative adverse environmental effect. Compensatory mitigation decisions are made on a case-by-case basis by district engineers, so it would be inappropriate to establish national minimums for compensatory mitigation requirements, or for all NWPs that have quantitative limits.

One commenter stated that paragraph (c) should be modified to allow for protection, restoration, or enhancement of areas next to wetlands as compensatory mitigation, similar to the proposed language in paragraph (d). A couple of commenters said that a one-for-one impact-to-compensation ratio only works if all compensatory mitigation efforts are successfully implemented and the Corps monitors and enforces compensatory mitigation requirements. These commenters recommended modifying this general condition to clarify how the ecological outcomes of compensatory mitigation projects would be improved and how the Corps would ensure that no-net-loss of aquatic resources is achieved.

The Corps' compensatory mitigation regulations at 33 CFR 332.3(i) allow district engineers to require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. This provision also applies to all types of DA permits, including the NWPs. There is no need to explicitly state this information in the text of the general condition. The Corps' compensatory mitigation regulations requires monitoring of compensatory mitigation projects, and for district engineers to take action to ensure that compensatory

mitigation projects achieve their objectives and offset the losses of waters of the United States. Adaptive management may be required to ensure that those compensatory mitigation objectives are met. The ecological outcomes of compensatory mitigation projects are more appropriately addressed on a case-by-case basis, through compliance efforts by district engineers.

A couple commenters supported the continued use of a 1/10-acre threshold for requiring compensatory mitigation and said that the threshold has been effective in encouraging avoidance and minimization of adverse effects to wetlands. Several commenters said that a one-for-one impact-to-compensation ratio should be required to compensate for all wetland losses to ensure no-net-loss, not just those losses that exceed 1/10-acre. Several commenters remarked that the proposed 1/10-acre threshold to require compensatory mitigation for losses of wetlands and stream bed does not achieve a goal of no-net-loss of aquatic resources. One commenter said no-net-loss should not be applied to areas that have been previously and heavily modified.

The Corps is retaining the 1/10-acre threshold for wetland compensatory mitigation in paragraph (c) of this general condition based on its experience administering the program. There is no requirement in Section 404 or the Clean Water Act, the Corps' regulations at 33 CFR parts 320 to 332, or the U.S. EPA's 404(b)(1) Guidelines for no net loss of wetlands or other types of aquatic resources. For all DA permits, including the NWPs, compensatory mitigation requirements are determined on a case-by-case basis. Compensatory mitigation may be required by district engineers to ensure that an activity that requires authorization under section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899 is not contrary to the public interest (see 33 CFR 332.1(d)). Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines (see 33 CFR 332.1(c)(3)).

One commenter said that paragraph (c) of this general condition should be modified to allow mitigation bank credits to be used at a one-for-one ratio rather than performing a functional analysis. A commenter stated that 1/10th-acre may be too restrictive of a compensatory mitigation threshold in some Corps districts or watersheds and compensatory mitigation may not be required to achieve no more than minimal adverse environmental effects for certain NWP activities. Another commenter suggested the applicant be required to provide documentation of credit availability or credit reservation if proposing to satisfy compensatory mitigation requirements with credits from a mitigation bank. One commenter said that this general condition should be modified to state that mitigation bank credits are preferred where practicable, and to elucidate that mitigation banks are not practicable in the State of Alaska.

Paragraph (c) of this general condition does not require the use of a functional analysis to determine whether mitigation bank credits can be used to provide compensatory mitigation for an NWP activity. District engineers have the discretion to waive the compensatory mitigation requirement for losses of greater than 1/10-acre of wetlands, or to require another form of mitigation to ensure that the NWP activity results in no more than minimal individual and cumulative adverse environmental effects. If the district engineer determines that compensatory mitigation is required for a proposed NWP activity, the applicant can propose to use mitigation bank credits or in-lieu fee program credits to fulfill the compensatory mitigation requirement. The district engineer can require the applicant to provide a statement of credit availability, so that the applicant does not have to prepare a mitigation proposal for a permittee-responsible mitigation project. The framework for evaluating compensatory mitigation options, that is the use of mitigation bank credits, in-lieu fee program credits, or permittee-responsible mitigation, is provided in the Corps' regulations at 33 CFR 332.3(b). Mitigation banks can be practicable in the State of Alaska.

One commenter requested clarification on PCN and compensatory mitigation requirements for NWP activities involving mechanized land clearing in forested wetlands for utility line rights-of-way since paragraph (i) of general condition 23 states that compensatory mitigation may be required for activities that convert a forested or scrub-shrub wetland to an herbaceous wetland. A commenter said that compensatory mitigation should be provided on-site or in the sub-basin where impacts occur.

Consistent with paragraph (i) of this general condition, if a proposed NWP activity involves mechanized land clearing in a forested wetland, and it requires a PCN, the district engineer can require compensatory mitigation to ensure the proposed activity result in no more than minimal individual and cumulative adverse environmental effects. For an NWP activity that requires compensatory mitigation, the district engineer will determine whether on-site or off-site compensatory mitigation is required, and the appropriate geographic scale for consideration of off-site compensatory mitigation options.

One commenter said that general condition 23 should clearly state whether compensatory mitigation would or would not be required for wetland and stream bed losses for NWP activities that do not require PCNs. One commenter recommended that compensatory mitigation be provided for all losses of wetland or stream bed that exceed 1/10-acre, not just those losses requiring PCNs. A few commenters stated that compensatory mitigation for wetland and stream bed losses should be required at ratios greater than one-for-one to account for temporal loss and the difficulty of replacing wetlands and stream bed, and to ensure that habitat is recovered at a greater degree than it is being lost. One commenter said that there is no basis for wetlands and streams to have the same 1/10-acre compensatory mitigation threshold.

For those NWP activities that do not require PCNs, compensatory mitigation is not required because the district engineer is not notified of those activities and cannot add permit conditions to the NWP authorization in accordance with 33 CFR 332.3(k). The district engineer determines the appropriate amount of compensatory mitigation in accordance with the Corps' regulations at 33 CFR 332.3(f). As discussed below, in response to comments received on the proposed rule, the Corps is changing the threshold in paragraph (d) of this general condition from 1/10-acre to 3/100-acre.

A few commenters stated that compensatory mitigation should only be required for the losses of jurisdictional wetlands and streams and compensatory mitigation should not be required for losses of ephemeral stream bed or losses of other non-jurisdictional waters. Several commenters said that compensatory mitigation should only be required for permanent impacts and that temporary impacts should not be counted in the 1/10-acre threshold. One commenter suggested that this general condition should be modified to clarify if the 1/10-acre threshold would be applied individually or cumulatively in cases where both stream bed and wetlands would be lost. Several commenters said the 1/10-acre threshold in paragraphs (c) and (d) should be applied cumulatively so that any

combination of wetland and stream losses exceeding 1/10-acre would require compensatory mitigation.

Since ephemeral streams are excluded from Clean Water Act jurisdiction, (see 33 CFR 328.3(b)(3)), NWP authorization is not applicable to ephemeral streams. Compensatory mitigation is not required for losses of ephemeral stream bed, or for losses of any other non-jurisdictional waters. The 1/10-acre and 3/100-acre thresholds in paragraphs (c) and (d) of this general condition apply to losses of waters of the United States, as that term is defined in Section F of the NWPs (Definitions). These thresholds apply to single and complete projects authorized by the NWPs.

Several commenters said it is important to maintain the Corps' flexibility as proposed to allow district engineers to determine that other forms of mitigation are appropriate or to waive mitigation requirements for specific NWP activities. Several commenters objected to allowing district engineers to waive compensatory mitigation requirements. One commenter said that if federal agencies are not required to submit PCNs, those agencies would not have to provide compensatory mitigation for wetland or stream bed losses that exceed 1/10-acre because the 1/10-acre threshold proposed in paragraphs (c) and (d) only applies to NWP activities that require PCNs. Several commenters said that paragraphs (c) and (d) should be modified to state that advanced mitigation is preferred.

The general condition retains flexibility for district engineers to determine the appropriate mitigation for a particular NWP activity to ensure that the activity causes no more than minimal individual and cumulative adverse environmental effects. After the district engineer reviews a PCN, he or she may determine that no mitigation is necessary for the proposed activity to be authorized by an NWP. For these 16 final NWPs, federal agencies are subjected to the same PCN requirements as non-federal permittees. They are also subject to the mitigation requirements in this general condition. Advance compensatory mitigation can be used to satisfy compensatory mitigation requirements added to NWP authorizations by district engineers.

One commenter voiced support for the addition of a 1/10-acre threshold for requiring compensatory mitigation for losses of stream beds that require pre-construction notification. Another commenter expressed support for the addition of a compensatory mitigation threshold for stream bed losses represented in either linear feet or acres. One commenter stated that compensatory mitigation for stream bed losses should result in net gains in area or functions. A few commenters said that headwater streams are fundamentally different and offer different services than non-tidal wetlands and therefore should not be regulated the same. Additionally, minimal adverse environmental effects are different for distinct aquatic resources. One commenter opposed the elimination of ''other open waters'' from paragraph (d) and said it would create uncertainty for when compensatory mitigation would be required for losses of other open waters. A couple commenters said that reducing compensatory mitigation requirements also reduces the incentive to minimize impacts.

Stream compensatory mitigation projects are expected to result in increases in stream functions, since the purpose of compensatory mitigation is to offset unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. Stream compensatory mitigation projects produce credits that represent the accrual or attainment of stream functions at a compensatory mitigation site, consistent with the definition of ''credit'' in the Corps' regulations at 33 CFR 332.2. While headwater streams exhibit some differences in structure and function than downstream streams in a tributary network, when those headwater streams are considered waters of the United States, they are subjected to the same regulatory requirements as other waters of the United States. Headwater streams have no special status under the Clean Water Act or its implementing regulations, including the 404(b)(1) Guidelines issued by the U.S. EPA. The only streams that are special aquatic sites under the 404(b)(1) Guidelines are riffle and pool complexes (see subpart E of 40 CFR part 230). When reviewing a PCN for a proposed activity that may cause the loss of headwater stream bed, the district engineer will consider the functions being performed by the headwater streams. The Corps proposed to redesignate paragraph (d) of the 2017 general condition 23 as paragraph (e) of the 2021 general condition 23, so it did not propose to remove ''other open waters'' from the paragraph that discusses the use of riparian areas next to open waters as compensatory mitigation for NWP activities. The Corps did not propose to reduce any compensatory mitigation requirements.

Several commenters stated the 1/10-acre stream compensatory mitigation threshold is too broad to apply nationally. One commenter recommended establishing thresholds for requiring compensatory mitigation for stream bed losses through regional conditions instead of general condition 23 to account for the regional variability of streams across the United States. Several commenters stated that implementation of a 1/10-acre threshold for stream compensatory mitigation does not achieve a goal of no-net-loss of aquatic resources. A couple commenters said that paragraph (d) allows for incremental losses of stream bed, which is contrary to the Corps' no-net-loss objective and is inconsistent with restoring habitat necessary to provide sustainable fish populations. One commenter stated that reductions in the amount of required mitigation to compensate for headwater stream losses would have large impacts on downstream waters, including large rivers. One commenter said that implementing a 1/10-acre threshold for requiring compensatory mitigation for stream bed losses would increase the regulatory burden on downstream applicants due to declining water quality.

Since the NWPs authorize activities across the country, paragraph (d) of this general condition establishes a national threshold for stream compensatory mitigation, but there is flexibility in the general condition to allow district engineers to make activity-specific determinations on whether stream compensatory mitigation should be required for activities that result in the loss of stream bed. Division engineers can add regional conditions to the NWPs to establish a lower threshold for requiring stream compensatory mitigation. As discussed above, there is no requirement for no net loss of stream bed in the Clean Water Act or the Corps' regulations for implementing the Clean Water Act. Previous versions of this general condition in prior NWP rulemakings did not have a threshold for compensatory mitigation for losses of stream bed. A stream compensatory mitigation threshold was added to this general condition to provide an additional mechanism to help ensure that activities authorized by the 10 NWPs from which the 300 linear foot limit for losses of stream bed was removed result in no more than minimal individual and cumulative adverse environmental effects. Similar to the 1/10-acre wetland compensatory mitigation threshold, this compensatory mitigation threshold for stream bed losses is expected to provide incentives for project proponents to design their

projects to minimize losses of stream bed, and help sustain downstream functions and water quality.

One commenter said that stream compensatory mitigation should only be required for new impacts associated with the maintenance or replacement of previously authorized structures. Another commenter stated that given the difficulties to achieve successful stream mitigation, requiring compensatory mitigation for stream bed losses greater than 1/10-acre will be unrealistic in areas where permittee-responsible mitigation is the only option available. A few commenters suggested that thresholds reflect what would be required to ensure activities result in only minimal adverse environmental effects. Many commenters said that the 1/10-acre threshold for requiring compensatory mitigation for stream bed losses is too large for headwater streams.

District engineers will determine on a case-by-case basis whether to require compensatory mitigation for losses of stream bed authorized by NWPs. When determining whether to require compensatory mitigation, the district engineer will also consider practicability, including whether permittee-responsible mitigation is likely to be ecologically successful in offsetting the permitted impacts. As discussed below, the Corps has changed the 1/10-acre threshold to 3/100-acre to account for stream size.

One commenter said the compensatory mitigation requirement for losses of stream bed greater than 1/10-acre reduces the flexibility of the district engineer in making compensatory mitigation decisions. A few commenters objected to including a threshold for compensatory mitigation for the loss of stream bed, stating that it may result in unnecessary additional mitigation requirements and would not reduce burdens on the regulated public. Several commenters said the 1/10-acre threshold for compensatory mitigation for stream bed losses or the district engineer's determination to waive compensatory mitigation requirements would individually and cumulatively would directly or indirectly result in more than minimal adverse environmental effects.

The text of this general condition is written to provide district engineers with substantial flexibility in determining whether compensatory mitigation is required for NWP activities and what the required compensatory mitigation should be for a particular NWP activity. Corps districts have been requiring stream compensatory mitigation for a number of years, so the changes to this general condition will not impose additional burdens on the regulated public. If the district engineer determines, after reviewing a PCN, that stream compensatory mitigation is not necessary to ensure that the NWP activity result in no more than minimal adverse environmental effects, he or she will not require stream compensatory mitigation for that activity.

Many commenters suggested requiring compensatory mitigation for stream bed losses of 300 linear feet or more instead of the proposed 1/10-acre threshold. One commenter said that a linear foot threshold is more appropriate than acreage and recommended revising paragraph (d) to require compensatory mitigation for stream bed losses greater than 100 linear feet. One commenter recommended revising paragraph (d) to require compensatory mitigation for stream bed losses greater than 150 linear feet. One commenter recommended changing paragraph (d) to require compensatory mitigation for stream bed losses of 1/10-acre or 300 linear feet. Many commenters said that the proposed 1/10-acre stream mitigation threshold would result in more impacts with less compensatory mitigation being required. One commenter suggested using a scaled approach for establishing a stream compensatory mitigation threshold, such as a length threshold of five times the bankfull width or five times the width between ordinary high water marks. This commenter said a scaled approach would better account for variations in headwater streams and large rivers, compared to a 1/10-acre threshold.

After evaluating the comments received in response to the proposed modification of general condition 23, the Corps is changing the threshold for stream compensatory mitigation in paragraph (d) from 1/10-acre to 3/100-acre. This is consistent with the stream compensatory mitigation threshold established in some Corps districts under the 2017 NWPs and the compensatory mitigation threshold recommended by several commenters. For the 2017 NWPs, a number of Corps districts have regional conditions requiring compensatory mitigation for losses of greater than 300 linear feet of stream bed. This is consistent with the recommendation for a 300 linear foot threshold made by many commenters in response to this proposed rule. The 3/100-acre threshold in paragraph (d) was calculated by estimating the average width of stream fills (4 feet) authorized by the 2017 NWPs under the 10 NWPs and multiplying that figure by 300 linear feet. The average width of stream filling or excavation was calculated from ORM2 data for NWP verifications issued between March 19, 2017, and March 19, 2019, for those NWP verifications where the average width of the stream fill or excavation was recorded by Corps district staff. The 3/100-acre threshold is anticipated to result in similar stream compensatory mitigation requirements for the NWPs in this final rule compared to the 2017 NWPs, and therefore is generally consistent with current agency practice. A scaled approach for establishing a stream compensatory mitigation threshold would add another level of complexity to a permit program that is intended to regulate, with little delay or paperwork, activities that result in minimal adverse environmental effects.

A few commenters said the 1/10-acre threshold for stream losses requiring compensatory mitigation is not scientifically supported or lacks supporting analysis. A couple commenters said they do not agree with the change in threshold from linear feet of impact to acres for requiring compensatory mitigation for losses of stream beds that require PCNs. A few commenters stated that the use of stream length rather than acreage has been used in many programs as a basis for determining mitigation credits to compensate for the loss of stream bed, and that the 1/10-acre threshold would create uncertainty and additional costs for applicants, the public, mitigation banks, and in-lieu fee programs. One commenter said that if the threshold for requiring stream compensatory mitigation is going to be changed from linear feet to acres, the acreage should include all of the affected area on the valley bottom, not just the area between ordinary high water marks of a river or stream.

The establishment of the 3/100-acre threshold for stream compensatory mitigation for NWP activities is an administrative decision to facilitate consistent implementation across districts. It is intended to be a conservative threshold based on the complexities of riverine systems, the substantial variation in riverine systems across the country, and the subjectivity inherent in the threshold for the NWPs (*i.e.,* no more than minimal individual and cumulative adverse environmental effects). The use of acres to quantify stream compensatory mitigation is consistent with the Corps' compensatory mitigation regulations at 33 CFR 332.8(o)(1), which does not mandate the use of a particular metric for quantifying stream compensatory mitigation credits. It would be inappropriate to use the area of a valley bottom, since the Corps only has jurisdiction over certain categories of waters and wetlands, and valley

bottoms may consist of a substantial proportion of upland area or other features that are outside of the Corps' jurisdiction.

Several commenters said the change to an area-based approach would not provide accounting consistency and would result in dual accounting systems for credits and debits generated under both linear feet and acreage-based scenarios and it would create inconsistencies, and would create confusion over how to handle sold versus proposed credits. One commenter expressed concern that ecological values of mitigation credits would not carry over in the conversion from linear feet to acres, creating the potential for activities to result in more than minimal individual and cumulative adverse environmental effects.

There is no requirement in the Corps' regulations to quantify stream compensatory mitigation credits in linear feet. Compensatory mitigation credits, including stream credits, can be quantified in acres, linear feet, functional assessment units, or other suitable metrics of particular resource types (33 CFR 332.8(o)(1)). This final rule does not affect prior credit transactions for previously authorized NWP activities where the permittee secured stream compensatory mitigation credits from mitigation bank or in-lieu fee program sponsors. This final rule only applies to activities authorized by these NWP after they go into effect. The Corps acknowledges that a period of adjustment will be required, and that different agencies may require the use of different metrics to quantify losses of stream bed and stream compensatory mitigation credits. The ecological values of mitigation credits from the accrual or attainment of aquatic functions at a compensatory mitigation site (see the definition of ''credit'' at 33 CFR 332.2). Quantifying stream mitigation credits in acres or linear feet is a surrogate for the increases in stream functions expected to result from a stream compensatory mitigation project, when there is no method available to assess the specific functional gains through a rapid ecological assessment method or other method.

The amount of compensatory mitigation required for an NWP activity has to be sufficient to replace lost aquatic resource functions (see 33 CFR 332.3(f)(1)), and the mitigation provider can use his or her judgment or the approved mitigation plans to determine how many stream credits quantified in linear feet are needed to offset a particular acreage of stream bed that is filled or excavated as a result of an NWP activity. It is important to note that the mitigation industry provides a service to permittees, as an option to fulfill the compensatory mitigation requirements in NWP authorization and other forms of DA authorizations. The Corps is making these changes for administrative efficiency, to provide NWP authorization for more activities that result in no more than minimal individual and cumulative adverse effects. The 300 linear foot limit for losses of stream bed in the 2017 NWPs and prior NWPs required the Corps to process individual permits for activities that likely would have otherwise qualified for NWP authorization. In the 2007 NWPs, general condition 23 was modified to state that district engineers could require stream compensatory mitigation for losses of stream bed, but there was no acreage threshold as there was for wetland losses. In paragraph (d) of this general condition, the Corps has established a 3/100-acre threshold for stream compensatory mitigation. District engineers can require compensatory mitigation for losses of less than 3/100-acre of stream bed, and they can require compensatory mitigation for losses of up to 1/2-acre of stream bed.

One commenter said mitigation banks and in-lieu fee programs would be negatively affected because less compensatory mitigation would be required for the loss of stream beds. A few commenters said they have reservations about the implementation of a compensatory mitigation threshold for losses of stream bed and that there may not be bank or in-lieu fee program credits available.

The removal of the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 and the changes to this general condition will not result in less compensatory mitigation being required for losses of stream bed authorized by NWPs. By providing equivalent quantitative limits for all non-tidal jurisdictional waters and wetlands in these 10 NWPs (*i.e.,* the 1/2-acre limit), there will likely be more NWP activities for which district engineers require compensatory mitigation. As discussed above, the Corps has changed the threshold from 1/10-acre to 3/100-acre to require stream compensatory mitigation that is more aligned with current practices and the recommendations of many commenters. The existing stream credits can be used for NWP activities, even though the authorized impacts will be quantified in acres.

Several commenters supported the flexibility of the district engineer to allow other forms of mitigation as determined appropriate and to waive compensatory mitigation requirements after an activity specific determination that other forms of mitigation would be environmentally preferable. Several commenters said that increased impacts and allowing the district engineer to waive compensatory mitigation requirements would be counterproductive to the success of salmon recovery efforts, and therefore would not be protective of tribal treaty rights. Several commenters said the district engineer should be able to consider other site-specific activities required by other regulatory programs, such as mine site reclamation to considered as mitigation for activities affecting stream beds. One commenter stated that requiring a compensatory mitigation decision by the district engineer could delay issuance of a permit and to modify paragraph (d) to allow the district engineer or designee to waive the compensatory mitigation requirement. One commenter expressed concern that allowing the district engineer to waive compensatory mitigation requirements could allow for up to 1/2-acre of stream bed loss which would result in adverse environmental impacts.

The removal of the 300 linear foot limit from the NWPs (while retaining the 1/2-acre limit, PCN process, and other tools to ensure no more than minimal adverse environmental effects) and the changes to general condition 23 will allow district engineers to authorize certain activities by NWP and require compensatory mitigation when necessary. It will provide more flexibility in the NWP and allow district engineers to devote more staff and other resources to proposed activities that have the potential for more substantial adverse environmental effects. These changes will not impair salmon recovery efforts, and for those proposed NWP activities that the district engineer determines ''may affect'' listed salmon species, additional protection to those listed species will be provided through the ESA section 7 process.

The flexibility in general condition 23 allows district engineers to consider mitigation and other site-specific activities required by other agencies, such as mine reclamation, when determining whether to require compensatory mitigation for NWP activities. District engineers are required to make compensatory mitigation decisions within the 45-day review period for NWP PCNs. The district engineer has the decision-making authority for whether compensatory mitigation is required for an NWP activity.

One commenter said the Corps should develop clear expectations and performance standards for the types of other mitigation that could be utilized to compensate for stream bed losses. One commenter suggested modifying paragraph (d) to list acceptable alternatives to compensatory mitigation. One commenter expressed support for compensatory mitigation requirements could be fulfilled through restoration or enhancement of riparian areas next to streams. Several commenters said that riparian restoration or enhancement results in out-of-kind mitigation since they do not always replace lost stream functions. One commenter suggested the proposed paragraph (d) be modified to state that riparian restoration or enhancement may only satisfy compensatory mitigation requirements when other in-kind mitigation options are unavailable or are not practicable.

Ecological performance standards for stream compensatory mitigation projects are determined by district engineers when they review and approve mitigation plans. Permit applicants may propose potential alternatives to compensatory to district engineers, who will determine whether that alternative mitigation is appropriate and likely to be effective in reducing adverse environmental effects so that it is not necessary to require compensatory mitigation. While the restoration or enhancement of riparian areas might not replace all stream functions, they can help improve some stream functions and help reduce nutrient and pollutant loads to streams. District engineers will determine on a case-by-case basis whether the restoration or enhancement of riparian areas is appropriate and practicable compensatory mitigation for an NWP activity.

One commenter said that the general condition should be modified to require the applicant to provide project specifications addressing the Natural Stream Channel Design Techniques and Review Checklist, developed by the U.S. EPA and U.S. FWS. One commenter said there currently are no national or regional tools developed by the Corps to guide compensatory mitigation for stream bed losses. One commenter stated the Corps and U.S. EPA are currently collaborating on a peer-reviewed study analyzing the environmental and policy consequences of stream restoration metrics. This commenter recommended not modifying the NWPs until they are scheduled to expire in 2022 to allow for the results of the study to be completed and the results to be considered. One commenter said general condition 23 should be incorporated into every applicable NWP rather than referring to the loss of 300 linear feet in each NWP.

District engineers evaluate stream compensatory mitigation proposals and should be provided the flexibility to consider a variety of potential stream restoration or rehabilitation approaches. This includes river and stream restoration approaches, such as dam removals, culvert replacements, and other process-based methods that may be more ecologically effective than natural channel design in improving stream functions (*e.g.,* Palmer et al. 2014). The Corps is removing the 300 linear foot limit for losses of stream bed from 10 NWPs and modifying general condition 23 for more efficient administration of the NWP program. The study on stream metrics may have some utility in future rulemakings and the development of guidance, but it is not necessary to delay this rulemaking to wait for that study to be completed. General condition 23 applies to all NWPs.

Several commenters supported the proposed changes to paragraph (e). Several commenters said that paragraph (e) of general condition 23 should be modified to eliminate the district engineer's ability to allow riparian area compensatory mitigation for wetland losses. One commenter suggested modifying paragraph (e) to allow the planting of adapted seed mixes that may contain non-native species and to allow for the replacement of existing vegetation when restoring riparian areas. One commenter said the proposed condition should be modified to state that use of native vegetation is preferred, rather than required, and to allow for consideration of regionally appropriate vegetation. A few commenters expressed opposition to the proposed changes the changes to paragraph (e) and expressed concerns that allowing non-native species would result in negative environmental effects. One commenter said they were concerned that allowing non-native species in the restored areas could negate the prevention, control, and management of non-native species performed by other government agencies, non-government organizations, and citizens and could introduce a source for spread among those activities.

The restoration and enhancement of riparian areas may be used to offset wetland losses as another form of mitigation that could be more environmentally appropriate, since riparian areas perform a number of functions that are also performed by wetlands (NRC 1995, NRC 2002). There may be a number of seed mixes that are acceptable for revegetating riparian areas. Paragraph (e) contains flexibility because it states that native species should be planted; it does not require native species to be planted. As discussed in the proposed rule, non-native species can have positive, negative, or neutral effects on ecosystems and the functions they perform. Compensatory mitigation requirements, including long-term management activities, must be practicable (see 33 CFR 332.3(a)(1)). For a particular compensatory mitigation site, the district engineer may determine that the management of invasive or non-native species is not practicable cause of site or watershed conditions, the degree to which the invasive or non-native species is established in the region, and other factors. If other government agencies and non-governmental organizations want to undertake efforts to control invasive or non-native species, they can do that under their authorities or mission statements.

Several commenters said there is no support for allowing narrow riparian areas of 25–50 feet wide on each side of the stream that would support habitat needed by federally threatened or endangered salmon. Buffers of 100 feet or more are needed. One commenter said that riparian area restoration and enhancement requirements (*e.g.* minimum riparian width, historical and existing site conditions) should be addressed regionally rather than included in paragraph (e). One commenter said that restoring or enhancing riparian areas does not achieve no-net-loss of the stream bed.

The recommended riparian area width of 25–50 feet was established in the NWP program in 2000 (65 FR 12833) because riparian areas of that width can provide important aquatic habitat functions and water quality benefits. The establishment of wider riparian areas for listed species be more appropriately addressed through the ESA section 7 consultation process. Division and district engineers can establish regional requirements for riparian areas. The purpose of restoring and enhancing riparian areas is to help improve stream functions and water quality. The improved functions are expected to occur in nearby stream bed and in downstream waters.

One commenter recommended modifying paragraph (f)(4) of this general condition to state that if permittee-responsible mitigation is the proposed compensatory mitigation option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will

coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement. The Corps added the suggested text to paragraph (f)(4) of general condition 23.

This general condition is adopted with the modifications discussed above.

GC 24. *Safety of Impoundment Structures.* The Corps did not propose any changes to this general condition. One commenter recommended adding ''federal'' to this general condition because some federal agencies may have established federal dam safety criteria. The Corps added ''federal'' to the text of this general condition so that district engineers can require non-federal applicants to demonstrate that the structures comply with established federal dam safety criteria.

This general condition is adopted as with the modification discussed above.

GC 25. *Water Quality.* The Corps proposed to modify this general condition to articulate that if the state, authorized tribe, or EPA (*i.e.,* the certifying authority under section 401 of the Clean Water Act) issued a water quality certification (WQC) for the issuance of an NWP, and the permittee cannot comply with all of the conditions in that water quality certification, he or she must submit a certification request to the certifying authority that satisfies the requirements of 40 CFR 121.5(b) for a water quality certification or waiver for the activity involving a specific discharge to be authorized by the NWP.

One commenter expressed general support for the proposed changes to general condition 25. Several commenters supported the proposed changes clarifying that applicants need to request certification from the certifying authority for specific discharges when he or she cannot comply with all of the conditions in the WQC for the NWP. One commenter said that general condition 25 should be clarified to state that WQCs must be consistent with 33 CFR 325.4 and 40 CFR 121.7(d), and that any WQC condition not within the established scope of the certification, may not be included as a regional condition.

The proposed changes have been incorporated into this general condition. The Corps has added text to this general condition to state that if the certifying authority issues a water quality certification for the proposed discharge authorized by a specific NWP activity, the permittee must submit a copy of the certification to the district engineer. Furthermore, the general condition states that if certification is required for a specific discharge, the discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied.

When water quality certification is required for a specific discharge authorized by an NWP, and the Corps has completed its review of the PCN and has determined that the activity is authorized by an NWP as long as water quality certification is issued or waived for that discharge, the district engineer will send a provisional notification to the permittee. The provisional notification will inform the project proponent that the activity will be authorized by an NWP once water quality certification for the proposed discharge is obtained or waived. If water quality certification is issued for the proposed discharge, the district engineer will conduct coordination that may be required under Section 401(a)(2) of the Clean Water Act. After that process, the district engineer will issue the NWP verification letter with the water quality certification. The district engineer may add conditions to the NWP authorization to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects. The district engineer will also add to the NWP authorization conditions in the water quality certification that are not waived pursuant to 40 CFR 121.9(b).

The Corps divided the text of this general condition into three paragraphs to make the general condition easier to read. This general condition is adopted with the modifications discussed above.

GC 26. *Coastal Zone Management.* The Corps proposed to modify this general condition to say that if the state issued a general Coastal Zone Management Act (CZMA) consistency concurrence for the NWP, and the permittee cannot comply with all conditions of that general concurrence, then he or she must obtain an individual CZMA consistency concurrence or presumption of concurrence from the state in order for the activity to be authorized by an NWP.

Several commenters expressed support for the change, stating that it provided clarification of the consistency concurrence process and additional flexibility. The commenters further noted that the proposed language makes it clear that the permittee is expected to fully comply with all the conditions of the general concurrence or seek an individual CZMA consistency concurrence or presumption of concurrence from the state coastal program.

To qualify for NWP authorization, the proposed activity must comply with all of the NWP's terms and conditions (see 33 CFR 330.1(c)). The Corps will consider unauthorized any activity requiring Corps authorization if that activity is under construction or completed and does not comply with all of the terms and conditions of an NWP. This includes any conditions added to the NWP authorization through a categorical or individual CZMA consistency concurrence. If the applicant cannot comply with all of the conditions in the general CZMA consistency concurrence, then in order to comply with the requirements of the CZMA, she or he would need to apply to the state for an individual CZMA consistency concurrence, or obtain a presumption of concurrence. The inability to comply with all conditions of a general CZMA consistency concurrence does not preclude the use of the NWP to authorize the permitted activities; such circumstances would be considered a denial without prejudice until the project proponent obtains an individual CZMA consistency concurrence or a presumption of concurrence.

When CZMA consistency concurrence is required for a specific activity authorized by an NWP, and the Corps has completed its review of the PCN and has determined that the activity is authorized by an NWP as long as CZMA consistency concurrence is issued or a presumption of concurrence occurs for the activity, the district engineer will send a provisional notification to the permittee. The provisional notification will inform the project proponent that the activity will be authorized by an NWP once CZMA consistency concurrence for the proposed activity is obtained or a presumption of concurrence occurs. The district engineer may add conditions to the NWP authorization to ensure the authorized activity results in no more than minimal individual and cumulative adverse environmental effects.

The general condition is adopted as proposed.

GC 27. *Regional and Case-By-Case Conditions.* The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 28. *Use of Multiple Nationwide Permits.* The Corps proposed changes to this general condition to address the use of more than one NWP to authorize a single and complete project, when two of those NWPs have different acreage limits. The proposed changes were

intended to ensure that use of an NWP with a higher acreage limit could not circumvent the lower acreage limit for another NWP, when the two NWPs are combined to authorize a single and complete project.

A few commenters expressed support for the change and said that it clarified language regarding the use of multiple NWPs for a single and complete project. Several commenters recommended making no changes to this general condition, and retaining the general condition language from the 2017 NWPs. One commenter suggested that the NWP numbers used in the example in the text of the general condition should match the NWP numbers used in the example in the preamble to the proposed rule, specifically by using NWP 39 rather than NWP 29. One commenter said that no more than two NWPs should be used to authorize a single and complete project. One commenter stated that the use of multiple NWPs to authorize a single and complete project should not cumulatively exceed the threshold of the highest limit.

In the example in the text of this general condition, the Corps has replaced NWP 29 with 39 to make the example clearer. Nationwide permit 29 has a subdivision provision that adds an additional layer of complexity, so it would be simpler to use NWP 39 in the example since that NWP has no subdivision provision. There may circumstances in which more than three NWPs may be appropriate for authorizing a single and complete project. One commenter stated that the use of multiple NWPs to authorize a single and complete project should not cumulatively exceed the threshold of the highest limit. The general condition does limit the acreage loss of waters of the United States to the highest specified acreage limit, but it does not allow the acreage limit of an NWP with a lower acreage limit to be exceeded.

One commenter stated that the proposed language would limit use of NWPs with no acreage limit, such as NWP 3 in combination with other NWPs, where it may be desirable to allow additional work beyond a specified acreage to occur as it would promote re-use and rehabilitation of existing structures rather than construction of new structures. One commenter recommended that the Corps provide clarification regarding how temporary and cumulative impacts would be addressed when more than one NWP is used to authorize a single and complete project.

The text in paragraph (a) of this general condition will limit the use of NWPs with no acreage limits, as it has since this text was incorporated into this general condition in 2000 (47 FR 12896). The general condition applies to losses of waters of the United States, as that term is defined in Section F of the NWPs. It does not include temporary impacts. Cumulative impacts are addressed separately during the district engineer's review of the PCN, in accordance with paragraph 2 of Section D, District Engineer's Decision.

Several commenters stated that the Corps must prohibit the use of multiple NWPs and NWPs with other general or individual permits as the Corps is not assessing the cumulative impacts. A few commenters stated that the proposed change may result in a greater loss of waters, and expressed concern that allowing two NWPs with different specified acreage limits to be used would result in larger impacts than allowed by each individual NWP. A few commenters said that allowing the use of more than one NWP to authorize a single and complete project will result in more than minimal individual and cumulative adverse environmental effects. One commenter suggested that the Corps eliminate the use of multiple NWPs to authorize individual segments of linear projects.

The Corps considers cumulative impacts when it evaluates PCNs for proposed NWP activities (see paragraph 2 of Section D, District Engineer's Decision). General condition 28 does not address the use of NWPs with individual permits; it only addresses the use of multiple NWPs to authorize a single and complete project. The use of NWPs with individual permits is addressed in the Corps' NWP regulations at 33 CFR 330.6(d). The modification of this general condition is specifically intended to prohibit the circumvention of the specified acreage limits of the NWPs, so that the loss of waters of the United States under a particular NWP is not exceeded.

Not allowing any deviation from the specified acreage limits of the NWPs used to authorize a single and complete project will help ensure that authorized activities will result in no more than minimal individual and cumulative adverse environmental effects. This general condition does not apply to the long-standing practice of allowing each separate and distant crossing of waters of the United States for a linear project to be considered a separate NWP authorization. This general condition does apply to circumstances where a linear project may involve two separate utility lines (*e.g.,* an electric utility line authorized by NWP 57 and a water line authorized NWP 58) both cross a waterbody. In this situation, the ½-acre limit would apply to the cumulative loss of waters of the United States caused by the electric line and water line crossing of that waterbody.

The general condition is adopted with the modifications discussed above.

GC 29. *Transfer of Nationwide Permit Verifications.* The Corps did not propose any changes to this general condition. No comments were received. The general condition is adopted as proposed.

GC 30. *Compliance Certification.* The Corps did not propose any changes to this NWP. No comments were received. The general condition is adopted as proposed.

GC 31. *Activities Affecting Structures or Works Built by the United States.* The Corps proposed to modify this general condition to be consistent with the current Engineer Circular (EC) for processing requests to alter Corps Civil Works Projects pursuant to 33 U.S.C. 408 (EC 1165–2–220, issued on September 10, 2018). Under the current EC, Corps districts are required to conduct section 10 and section 404 permit evaluations and requests for 408 permissions in a coordinated and concurrent manner.

One commenter supported the proposed changes to this general condition. One commenter stated that a PCN should not be required for a Section 408 review or permission if the underlying NWP activity does not otherwise require a PCN. One commenter said that the proposed text raises concerns about timely processing of NWPs.

Pre-construction notifications are required for proposed NWP activities that also require Section 408 permissions so that the appropriate coordination can occur between district staff involved in the NWP authorization and Section 408 permission processes. The Corps acknowledges that it may take longer for NWP verification letters to be issued by the district engineer, because the NWP verification cannot be issued before the Section 408 permission process is completed.

The general condition is adopted as proposed.

GC 32. *Pre-Construction Notification.* The Corps proposed several modifications to this general condition to provide consistency with proposed changes to the NWPs and to clarify pre-construction notification requirements. The Corps proposed to change paragraph (a)(2) of this general condition by removing the following sentence: ''Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval

from the Corps.'' This proposed change will conform to one of the changes we are proposing for these three NWPs, which is to remove the term requiring the permittee to obtain a written verification from the district engineer before commencing the regulated activities in waters of the United States. As discussed above, the Corps proposed to make NWPs 21, 49, and 50 consistent with the other NWPs that require pre-construction notification, where the project proponent can proceed with the authorized work if the district engineer does not respond to the PCN within 45 days (see 33 CFR 330.1(e)(1)).

Many commenters expressed concern with the 45-day clock and the default authorization of PCNs and questioned whether this was a sufficient review period. Many commenters stated that the Corps should hold districts accountable regarding when the 45-day PCN review period starts and limit information requests to a single request. These commenters further stated that some Corps districts make numerous information requests to reset the 45-day review period or request additional information not listed in the text of the general condition. One commenter suggested that the Corps provide more direction/guidance to districts on the ability to use sketches (rather than engineered drawings). A few commenters said that no additional information requirements should be added to the PCN process that would further complicate or burden the process. One commenter recommended that district engineer use their discretionary authority to expedite certain time-sensitive maintenance and inspection projects associated with key energy infrastructure projects.

Forty-five days is sufficient time for district engineers to review PCNs and determine whether proposed activities qualify for NWP authorization or whether discretionary authority should be exercised to require individual permits. Exceptions to the 45-day review period when district engineers have to complete ESA section 7 consultation, NHPH section 106 consultations, or other required consultations. District engineers are supposed to make only one request for additional information to make PCNs complete. District engineers can make additional requests only when the project proponent has not submitted the requested information to the district engineer. A complete PCN only requires the information listed in general condition 32, plus the text of the NWP itself if the ''Notification'' provision includes additional information requirements. The sketches submitted with a PCN have to be sufficiently detailed to help a district engineer understand the proposed activity, but it does not have to be an engineering drawing or a comparably detailed drawing. The Corps has not added any more information requirements beyond what was proposed in the 2020 Proposal. The Corps does not agree that general condition 32 should be modified to state that a district engineer has discretionary authority to expedite certain time-sensitive maintenance and inspection activities. District engineers already have the discretion to manage their workload.

The Corps also proposed to modify paragraph (b)(4) of this general condition by dividing it into subparagraphs to clarify different requirements of a complete PCN: The description of the proposed NWP and associated information (subparagraph (b)(4)(i)); the quantities of anticipated losses of waters, wetlands, and other special aquatic sites for linear projects (subparagraph (b)(4)(ii)); and the inclusion of sketches with the PCN (subparagraph (b)(4)(iii)). In subparagraph (b)(4)(i), the Corps also proposed to add ''(including the same NWP for activities that do not require PCNs)'' after ''any other NWP(s)'' to clarify that the PCN must identify non-PCN NWPs that are used to authorize any part of the proposed project or related activity, including separate and distant crossings of waters and wetlands for linear projects. In subparagraph (b)(4)(ii), the Corps proposed to clarify the information requirements for linear projects, and state that these information requirements do not trigger a PCN requirement for those crossings authorized by an NWP that do not require PCNs. The Corps also proposed to modify this subparagraph to state that this information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project.

A few commenters expressed support for the proposed changes, particularly the clarification that a PCN must identify non-PCN NWPs used to authorize other aspects of projects, including linear projects. The Corps has incorporated the proposed changes into paragraph (b)(4).

In the first sentence of paragraph (b)(5), the Corps proposed to remove the phrase ''and perennial, intermittent, and ephemeral streams,'' and replace it with ''streams.'' If there are streams on the project site, then the PCN must include a delineation of those streams. In addition, the Corps proposed to modify paragraph (b)(5) to be consistent with its proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, and rely on the ½-acre limit, PCN review process, and the ability of division and district engineers, based on regional or local conditions, to modify, suspend, or revoke NWP authorizations on a regional or case-by-case basis, respectively, to comply with the requirement that NWPs may only authorize those activities that have no more than minimal individual and cumulative adverse environmental effects. The delineation of streams on the project site will be used to calculate the area of stream bed is proposed to be filled or excavated and thus results in a loss of stream bed. The area of jurisdictional stream bed filled or excavated would be applied to the ½-acre limit for these NWPs, to determine whether the loss of stream bed plus the losses of any other non-tidal jurisdictional waters and wetlands exceeds the ½-acre limit.

A few commenters stated that the Corps should add the word ''jurisdictional'' to ''streams'' in paragraph (b)(5). One commenter recommended that the Corps clarify that paragraph (b)(5) only applies to jurisdictional waters. One commenter stated that the use of the word ''ephemeral'' in paragraph (b)(5) is inconsistent with the Navigable Waters Protection Rule and recommended omitting the term from the general condition. One commenter opposed the addition of ''streams'' in paragraph (b)(6) and requiring PCNs for stream losses in excess of 1/10-acre, since the removal of the 300-foot limit only applies to 10 NWPs.

The Corps declines to add the word ''jurisdictional'' to modify the word ''stream'' or other types of waters listed in paragraph (b)(5) because an approved jurisdictional determination is not required for an NWP PCN. If the project proponent did not obtain an approved jurisdictional determination for the project site prior to submitting the PCN, for the purposes of evaluating the PCN the district engineer will presume the wetlands, streams, and other waters on the project site are subject to Clean Water Act jurisdiction. The Corps has removed the word ''ephemeral'' from paragraph (b)(5). Paragraph (b)(6) does not impose any additional PCN requirements for losses of stream bed. The first sentence of paragraph (b)(6) has been revised as follows to incorporate the mitigation thresholds in general condition 23: ''If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a

statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required.''

The Corps proposed to modify paragraph (c) to state that the PCN should be submitted using Form ENG 6082 that was approved earlier this year. Form ENG 6082 should be used instead of ENG 4345, which is the standard individual permit application form. Block 18 of Form ENG 6082 has a space for the project proponent to identify the specific NWP(s) she or he wants to use to authorize the proposed activity. Therefore, the Corps proposed to remove the text of paragraph (c) that stated that a completed ENG 4345 must clearly indicated that it is an NWP PCN and must include all of the information required by subparagraphs (b)(1) through (10) of this general condition.

One commenter stated that paragraph (c), which references the use of ENG 6082, should be altered to include allowance for states that have a joint application process. The ENG Form 6082 has been approved for purposes of the Paperwork Reduction Act, but joint state-federal forms have not been approved. Therefore, the Corps declines to make this suggested change.

Because of the proposal to remove the 300 linear foot limit for losses of stream bed in NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52, as well as the associated waiver provision for losses of intermittent and ephemeral stream bed, the Corps proposed to modify paragraph (d)(2) of the agency coordination provisions of this general condition. The Corps proposed to remove the requirement for agency coordination for NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed.

Several commenters objected to the removal of the agency coordination process with the removal of the 300 linear foot limit for loss of stream bed. One commenter stated that removal of the agency coordination process resulting from the removal of PCN requirements may lead to the Corps being the only entity involved in the review of potential source water (*i.e.* drinking water) impacts. One commenter stated that the PCN requirement is a benefit for state agency coordination, which assists the applicant and regulatory agencies in permit streamlining.

The Corps has removed the agency coordination provisions for waivers for losses of greater than 300 linear feet of intermittent or ephemeral stream bed for activities authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The NWPs do not require district engineers to coordinate proposed activities that may affect source waters or drinking water supplies. Pre-construction notifications are required for certain NWP activities, and coordination with state agencies is only required for specific activities identified in paragraph (d) of this general condition.

This general condition is adopted with the modifications discussed above.

I. Discussion of Proposed Modifications to Section D, District Engineer's Decision

In paragraph 1 of Section D, the Corps proposed to remove provisions that refer to potential waivers of the 300 linear foot limit for losses of stream bed authorized by NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. The Corps proposed this change to be consistent with our proposal to remove the 300 linear foot limit and the waiver provision from those NWPs. In the second sentence of paragraph 4, the Corps proposed to remove ''or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50'' because we are proposing to remove the requirement that permittees obtain written verification from the district engineer before these activities are authorized. Pre-construction notifications for activities authorized by NWPs 21 and 50 will be subject to the same timeframes as other NWP activities that require PCNs, because the Corps removed the provision from these NWPs that required the permittee to obtain written verification from the Corps before commencing the authorized activity. This includes the ability for the permittee to presume that her or his project qualifies for the NWP unless she or he is otherwise notified by the district engineer within a 45-day period (see 33 CFR 330.1(e)(1)), or Endangered Species Act Section 7 consultation and/or National Historic Preservation Act Section 106 consultation needs to be completed for non-federal permittees to comply with the requirements of general conditions 18 and 20.

One commenter said the Corps should only use functional assessments that have been developed, peer reviewed, and subject to public and stakeholder comment at the regional level, and that the Corps not unilaterally revise the tools or substitute alternative methodologies only when the Corps prefers. The Corps determines which functional assessments are appropriate for use in evaluating NWP PCNs and other applications for DA authorization. The Corps does not require functional assessments to be peer reviewed, but acknowledges that peer review can help improve functional assessments to better assess aquatic resource functions. The Corps has modified the first sentence of paragraph 3 of this section to be consistent with the wetland and stream mitigation thresholds in general condition 23. That sentence has been changed to read: ''If the proposed activity requires a PCN and will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN.''

J. Discussion of Proposed Modifications to Section F, Definitions

In the 2020 Proposal, the Corps proposed changes to some of the NWP definitions and the Corps proposed to remove some definitions. Several commenters stated that the definitions in Section F should match the definitions used in the Navigable Waters Protection Rule and in other regulations. A few commenters suggested retaining the definitions for intermittent stream and ephemeral stream. One commenter suggested repeating all ''geographic definitions'' in the NWP definitions. One commenter requested definitions for levee, berm and dike. One commenter asked that the Corps differentiate between ''top of bank,'' ''ordinary high water mark'' and ''bankfull elevation.'' One commenter expressed concern with the proposed removal of definitions for ''protected tribal resources,'' ''ephemeral streams'' and ''intermittent streams.''

As discussed in the proposed rule, the Corps proposed to modify the definitions of ''ordinary high water mark'' and ''perennial stream'' to be consistent with the Navigable Waters Protection Rule at 33 CFR 328.3(c)(7) and 33 CFR 328.3(c)(8). The Corps is removing the definitions of intermittent stream and ephemeral stream because they are no longer used in the text of the NWPs. The Corps does not believe it is necessary to copy the entire definition of ''waters of the United States'' into the NWPs because that definition is available at 33 CFR 328.3. The Corps declines to add definitions of the terms ''levee,'' ''berm,'' ''dike,'' and ''top of bank.'' The Corps does not see a need to differentiate or define the terms ''top of bank'' or ''bankfull elevation'' because those terms are not used in the NWPs. The definition of ''protected tribal resources'' has been removed because that phrase is no longer in the text of general condition 17, tribal rights. The term ''protected tribal resources'' continues to be applied

through the Corps' implementation of the 1998 Department of Defense American Indian and Alaska Native Policy.

One commenter stated that unless a definition of ''water of the United States'' is included or referenced all waterbodies should be defined within the NWPs to avoid confusion. One commenter requested a definition of ''adjacent wetlands'' that is consistent across all regulations. One commenter suggested adding a definition of ''oil and gas pipeline.'' One commenter supported retention of the definitions for ''single and complete linear project,'' ''single and complete non-linear project'' and ''independent utility.'' One commenter suggested adding a definition of ''stream'' to differentiate between linear wetlands and streams for compensatory mitigation purposes.

The phrase ''waters of the United States'' is defined at 33 CFR part 328.3. The term ''adjacent wetlands'' is defined at 33 CFR 328.3(c)(1)). The term ''oil or natural gas pipeline'' is defined in the text of NWP 12. The Corps declines to add a definition of ''stream'' because the NWPs include a definition of ''stream bed.'

Best management practices (BMPs). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Compensatory mitigation. The Corps did not propose any changes to this definition. The Corps did not receive any comments. The definition is adopted as proposed.

Currently serviceable. The Corps did not propose any changes to this definition. One commenter stated that the proposed definition includes the unclear phrase ''some maintenance'' and requested clarification. The Corps declines to clarify the phrase ''some maintenance'' because it is subject to application on a case-by-case basis.

The definition is adopted as proposed.

Direct effects. The Corps did not propose any changes to this definition and did not receive any comments. The definition is adopted as proposed.

Discharge. The Corps did not propose any changes to this definition. One commenter said that the proposed definition includes the word being defined in its definition and suggested edit of the definition replacing the word discharge in the definition with ''addition'', ''release'', or ''placement.'' The Corps declines to make the suggested changes because the Corps regulates discharges of dredged or fill material and those terms are more comprehensively defined in 33 CFR 323.2.

The definition is adopted as proposed.

Ecological reference. The Corps did not propose any changes to this definition. The Corps We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Enhancement. The Corps did not propose any changes to this definition. The Corps We did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ephemeral stream. The Corps proposed to remove the definition of ''ephemeral stream'' in conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed and the ability of district engineers to waive that 300 linear foot limit for losses of ephemeral stream bed on a case-by-case basis. It should also be noted that ephemeral features, including ephemeral streams, are excluded from the definition of ''waters of the United States'' at 33 CFR 328.3(b)(3). Section 328.3 of the Corps' regulations defines ''waters of the United States'' for the purposes of the Clean Water Act.

A few commenters stated that the definition of ''ephemeral stream'' should be retained given the importance of stream categorization in jurisdiction and thus whether an NWP is necessary. One commenter stated that the definition should be retained to differentiate ephemeral streams from intermittent and perennial streams. One commenter supported the removal of the definition given proposed elimination of the 300 linear foot limit from the NWPs and the exclusion of ephemeral streams from jurisdiction under the Navigable Waters Protection Rule. One commenter expressed opposition to the definition's removal based on opposition to removal of the 300 linear foot limit from the NWPs. One commenter stated that the term should be retained because a cumulative impacts analysis may include a determination of flow through ephemeral and intermittent streams.

The Corps is removing this definition as proposed because, in accordance with the Navigable Waters Protection Rule, ephemeral features, including ephemeral streams, are categorically excluded from the definition of ''waters of the United States'' under the Clean Water Act (see 33 CFR 328.3(b)(3)).

Establishment (creation). The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

High Tide Line. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Historic property. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Independent utility. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Indirect effects. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Intermittent stream. The Corps proposed to remove the definition of ''intermittent stream,'' in conjunction with the proposal to remove the 300 linear foot limit for losses of stream bed which obviated the need to reference a waiver for losses of an intermittent stream bed.

One commenter supported the removal of the definition given proposed elimination of the 300 linear foot limit from the NWPs and the exclusion of ephemeral streams from jurisdiction under the Navigable Waters Protection Rule. One commenter objected to the removal of the definition of intermittent streams since they are in the Navigable Waters Protection Rule. One commenter opposed the definition's removal based on opposition to removal of the 300 linear foot limit from the NWPs. One commenter stated that the term should be retained because a cumulative impacts analysis may include a determination of flow through ephemeral and intermittent streams.

The Corps is removing this definition as proposed because this term is no longer used in the text of the NWPs.

Loss of waters of the United States. The Corps proposed to rearrange the sentences in this definition so that the sentence that defines the loss of stream bed is moved to become the second sentence of this definition. In addition, the Corps proposed to modify this sentence to state that the stream bed would have to be permanently adversely affected, to be consistent with the first sentence of this definition. For consistency with the proposal to remove the 300 linear foot limit for losses of stream bed from 21, 29, 39, 40, 42, 43, 44, 51, and 52, and rely on the ½-acre limit and other tools to comply with the statutory requirement that the NWPs only authorize those activities that have

no more than minimal individual and cumulative adverse environmental effects, the Corps proposed to remove ''linear feet'' from the third sentence of this definition. This would provide consistency among the various types of waters when applying the fourth sentence of this definition, which states that the acreage loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP.

One commenter stated that the Corps should not remove the words ''linear feet'' from the definition because of opposition to removing a method of calculating stream loss relative to compensatory mitigation. One commenter expressed support for the changes as it makes clear that loss is limited to stream beds permanently adversely impacted. One commenter said that removal of linear feet from the definition would result in more than minimal adverse environmental effects. One commenter stated that conversion of forested wetlands to other wetland types should be included in the definition of permanent adverse effects which is included in the ''loss of waters of the United States'' definition.

The Corps has removed the 300 linear foot limit for losses of stream bed from NWPs 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52. Therefore, the Corps is removing ''linear feet'' from this definition. The Corps declines to include the conversion of forested wetlands to other wetland types in the definition of ''loss of waters of the United States'' because those areas remain wetlands and they continue to provide wetland functions.

This definition is adopted as proposed.

Navigable waters. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Non-tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Open water. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Ordinary high water mark. The Corps proposed to modify this definition to be consistent with the definition in the Navigable Waters Protection Rule defining ''waters of the United States'' (see 33 CFR 328.3(c)(7)). One commenter said that the definition includes only a discussion of the stream bed and omits reference to the bank contrary to the definition in other Clean Water Act rules and regulations. The lateral extent of Clean Water Act jurisdiction ends at the ordinary high water mark, not the bank, if no adjacent wetlands are present. See 33 CFR 328.4(c).

The definition is adopted as proposed.

Perennial stream. The Corps proposed to modify the definition of ''perennial stream'' to be consistent with the definition of ''perennial'' in the Navigable Waters Protection Rule defining ''waters of the United States'' (see 33 CFR 328.3(c)(8)).

One commenter stated support for the proposed change because of the elimination of the 300 linear foot limit for losses of stream bed and changes made to the definition in the Navigable Waters Protection Rule. One commenter said that the previous definition was clearer in instances when perennial streams are diverted underground. One commenter stated that the definition does not match the definition in the Navigable Waters Protection Rule, and recommended changing the definition to match that definition.

The Navigable Waters Protection Rule at 33 CFR 328.3(c)(8) defines the term ''perennial'' not ''perennial stream.'' The Corps used the definition of ''perennial'' at 33 CFR 328.3(c)(8) to modify the NWP definition of ''perennial steam.''

The definition is adopted as proposed.

Practicable. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Pre-construction notification. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Preservation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Protected tribal resources. Because of the proposed changes to NWP general condition 17, tribal rights, the Corps proposed to remove this definition from the NWPs since this term is not in the text of the proposed general condition. The term ''protected tribal resources'' does not appear elsewhere in the text of NWPs, general conditions, or definitions, or in Section D, ''District Engineer's Decision.''

A few commenters opposed the removal of the definition because they opposed changing the text of general condition 17. A few commenters said that that removal of the definition and the change to general condition 17 will result in substantial impacts to tribal waters, treaty, trust and cultural resources. One commenter suggested adding the definition to general condition 17.

The Corps is removing this definition as proposed because it is no longer used in the text of the NWPs or the general conditions.

Re-establishment. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Rehabilitation. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Restoration. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riffle and pool complex. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Riparian areas. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Shellfish seeding. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Single and complete linear project. The Corps did not propose any changes to this definition.

Many commenters stated support for retaining the definition given longstanding presence in regulation, practice by the Corps and upholding in court cases. Several commenters stated that the definition violates the Clean Water Act Section 404(e) minimal impact limitation, the National Environmental Policy Act the Endangered Species Act and other statutes and regulations. A few commenters stated that the definition recognizes ''that discharges of dredged or fill material along a utility line, with narrow crossings of separate and distant waters, will typically have minimal effects both on the individual waters crossed and cumulatively on watersheds.'' One commenter supported continued use of the definition but said

that it is vague and has led to inconsistent application among districts, particularly relative to multiple crossings of a single water with multiple channels. One commenter stated that the definition is inconsistently applied and should be revised to require or strongly promote the concept of ''multiple'' single and complete linear projects. One commenter requested clarification of the definition to allow a determination of permit requirements and compensatory mitigation by the permittee.

The definition is consistent with the Corps' regulations at 33 CFR 330.2(i), which was promulgated in 1991, and with long-standing practice for authorizing linear projects by NWP. This definition does not violate the Clean Water Act, the National Environmental Policy Act, or the Endangered Species Act. It is based on a regulation that was promulgated in accordance with the Administrative Procedure Act. District engineers have discretion in applying this definition, and in identifying separate and distant crossings of waters of the United States. Only the district engineer has the authority to require compensatory mitigation for activities authorized by NWPs. The permit applicant is responsible for submitting a mitigation plan to the district engineer for consideration.

The definition is adopted as proposed.

Single and complete non-linear project. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stormwater management facilities. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream bed. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Stream channelization. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Structure. The Corps did not propose any changes to this definition. One commenter suggested that the definition be altered to be consistent with language used in proposed new NWP C. Specifically, the commenter, proposes replacing the example of ''power transmission line'' with ''utility line'' so it includes other types of lines. The Corps declines to make the suggested change to this definition because it covers a wide variety of structures that may be authorized by NWPs.

The definition is adopted as proposed.

Tidal wetland. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Tribal lands. The Corps did not propose any changes to this definition. One commenter stated that the definition of tribal Lands used by the U.S. EPA and the Corps' definition is different and suggested that they be revised to be consistent. This definition was adopted from the 1998 Department of Defense American Indian and Alaska Native Policy, so the Corps is retaining that definition.

The definition is adopted as proposed.

Tribal rights. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Vegetated shallows. The Corps did not propose any changes to this definition. The Corps did not receive any comments on the proposed definition. The definition is adopted as proposed.

Waterbody. The Corps did not propose any changes to this definition. Several commenters said that the term ''waterbody'' can be confused with ''water body,'' which describes both jurisdictional and non-jurisdictional features, for example as used in the Navigable Waters Protection Rule. The commenter suggested deletion of ''waterbody'' and instead use of ''waters of the United States'' to avoid confusion. One commenter recommended removal of the last sentence of this definition. The Corps declines to make the suggested changes, except for the removal of the last sentence, because this term is used through the NWPs. The definition of ''waters of the United States'' at 33 CFR 328.3 is used to identify waterbodies, including adjacent wetlands.

The definition is adopted as proposed.

III. Compliance With Relevant Statutes

A. National Environmental Policy Act Compliance

The Corps has prepared a decision document for each NWP. Each decision document contains an environmental assessment (EA) to fulfill the requirements of the National Environmental Policy Act (NEPA). The EA includes the public interest review described in 33 CFR part 320.4(b). The EA generally discusses the anticipated impacts the NWP will have on the human environment and the Corps' public interest review factors. If a proposed NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document also includes an analysis conducted pursuant to the Clean Water Act section 404(b)(1), in particular 40 CFR part 230.7. These decision documents evaluate, from a national perspective, the environmental effects of each NWP.

The final decision document for each NWP is available on the internet at: *www.regulations.gov* (docket ID number COE–2020–0002) as Supporting and Related Materials for this final rule. Before the 2021 NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (*e.g.,* a state or Corps district) and to determine whether regional conditions are necessary to ensure that the NWPs will result in no more than minimal individual and cumulative adverse environmental effects on a regional basis. The supplemental documents are prepared by Corps districts, but must be approved and issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations in a specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other Corps districts, their geographic area of responsibility may be based on watershed boundaries. For some states, there may be more than one Corps district responsible for implementing the Corps regulatory program, including the NWP program. In states with more than one Corps district, there is a lead Corps district responsible for preparing the supplemental decision documents for all of the NWPs. The supplemental decision documents will also discuss regional conditions imposed by division engineers to protect the aquatic environment and other public interest review factors and ensure that any

adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

The Corps solicited comments on the draft national decision documents, and any comments received were considered when preparing the final decision documents for the NWPs.

Before the final NWPs go into effect, division engineers will issue supplemental documents to evaluate environmental effects on a regional basis (*e.g.,* state or Corps district). The supplemental documents are prepared by Corps districts, but must be approved and formally issued by the appropriate division engineer, since the NWP regulations at 33 CFR 330.5(c) state that the division engineer has the authority to modify, suspend, or revoke NWP authorizations for any specific geographic area within his or her division. For some Corps districts, their geographic area of responsibility covers an entire state. For other states, there is more than one Corps district responsible for implementing the Corps Regulatory Program, including the NWP program. In those states, there is a lead Corps district responsible for preparing the supplemental documents for all of the NWPs. The supplemental documents will discuss regional conditions imposed by division engineers to protect the aquatic environment and ensure that any adverse environmental effects resulting from NWP activities in that region will be no more than minimal, individually and cumulatively.

For the NWPs, the assessment of cumulative effects under the Corps' public interest review occurs at three levels: National, regional, and the verification stage. Each national NWP decision document includes a national-scale cumulative effects analysis under the Corps' public interest review. Each supplemental document has a cumulative effects analysis under the Corps' public interest review conducted for a region, which is usually a state or Corps district. When a district engineer issues a verification letter in response to a PCN or a voluntary request for a NWP verification, the district engineer prepares a brief decision document. That decision document explains whether the proposed NWP activity, after considering permit conditions such as mitigation requirements, will result in no more than minimal individual and cumulative adverse environmental effects.

If the NWP is not suspended or revoked in a state or a Corps district, the supplemental document includes a certification that the use of the NWP in that district, with any applicable regional conditions, will result in no more than minimal cumulative adverse environmental effects.

After the NWPs are issued or reissued and go into effect, district engineers will monitor the use of these NWPs on a regional basis (*e.g.,* within a watershed, county, state, Corps district or other appropriate geographic area), to ensure that the use of a particular NWP is not resulting in more than minimal cumulative adverse environmental effects. The Corps staff that evaluate NWP PCNs that are required by the text of the NWP or by NWP general conditions or regional conditions imposed by division engineers, or voluntarily submitted to the Corps district by project proponents to receive written NWP verifications, often work in a particular geographic area and have an understanding of the activities that have been authorized by NWPs, regional general permits, and individual permits over time, as well as the current environmental setting for that geographic area. If the Corps district staff believe that the use of an NWP in that geographic region may be approaching a threshold above which the cumulative adverse environmental effects for that category of activities may be more than minimal, the district engineer may either make a recommendation to the division engineer to modify, suspend, or revoke the NWP authorization in that geographic region in accordance with the procedures in 33 CFR 330.5(c). Alternatively, under the procedures at 33 CFR 330.5(d), the district engineer may also modify, suspend, or revoke NWP authorizations on a case-by-case basis to ensure that the NWP does not authorize activities that result in more than minimal cumulative adverse environmental effects.

A few commenters said that the Council on Environmental Quality's amended NEPA regulations are currently being litigated, and that the Corps should continue to apply the 1978 regulations. Several commenters stated that an environmental assessment would conclude that a finding of no significant impact cannot be achieved for the NWPs, and therefore, an environmental impact statement must be prepared for the issuance of the NWPs. Several commenters said that a reasonable range of actual alternatives must be evaluated, including a no action alternative, for each NWP. A few commenters said because NWPs are in effect for five years, the Corps should include reasonably foreseeable future actions. A few commenters stated the Corps decision documents fail to take a ''hard look'' at direct, indirect, and cumulative analysis required by NEPA, and that the Corps decision documents fail to consider or analyze relevant factors necessary to determine significance.

The Corps prepared NEPA components of the draft and final national decision documents in accordance with the Council on Environmental Quality's current NEPA regulations, published in the **Federal Register** on July 16, 2020 (85 FR 43304). The commenters objecting to the preparation of environmental assessments for the issuance of the NWPs do not provide any substantive information backing their claims that the issuance of the NWPs requires an environmental impact statement. The national decision document prepared for each NWP issued by this final rule discusses alternatives, consistent with CEQ's current NEPA regulations at 40 CFR 1501.5(c). The national decision documents examine the effects and impacts of the proposed action (*i.e.,* the issuance of the NWP by Corps Headquarters) consistent with the definition of ''effects or impacts'' at 40 CFR 1508.1(g).

A few commenters said the decision documents somehow imply that the NWPs provide site-specific NEPA analysis, but that the Corps does not undertake any NEPA analysis at a project-specific level. One commenter stated that the Corps cannot defer its NEPA obligations to consider mitigation measures, public comments, or alternatives analysis to the regional or project level review because there is no guarantee any further NEPA analysis would occur. Several commenters said the national decision documents do not provide an a NEPA-level cumulative effects analysis, and that the Corps cannot defer the analysis at a later stage of review.

The Corps did not defer any of its NEPA obligations during the preparation of the national decision documents for these NWPs. No further NEPA analysis is required for specific activities authorized by NWPs because the Corps fulfills the requirements of NEPA when it prepares an environmental assessment with a finding of no significant impact for each NWP's national decision document, to inform the decision whether to issue or reissue that NWP. The 2020 CEQ NEPA regulations altered how cumulative effects are considered under NEPA (see the definition of ''effects or impacts'' at 40 CFR 1508.1(g)). The Corps considered the effects of the proposed action in its national decision documents.

One commenter requested information on what type of NEPA assessment has been completed to determine the effects on aquatic resources as a result of the proposed changes, and what type of studies have been performed to show these changes will not result in more than minimal effects. One commenter stated the national decision documents do not provide a list of agencies or persons consulted in the development of the environmental assessment. One commenter said the national decision documents do not include tribal interests or treaty responsibilities.

The Corps' NEPA assessment is provided in the national decision document for each NWP. Further, the Corps considered public comments received on the 2020 Proposal and on the draft national decision documents. Tribal interests and treaty responsibilities are more appropriately addressed through consultations between Corps districts and tribes on matters related to the NWP program and its implementation.

B. Compliance With Section 404(e) of the Clean Water Act

The NWPs are issued in accordance with Section 404(e) of the Clean Water Act and 33 CFR part 330. These NWPs authorize categories of activities that are similar in nature. The ''similar in nature'' requirement does not mean that activities authorized by an NWP must be identical to each other. We believe that the ''categories of activities that are similar in nature'' requirement in Clean Water Act section 404(e) is to be interpreted broadly, for practical implementation of this general permit program.

Nationwide permits, as well as other general permits, are intended to reduce administrative burdens on the Corps and the regulated public while maintaining environmental protection, by efficiently authorizing activities that have no more than minimal adverse environmental effects, consistent with Congressional intent expressed in the 1977 amendments to the Federal Water Pollution Control Act. The NWPs provide incentives for project proponents to minimize impacts to jurisdictional waters and wetlands to qualify for NWP authorization instead of having to apply for individual permits. Keeping the number of NWPs manageable is a key component for making the NWPs protective of the environment and streamlining the authorization process for those general categories of activities that have no more than minimal individual and cumulative adverse environmental effects.

The various terms and conditions of these NWPs, including the NWP regulations at 33 CFR 330.1(d) and 330.4(e), allow district engineers to exercise discretionary authority to modify, suspend, or revoke NWP authorizations or to require individual permits, and ensure compliance with section 404(e) of the Clean Water Act. For each NWP that may authorize discharges of dredged or fill material into waters of the United States, the national decision documents prepared by Corps Headquarters include a 404(b)(1) Guidelines analysis. The supplemental documents prepared by division engineers will discuss regional circumstances to augment the 404(b)(1) Guidelines analyses in the national decision documents. These 404(b)(1) Guidelines analyses are conducted in accordance with 40 CFR part 230.7.

The 404(b)(1) Guidelines analyses in the national decision documents also include cumulative effects analyses done in accordance with 40 CFR 230.7(b) and 230.11(g). A 404(b)(1) Guidelines cumulative effects analysis is provided in addition to the NEPA cumulative effects analysis because the implementing regulations for NEPA and the 404(b)(1) Guidelines define ''cumulative impacts'' or ''cumulative effects'' differently.

C. 2020 Revisions to the Definition of ''Waters of the United States'' (i.e., the Navigable Waters Protection Rule)

Corps general permits are not intended to make or imply a conclusion or determination regarding what water bodies are or are not subject to CWA jurisdiction. Instead, a Corps general permit merely states that, if a person complies with all of the terms and conditions of the general permit, that person's proposed discharges of dredged or fill material into the waterbody will be consistent with the CWA, on the ground that any such discharges either (1) are legally authorized under the CWA (to the extent that the waterbody is subject to CWA jurisdiction) or (2) are otherwise consistent with the CWA to the extent that the waterbody is not jurisdictional under the CWA. The Corps acknowledges that some members of the public may seek to comply with the conditions of a general permit even for water bodies that are not jurisdictional or may not be jurisdictional under the CWA. Such practice, though not required, is not unlawful. The Corps is not required to make a formal determination whether a particular wetland or water is subject to jurisdiction under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act of 1899 before issuing an individual permit or a general permit verification. Many project proponents prefer the time savings that can occur when the Corps issues an individual permit or general permit verification without expending the time and resources needed to make a formal, definitive determination whether those wetlands and waters are in fact jurisdictional and thus regulated under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899.

On April 21, 2020, the U.S. Environmental Protection Agency (EPA) and the Department of the Army published the Navigable Waters Protection Rule, revising the definition of ''waters of the United States'' (85 FR 22250). Specifically, this final rule revises the Corps' regulations at 33 CFR part 328.3, where the definition of ''waters of the United States'' is located for the purposes of implementing Section 404 of the Clean Water Act. On June 22, 2020, the Navigable Waters Protection Rule became effective in all states and jurisdictions except for the State of Colorado due to a federal district court-issued stay in that state (the case is currently under appeal). The rule has also been challenged in several other federal district courts.

Please note that some of the NWPs could authorize activities that involve the discharge of dredged or fill material into water bodies that are not subject to CWA jurisdiction, or that may not be subject to CWA jurisdiction. For example, a project proponent could proceed with an NWP activity that does not require submission of a PCN to the Corps in a non-jurisdictional water without getting a definitive determination from the Corps that the wetland or waterbody is not a water of the United States and thus not subject to CWA jurisdiction. As another example, if a proposed NWP activity requires pre-construction notification, the district engineer could issue the NWP verification based on the delineation of wetlands, other special aquatic sites, and other waters provided with the PCN in accordance with paragraph (b)(5) of NWP general condition 32, without the Corps making any formal determination as to whether those wetlands, special aquatic sites, and other waters are ''waters of the United States.''

During the pendency of any litigation challenging the Navigable Waters Protection Rule, the NWPs will continue to authorize discharges of dredged or fill material in all water bodies that are subject to CWA jurisdiction, or that may

be subject to CWA jurisdiction, at the time those discharges occur. Where a particular waterbody into which a person proposes to discharge dredged or fill material is subject to CWA jurisdiction, compliance with the terms and conditions of one or more NWPs, or an individual permit, will be necessary. An affected party has the opportunity to request an approved jurisdictional determination from the Corps if the affected party would like the Corps' formal determination on the jurisdictional status of a water or feature under the CWA.

D. Compliance With the Endangered Species Act

The NWP regulations at 33 CFR 330.4(f) and NWP general condition 18, endangered species, ensure that all activities authorized by NWPs comply with section 7 of the Endangered Species Act (ESA). Those regulations and general condition 18 require non-federal permittees to submit PCNs for any activity that might affect listed species or designated critical habitat, as well as species proposed for listing and critical habitat proposed for such designation. When the district engineer evaluates a PCN, he or she determines whether the proposed NWP activity may affect listed species or designated critical habitat. The Corps established the ''might affect'' threshold in 33 CFR 330.4(f)(2) and paragraph (c) of general condition 18 because it is more stringent than the ''may affect'' threshold for section 7 consultation in the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) ESA section 7 consultation regulations at 50 CFR part 402. The word ''might'' is defined as having ''less probability or possibility'' than the word ''may'' (Merriam-Webster's Collegiate Dictionary, 10th edition). Since ''might'' has a lower probability of occurring, it is below the threshold (*i.e.,* ''may affect'') that triggers the requirement for ESA section 7 consultation for a proposed Federal action. As discussed below, each year the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. In recent years, an average of more than 10,800 formal, informal, and programmatic ESA section 7 consultations are conducted each year between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18 under the ''might affect'' threshold.

If the project proponent is required to submit a PCN and the proposed activity might affect listed species or designated critical habitat, species proposed for listing, or critical habitat proposed for such designation, the activity is not authorized by an NWP until either the district engineer makes a ''no effect'' determination or makes a ''may affect'' determination and completes formal or informal ESA section 7 consultation. The district engineer may also use a regional programmatic consultation to comply with the requirements of section 7 of the ESA.

When evaluating a PCN, where necessary and appropriate, the Corps district will either make a ''no effect'' determination or a ''may affect'' determination. If the district engineer makes a ''may affect'' determination, she or he will notify the non-federal project proponent and the activity is not authorized by the NWP until ESA Section 7 consultation has been completed. In making these determinations, the district engineer will apply the definition of ''effects of the action'' in the FWS's and NMFS's ESA consultation regulations at 50 CFR 402.02. If the district engineer initiates section 7 consultation with the FWS and/or NMFS, that consultation will also consider ESA section 7 cumulative effects, in accordance with the definition of ''cumulative effects'' at 50 CFR 402.02. If the non-federal project proponent does not comply with 33 CFR 330.4(f)(2) and general condition 18, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action under its regulations at 33 CFR part 326 to respond to the unauthorized activity, if and when the Corps learns about that unauthorized activity.

Federal agencies, including state agencies (*e.g.,* certain state Departments of Transportation) to which the Federal Highway Administration has assigned its responsibilities for ESA section 7 consultation pursuant to 23 U.S.C. 327(a)(2)(B), are required to follow their own procedures for complying with Section 7 of the ESA (see 33 CFR 330.4(f)(1) and paragraph (b) of general condition 18). This includes circumstances where an NWP activity is part of a larger overall federal project or action. The federal agency's ESA section 7 compliance covers the NWP activity because it is undertaking the NWP activity and possibly other related activities that are part of a larger overall federal project or action. For those NWPs that require pre-construction notification for proposed activities, the federal permittee is required to provide the district engineer with the appropriate documentation to demonstrate compliance with section 7 of the ESA. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the proposed activity to fulfill both the federal agency's and the Corps' obligations to comply with the ESA.

The only activities that potentially could be immediately authorized by NWPs, assuming they meet all other applicable NWP conditions, are activities that would have ''no effect'' on listed species or designated critical habitat within the meaning of Section 7 of the ESA and its implementing regulations at 50 CFR part 402. Therefore, the issuance or reissuance of NWPs does not require ESA section 7 consultation because no activities authorized by any NWPs ''may affect'' listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f). Regional programmatic ESA section 7 consultations may also be used by district engineers to satisfy the requirements of the NWPs in general condition 18 and 33 CFR 330.4(f) if a proposed NWP activity is covered by that regional programmatic consultation.

In the August 27, 2019, issue of the **Federal Register** (84 FR 44976) the FWS and NMFS published a final rule that amended their regulations for interagency cooperation under Section 7 of the ESA. That final rule went into effect on October 28, 2019. With respect to making effects determinations for proposed federal actions, such as activities authorized by NWPs, the FWS and NMFS made two important changes to 50 CFR part 402: (a) Introducing the term ''consequences'' to help define what is an effect under ESA section 7, and (b) emphasizing that to be considered an ''effect of the action'' under section 7 consultation, the consequences caused by the action would not occur but for the proposed action and must be reasonably certain to occur (see 84 FR 44977). Further clarification of ''activities that are reasonably certain to occur'' and ''consequences caused by the proposed action'' were provided by the FWS and NMFS in rule text added at 50 CFR 402.17(a) and (b), respectively.

Applying the 2019 amendments to the section 7 regulations to the NWP program, consequences to listed species and designated critical habitat caused

by proposed NWP activities must be reasonably certain to occur. In the preamble to their final rule, the FWS and NMFS stated that for a ''consequence of an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information'' (see 84 FR 44977). The FWS and NMFS explained that ''clear and substantial'' means that there has to be a firm basis for supporting a conclusion that a consequence of a federal action is reasonably certain to occur. The determination that a consequence is reasonably certain to occur should not be based on speculation or conjecture, and the information used to make that determination should have a ''degree of certitude'' (see 84 FR 44977). The Corps will apply these considerations when evaluating pre-construction notifications for proposed NWP activities.

When the district engineer receives a pre-construction notification for a proposed NWP activity, he or she is responsible for applying the current definition of ''effect of the action'' to the proposed NWP activity and to determine the consequences caused by the proposed action and which activities are reasonably certain to occur. The district engineer determines whether the proposed NWP activity ''may affect'' listed species or designated critical habitat and initiates formal or informal section 7 consultation, unless she or he determines that the proposed NWP activity will have ''no effect'' on listed species or designated critical habitat. As a general rule, the district engineer documents his or her ''no effect'' determination in writing for every pre-construction notification that the district engineer receives and responds to.

The NWP program has been structured, through the requirements of NWP general condition 18 and 33 CFR 330.4(f), to focus ESA section 7 compliance at the activity-specific and regional levels. Each year, an average of more than 10,800 formal, informal, and regional programmatic ESA section 7 consultations are conducted by Corps districts with the FWS and/or NMFS in response to NWP PCNs for specific NWP activities (see below). Focusing ESA section 7 compliance at the activity-specific scale and regional programmatic scale is more efficient for the permittees, the Corps, and the FWS and NMFS, than doing so at the national level because of the similarities in ecosystem characteristics and associated listed species and critical habitat within a particular region.

For a proposed NWP activity that may affect listed species or designated critical habitat, a biological opinion with an incidental take statement is needed for the NWP activity to go forward unless the FWS or NMFS issued a written concurrence that the proposed NWP activity is not likely to adversely affect listed species or designated critical habitat. It is through activity-specific section 7 consultations and regional programmatic section 7 consultations between the Corps and the FWS and NMFS that effective protection of listed species and their designated critical habitat is achieved.

After applying the current ESA section 7 regulations at 50 CFR part 402 to the NWP rulemaking process, the Corps continues to believe that the issuance or reissuance of the NWPs has ''no effect'' on listed species or designated critical habitat, and that the ESA section 7 compliance is most effectively achieved by applying the requirements of general condition 18 and 33 CFR 330.4(f) to specific proposed NWP activities that are identified after the NWPs are issued and go into effect. Compliance with the requirements of ESA section 7 can also be achieved by district engineers applying appropriate formal or informal regional programmatic ESA section 7 consultations that have been developed by Corps districts with regional offices of the FWS and NMFS.

Section 7 of the Endangered Species Act requires each federal agency to ensure, through consultation with the Services, that ''any action authorized, funded, or carried out'' by that agency ''is not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat.'' (See 16 U.S.C. 1536(a)(2).) Accordingly, the Services' section 7 regulations specify that an action agency must ensure that the action ''it authorizes,'' including authorization by permit, does not cause jeopardy or adverse modification. (See 50 CFR 402.01(a) and 402.02). Thus, in assessing application of ESA section 7 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities ''authorized'' by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by these NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required by a specific NWP. With respect to listed species and critical habitat, general condition 18 expressly prohibits any activity ''which 'may affect' a listed species or designated critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed.'' General condition 18 also states that if an activity ''might affect'' a listed species or designated critical habitat (or a species proposed for listing or critical habitat proposed for such designation), a non-federal applicant must submit a PCN and ''shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.'' In addition, 33 CFR 330.4(f)(2) imposes a PCN requirement for proposed NWP activities by non-federal permittees where listed species (or species proposed for listing) or critical habitat might be affected or are in the vicinity of the proposed NWP activity. Section 330.4(f)(2) also prohibits those permittees from beginning the NWP activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. Permit applicants that are Federal agencies must and will follow their own requirements for complying with the ESA (see 33 CFR 330.4(f)(1)).

Thus, because no NWP can or does authorize an activity that may affect a listed species or critical habitat absent an activity-specific ESA section 7 consultation or applicable regional programmatic ESA section 7 consultation, and because any activity that may affect a listed species or critical habitat must undergo an activity-specific consultation or be in compliance with a regional programmatic ESA section 7 consultation before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has ''no effect'' on listed species or critical habitat. Accordingly, the action being ''authorized'' by the Corps (*i.e.,* the issuance or re-issuance of the NWPs themselves) has no effect on listed species or critical habitat.

To help ensure protection of listed species and critical habitat, general condition 18 and 33 CFR 330.4(f) establish a more stringent threshold than the threshold set forth in the Services' ESA section 7 regulations for initiation of section 7 consultation. Specifically, while section 7 consultation must be initiated for any activity that ''may affect'' listed species or critical habitat, for non-federal permittees general condition 18 require submission of a PCN to the Corps if ''any listed species (or species proposed

for listing) or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat'' or critical habitat proposed for such designation, and prohibits work until ''notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized.'' (See paragraph (c) of general condition 18.) The PCN must ''include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed work or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed work.'' (See paragraph (b)(7) of the ''Pre-Construction Notification'' general condition.) Paragraph (f) of general condition 18 notes that information on the location of listed species and their critical habitat can be obtained from the Services directly or from their websites.

General condition 18 makes it clear to project proponents that an NWP does not authorize the ''take'' of an endangered or threatened species. Paragraph (e) of general condition 18 also states that a separate authorization (*e.g.,* an ESA section 10 permit or a biological opinion with an ''incidental take statement'') is required to take a listed species. In addition, paragraph (a) of general condition 18 states that no activity is authorized by an NWP which is likely to ''directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation'' or ''which will directly or indirectly destroy or adversely modify the critical habitat of such species.'' Such activities would require district engineers to exercise their discretionary authority and subject the proposed activity to the individual permit review process, because an activity that would jeopardize the continued existence of a listed species, or a species proposed for listing, or that would destroy or adversely modify the critical habitat of such species would not result in no more than minimal adverse environmental effects and thus cannot be authorized by an NWP.

The Corps' NWP regulations at 33 CFR 330.1(c) state that an ''activity is authorized under an NWP only if that activity and the permittee satisfy all of the NWP's terms and conditions.'' Thus, if a project proponent moves forward with an activity that ''might affect'' an ESA listed species without complying with the PCN or other requirements of general condition 18, the activity is not authorized under the CWA. In this case, the project proponent could be subject to enforcement action and penalties under the CWA. In addition, if the unauthorized activity results in a ''take'' of listed species as defined by the ESA and its implementing regulations, then he or she could be subject to penalties, enforcement actions, and other actions by the FWS or NMFS under section 11 of the ESA.

For listed species (and species proposed for listing) under the jurisdiction of the FWS, information on listed species that may be present in the vicinity of a proposed activity is available through the Information Planning and Consultation (IPaC) system,[4] an on-line project planning tool developed and maintained by the FWS.

During the process for developing regional conditions, Corps districts collaborate with FWS and/or NMFS regional or field offices to identify regional conditions that can provide additional assurance of compliance with general condition 18 and 33 CFR 330.4(f)(2). Such regional conditions can add PCN requirements to one or more NWPs in areas inhabited by listed species or where designated critical habitat occurs. Regional conditions can also be used to establish time-of-year restrictions when no NWP activity can take place to ensure that individuals of listed species are not adversely affected by such activities. Corps districts will continue to consider through regional collaborations and consultations, local initiatives, or other cooperative efforts additional information and measures to ensure protection of listed species and critical habitat, the requirements established by general condition 18 (which apply to all uses of all NWPs), and other provisions of the Corps regulations ensure full compliance with ESA section 7.

Corps district office personnel meet with local representatives of the FWS and NMFS to establish or modify existing procedures, where necessary, to ensure that the Corps has the latest information regarding the existence and location of any threatened or endangered species or their critical habitat, including species proposed for listing or critical habitat proposed for such designation. Corps districts can also establish, through local procedures or other means, additional safeguards that ensure compliance with the ESA. Through formal ESA section 7 consultation, or through other coordination with the FWS and/or the NMFS, as appropriate, the Corps establishes procedures to ensure that NWP activities will not jeopardize any threatened and endangered species or result in the destruction or adverse modification of designated critical habitat. Such procedures may result in the development of regional conditions added to the NWP by the division engineer, or in activity-specific conditions to be added to an NWP authorization by the district engineer.

The Corps has prepared a biological assessment for this rulemaking action. The biological assessment concludes that the issuance or reissuance of NWPs has ''no effect'' on listed species and designated critical habitat and does not require ESA section 7 consultation. This conclusion was reached because no activities authorized by any NWPs ''may affect'' listed species or critical habitat without first completing activity-specific ESA Section 7 consultations with the Services, as required by general condition 18 and 33 CFR 330.4(f).

Based on the fact that NWP issuance or reissuance of the NWPs is contingent upon any proposed NWP activity that ''may affect'' listed species or critical habitat undergoing an activity-specific or regional programmatic ESA section 7 consultation, there is no requirement that the Corps undertake consultation for the NWP program. The national programmatic consultations conducted in the past for the NWP program were voluntary consultations despite the inclusion of procedures to ensure consultation under Section 7 for proposed NWP activities that may affect listed species or designated critical habitat. Regional programmatic consultations can be conducted voluntarily by Corps districts and regional or local offices of the FWS and/or NMFS to tailor regional conditions and procedures to ensure the ''might affect'' threshold is implemented consistently and effectively.

Examples of regional programmatic consultations currently in effect, with the applicable Service the Corps consulted with, include: The Standard Local Operating Procedures for Endangered Species in Mississippi (2017—FWS); the Endangered Species Act Section 7 Programmatic Biological Opinion and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Consultation for Tidal Area Restoration Authorized, Funded, or Implemented by the Corps of Engineers, Federal Emergency Management Agency, and Federal Highways Administration, in Oregon and the Lower Columbia River (NMFS—2018); the U.S. Army Corps of Engineers Jacksonville District's Programmatic Biological Opinion (JAXBO) (NMFS—2017); Missouri Bat Programmatic

[4] *https://ecos.fws.gov/ipac/.*

Informal Consultation Framework (FWS—2019); Revised Programmatic Biological/Conference Opinion for bridge and culvert repair and replacement projects affecting the Dwarf Wedgemussel, Tar River Spinymussel, Yellow Lance and Atlantic Pigtoe. Programmatic Conference Opinion (PCO) for Bridge and Culvert Replacement/Repairs/Rehabilitations in Eastern North Carolina, NCDOT Divisions 1–8 (FWS—2018); and the Corps and NOAA Fisheries Greater Atlantic Regional Fisheries Office (GARFO) Not Likely to Adversely Affect Program Programmatic Consultation (NMFS—2017).

The programmatic ESA section 7 consultations that the Corps conducted for the 2007 and 2012 NWPs were voluntary consultations. The voluntary programmatic consultation conducted with the NMFS for the 2012 NWPs resulted in a biological opinion issued on February 15, 2012, which was replaced by a new biological opinion issued on November 24, 2014. A new biological opinion was issued by NMFS after the proposed action was modified and triggered re-initiation of that programmatic consultation. The programmatic consultation on the 2012 NWPs with the FWS did not result in a biological opinion. For the 2017 NWPs, the Corps did not request a national programmatic consultation.

In the Corps Regulatory Program's automated information system (ORM), the Corps collects data on all individual permit applications, all NWP PCNs, all voluntary requests for NWP verifications where the NWP or general conditions do not require PCNs, and all verifications of activities authorized by regional general permits. For all written authorizations issued by the Corps, the collected data include authorized impacts and required compensatory mitigation, as well as information on all consultations conducted under section 7 of the ESA. Every year, the Corps evaluates approximately 35,000 NWP PCNs and requests for NWP verifications for activities that do not require PCNs, and provides written verifications for those activities when district engineers determine those activities result in no more than minimal adverse environmental effects. During the evaluation process, district engineers assess potential impacts to listed species and critical habitat and conduct section 7 consultations whenever they determine proposed NWP activities ''may affect'' listed species or critical habitat. District engineers will exercise discretionary authority and require individual permits when proposed NWP activities will result in more than minimal adverse environmental effects.

Each year, the Corps conducts thousands of ESA section 7 consultations with the FWS and NMFS for activities authorized by NWPs. These section 7 consultations are tracked in ORM. In FY 2018 (October 1, 2017 to September 30, 2018), Corps districts conducted 640 formal consultations and 3,048 informal consultations under ESA section 7 for NWP PCNs. During that time period, the Corps also used regional programmatic consultations for 7,148 NWP PCNs to comply with ESA section 7. Therefore, each year an average of more than 10,800 formal, informal, and programmatic ESA section 7 consultations are conducted between the Corps and the FWS and/or NMFS in response to NWP PCNs, including those activities that required PCNs under paragraph (c) of general condition 18. For a linear project authorized by NWPs 12 or 14, where the district engineer determines that one or more crossings of waters of the United States that require Corps authorization ''may affect'' listed species or designated critical habitat, the district engineer initiates a single section 7 consultation with the FWS and/or NMFS for all of those crossings that he or she determines ''may affect'' listed species or designate critical habitat. The number of section 7 consultations provided above represents the number of NWP PCNs that required some form of ESA section 7 consultation, not the number of single and complete projects authorized by an NWP that may be included in a single PCN. A single NWP PCN may include more than one single and complete project, especially if it is for a linear project such as a utility line or road with multiple separate and distant crossings of jurisdictional waters and wetlands from its point of origin to its terminal point.

During the process for reissuing the NWPs, Corps districts coordinated with regional and field offices of the FWS and NMFS to discuss whether new or modified regional conditions should be imposed on the NWPs to improve implementation of the ''might effect'' threshold and improve protection of listed species and designated critical habitat and ensure that the NWPs only authorize activities with no more than minimal individual and cumulative adverse environmental effects. Regional conditions must comply with the Corps' regulations at 33 CFR 325.4 for adding permit conditions to DA authorizations. The Corps decides whether suggested regional conditions identified during this coordination are appropriate for the NWPs. During this coordination, other tools, such as additional regional programmatic consultations or standard local operating procedures, might be developed by the Corps, FWS, and NMFS to facilitate compliance with the ESA while streamlining the process for authorizing activities under the NWPs. Section 7 consultation on regional conditions occurs only when a Corps districts makes a ''may affect'' determination and initiates formal or informal section 7 consultation with the FWS and/or NMFS, depending on the species that may be affected. Otherwise, the Corps district coordinates the regional conditions with the FWS and/or NMFS. Regional conditions, standard local operating procedures, and regional programmatic consultations developed by the Corps, FWS, and NMFS are important tools for protecting listed species and critical habitat and helping to tailor the NWP program to address specific species, their habitats, and the stressors that affect those species.

The Corps received numerous comments regarding compliance with the Endangered Species Act for both the rulemaking process for issuing, reissuing, and modifying the NWPs by Corps Headquarters, and compliance for specific activities authorized by NWPs.

Many commenters expressed support for the Corps' current method of ESA compliance without need for a national programmatic section 7 consultation. These commenters said that the requirements of general condition 18 provide a sufficiently low threshold to trigger necessary ESA section 7 consultations for NWP activities. Many commenters said that there is no requirement for the Corps to consult under the ESA for the reissuance of the NWPs because the reissuance of the NWPs has no effect on listed species and consultation for each NWP activity occurs as necessary. One commenter suggested that the Corps voluntarily consult on reissuance of the NWPs to provide regulatory certainty to the business community, and said that this voluntary consultation should not delay issuance of a final rule. Many commenters expressed opposition to reissuing the NWPs without completing a national programmatic ESA section 7 consultation and addressing cumulative impacts to listed species. Several commenters stated that the Corps had failed to ensure that NWP activities are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat, in violation of the ESA. A few commenters said that the Corps' programmatic ''no effect'' determination for the NWPs is in error because it is arbitrary and

capricious, in violation of the ESA, and/or in violation of federal court decisions.

With this final rule, the Corps is continuing to implement its current approach to ESA section 7 compliance, through general condition 18 and 33 CFR 330.4(f). The Corps has determined that the issuance of this final rule will have no effect on endangered or threatened species or critical habitat, completed a Biological Assessment to inform that conclusion, and therefore will not be submitting a request to the FWS and NMFS for a voluntary national programmatic ESA section 7 consultation. The Corps will continue to comply with the requirements of Section 7(a)(2) of the ESA through activity-specific and regional programmatic section 7 consultations conducted between district engineers and regional and field offices of the FWS and NMFS.

A few commenters stated that general 18 unlawfully delegates the Corps' ESA section 7 responsibilities to permittees. By requiring project proponents to submit PCNs if listed species ''might be'' affected, some commenters stated that the Corps unlawfully delegates the initial effect determination to the permittee. A few commenters said that the definition of agency ''action'' in the ESA which requires ESA section 7(b) consultation includes programmatic actions such as the Corps issuance of the NWPs. A few commenters said that formal programmatic consultation between the Corps and the Services is necessary to meet the requirements of the ESA, asserting that such consultation allows for consideration of the cumulative impacts of a program and guides implementation of the program by establishing criteria to avoid adverse effects. These commenters also said that project-specific consultation must then be undertaken for specific actions under the program, which is when incidental take is authorized. One commenter said that the Corps' programmatic ''no effect'' with reliance on project specific consultation for compliance with the ESA is in error as it does not address cumulative impacts to species. The commenter further stated that this is clear based on past court cases, a past national programmatic consultation with NMFS, and the Services' listing decisions and critical habitat designations whereby they assess activities permitted by NWP as a cause of the listing or designation decision.

General condition 18 does not delegate the Corps' ESA section 7 responsibilities to permittees. Consultation under section 7(a)(2) of the ESA is only required when a federal agency determines that its proposed action may affect listed species or designated critical habitat. As explained in this section of the final rule, the ''might affect'' threshold in paragraph (c) of general condition 18 is lower than the ''may affect'' threshold for triggering a requirement for consultation with the FWS and/or NMFS. The district engineer, not the permit applicant, is responsible for making a ''may effect'' or ''no effect'' determination under ESA section 7. The non-federal permittee is responsible for complying with paragraph (c) of general condition 18 and submitting a PCN to the district engineer when a proposed NWP activity triggers one of the PCN thresholds in that paragraph.

As discussed above, the Corps evaluated the programmatic action of rulemaking to issue these NWPs and determined that the issuance or reissuance of the NWPs by Corps Headquarters has no effect on listed species or designated critical habitat; that evaluation is documented in a Biological Assessment that supports its no effect determination. Therefore, an ESA section 7(a)(2) consultation with the FWS and NMFS is not required on a national, programmatic level for the issuance or reissuance of the NWPs in this final rule. The Corps considered the effects of its proposed action (*i.e.,* the issuance or reissuance of the NWPs through the rulemaking process), including the cumulative effects anticipated to be caused by that proposed action. Those cumulative impacts include the projected use of the NWPs during the 5-year period those NWPs are anticipated to be in effect, along with the estimated impacts to jurisdictional waters and wetlands and other resources, and the estimated compensatory mitigation required by district engineers to offset the authorized impacts. When issuing or reissuing the NWPs, or determining whether specific activities are authorized by an NWP, the Corps considers the individual and cumulative adverse environmental effects caused by those activities, including adverse environmental effects to a variety of resources, including jurisdictional waters and wetlands and the species that inhabit those waters and wetlands.

With respect to cumulative effects under ESA section 7, the FWS and NMFS define ''cumulative effects'' as the ''effects of future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation'' (see 50 CFR 402.02). The Corps does not have the legal authority to regulate or control future state or private actions that do not involve activities that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 or Section 404 of the Clean Water Act. Therefore, the Corps does not have the authority or discretion to control cumulative effects to listed species or designated critical habitat that are caused by future state or private activities. Incidental take is addressed through activity-specific and regional programmatic formal ESA section 7 section consultations when district engineers determine proposed NWP activities may affect listed species or designated critical habitat.

Previous national ESA section 7 programmatic consultations on the NWPs were voluntary consultations. Even though some listing decisions by the FWS or NMFS may have identified activities that may require DA permits as one of the contributing factors to listing a particular species as endangered or threatened under the ESA, those listing decisions usually acknowledge that section 7 consultations will be conducted for proposed federal actions that may affect those species, including activities that require DA authorization under Section 10 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act. An example is the final rule issued by NMFS on June 28, 2005, for the final listing determinations for 16 evolutionary significant units of west coast salmon (see 70 FR 37195).

One commenter suggested that the Corps require PCNs for all NWPs to ensure that the Corps is consulting as necessary under the ESA and is able to accurately track and evaluate cumulative impacts. One commenter stated that there is no requirement for the Corps to consult under the ESA for the NWPs but believes the Corps needs to rebut the findings in the Montana district court case in the text of the rule for purposes of future litigation. One commenter said that the Corps' ''no effect'' determination and deferral of ESA consultation until the project is proposed is in alignment with recent changes to ESA implementing regulations at 50 CFR 402.17(a) and (b). Specifically, these commenters assert that the change to the ESA section 7 regulations require that ''program actions that are reasonably certain to occur'' and the potential consequences of proposed actions be based on ''clear and substantial information.'' Information that, the commenter argues, is not available until the project and its location are proposed.

It is neither practical nor necessary to require PCNs for all activities authorized by NWPs to ensure compliance with section 7 the ESA. There are many activities authorized by the NWPs each year that have no effect on listed species or designated critical habitat, despite approximately 10,800 ESA section 7 consultations occurring annually. Listed species are not uniformly distributed across the United States and tend to be concentrated in specific geographic areas (''hotspots'') (*e.g.,* Evans et al. 2016), and there are areas in the country with jurisdictional waters and wetlands that have no or few listed species where NWP activities proceed with no effects to listed species or critical habitat. In addition, requiring PCNs for all activities authorized by NWPs would nearly double the number of PCNs reviewed by Corps district each year. In Appendix A of the Regulatory Impact Analysis for the 2020 Proposal, the Corps estimates that nearly 32,000 NWP activities proceed without PCNs each year. The Regulatory Impact Analysis for the 2020 proposal is available in the *www.regulations.gov* docket for this rule (docket number COE–2020–0002). That increase in the Corps' workload could result in changes in the effectiveness and efficiency in the review of PCNs by district engineers, as well as their evaluations of other activities requiring DA authorization, including activities authorized by individual permits and regional general permits. The increase in the Corps' workload could also affect its ability to conduct enforcement and compliance actions. Finally, and as explained above, General Condition 18 addresses this commenter's concerns regarding PCN requirements.

The Corps agrees that its ''no effect'' determination for the issuance or reissuance of the NWPs complies with the ESA section 7 regulations at 50 CFR part 402, because section 7 consultation is not required when a federal agency determines its proposed action will have no effect on listed species or designated critical habitat. In the biological assessment prepared by the Corps for this rulemaking activity, the Corps presents a substantial amount of data to demonstrate the actions it takes to comply with section 7 of the ESA, including the number of formal and informal section 7 consultations it conducts with the FWS and NMFS and the number of regional programmatic consultations and other tools it has developed with the FWS and NMFS.

One commenter said that the when the Corps implements an incidental take statement as a condition in its NWP verification it must undertake a project specific NEPA analysis. One commenter stated that the incidental take statement must be applied to entire project and not just the areas over which the Corps has control and responsibility. If not, the project proponent must obtain an ESA section 10(a)(1)(B) permit from the Services to ensure compliance with the ESA. Absent this, general condition 18 has the potential to continuously violate the ESA.

When a district engineer adds conditions to an NWP authorization to comply with the ESA or other federal laws, including terms and conditions from reasonable and prudent measures identified in an incidental take statement in a biological opinion that apply to the activity authorized by an NWP, a project-specific NEPA analysis is not required. The Corps complies with the requirements of NEPA when it prepares environmental assessments in the national decision documents for the issuance or reissuance of the NWPs by Corps Headquarters. The activities to which an incidental take statement in a biological opinion issued by the FWS or NMFS applies is dependent on project-specific circumstances identified in that biological opinion. When the FWS or NMFS write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the ESA they can assign responsibility of specific terms and conditions of the incidental take statement to the federal action agency (*e.g.,* the Corps), the applicant, or both taking into account their respective roles, authorities, and responsibilities (see 84 FR 44977). Paragraph (f) of general condition 18 addresses ESA section 10(a)(1)(B) incidental take permits and their potential application for NWP activities.

The Corps has carefully considered and evaluated all comments that were provided regarding this issue. The Corps reaffirms that its ''no effect'' determination for the promulgation of the NWPs is correct and appropriate, for the reasons explained above.

E. Compliance With the Essential Fish Habitat Provisions of the Magnuson-Stevens Fishery Conservation and Management Act

The NWP Program's compliance with the essential fish habitat (EFH) consultation requirements of the Magnuson-Stevens Fishery Conservation and Management Act will be achieved through EFH consultations between Corps districts and NMFS regional offices. This approach continues the EFH Conservation Recommendations provided by NMFS Headquarters to Corps Headquarters in 1999 for the NWP program. Corps districts that have EFH designated within their geographic areas of responsibility will coordinate with NMFS regional offices, to the extent necessary, to develop NWP regional conditions that conserve EFH and are consistent with the NMFS regional EFH Conservation Recommendations. Corps districts will conduct consultations in accordance with the EFH consultation regulations at 50 CFR 600.920.

One commenter said that consultation with NMFS needs to occur for all NWPs used in essential fish habitat. The Corps continues to implement the EFH Conservation Recommendation provided by NMFS in 1999. In those Corps districts where essential fish habitat has been designated, district engineers review PCNs for proposed NWP activities to determine whether those proposed activities may adversely affect essential fish habitat. If the district engineer determines a proposed NWP activity may adversely affect essential fish habitat, she or he initiates EFH consultation with the NMFS. Division engineers can add PCN requirements via regional conditions to those NWPs that do not require PCNs for all activities to ensure that EFH consultation is conducted for proposed activities that may adversely affect EFH.

F. Compliance With Section 106 of the National Historic Preservation Act

The NWP regulations at 33 CFR 330.4(g) and the ''Historic Properties'' general condition (general condition 20), ensure that all activities authorized by NWPs comply with section 106 of the NHPA. The ''Historic Properties'' general condition requires non-federal permittees to submit PCNs for any activity that might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. The Corps then evaluates the PCN and makes an effect determination for the proposed NWP activity for the purposes of NHPA section 106. We established the ''might have the potential to cause effects'' threshold in paragraph (c) of the ''Historic Properties'' general condition to require PCNs for those activities so that the district engineer can evaluate the proposed NWP activity and determine whether it has no potential to cause effects to historic properties or whether it has potential to cause effects to historic properties and thus require section 106 consultation.

If the project proponent is required to submit a PCN and the proposed activity might have the potential to cause effects

to historic properties, the activity is not authorized by an NWP until either the Corps district makes a ''no potential to cause effects'' determination or completes NHPA section 106 consultation.

When evaluating a PCN, the Corps will either make a ''no potential to cause effects'' determination or a ''no historic properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination. If the Corps makes a ''no historic properties affected,'' ''no adverse effect,'' or ''adverse effect'' determination, it will notify the non-federal applicant and the activity is not authorized by an NWP until NHPA Section 106 consultation has been completed. If the non-federal project proponent does not comply with the ''Historic Properties'' general condition, and does not submit the required PCN, then the activity is not authorized by an NWP. In such situations, it is an unauthorized activity and the Corps district will determine an appropriate course of action to respond to the unauthorized activity.

The only activities that are immediately authorized by NWPs are ''no potential to cause effect'' activities under section 106 of the NHPA, its implementing regulations at 36 CFR part 800, and the Corps' ''Revised Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR part 800,'' dated April 25, 2005, and amended on January 31, 2007. Therefore, the issuance or reissuance of NWPs does not require NHPA section 106 consultation because no activities that might have the potential to cause effects to historic properties can be authorized by an NWP without first completing activity-specific NHPA Section 106 consultations, as required by the ''Historic Properties'' general condition. Programmatic agreements (see 36 CFR 800.14(b)) may also be used to satisfy the requirements of the NWPs in the ''Historic Properties'' general condition if a proposed NWP activity is covered by that programmatic agreement.

NHPA section 106 requires a federal agency that has authority to license or permit any undertaking, to take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register, prior to issuing a license or permit. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. Thus, in assessing application of NHPA section 106 to NWPs issued or reissued by the Corps, the proper focus is on the nature and extent of the specific activities ''authorized'' by the NWPs and the timing of that authorization.

The issuance or reissuance of the NWPs by the Chief of Engineers imposes express limitations on activities authorized by those NWPs. These limitations are imposed by the NWP terms and conditions, including the general conditions that apply to all NWPs regardless of whether pre-construction notification is required. With respect to historic properties, the ''Historic Properties'' general condition expressly prohibits any activity that ''may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places,'' until the requirements of section 106 of the NHPA have been satisfied. The ''Historic Properties'' general condition also states that if an activity ''might have the potential to cause effects'' to any historic properties, a non-federal applicant must submit a PCN and ''shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' Permit applicants that are Federal agencies should follow their own requirements for complying with section 106 of the NHPA (see 33 CFR 330.4(g)(1) and paragraph (b) of the ''Historic Properties'' general condition).

Thus, because no NWP can or does authorize an activity that may have the potential to cause effects to historic properties, and because any activity that may have the potential to cause effects to historic properties must undergo an activity-specific section 106 consultation (unless that activity is covered under a programmatic agreement) before the district engineer can verify that the activity is authorized by an NWP, the issuance or reissuance of NWPs has ''no potential to cause effects'' on historic properties. Accordingly, the action being ''authorized'' by the Corps, which is the issuance or re-issuance of the NWPs by Corps Headquarters, has no potential to cause effects on historic properties.

To help ensure protection of historic properties, the ''Historic Properties'' general condition establishes a higher threshold than the threshold set forth in the Advisory Council's NHPA section 106 regulations for initiation of section 106 consultation. Specifically, while section 106 consultation must be initiated for any activity that ''has the potential to cause effects to'' historic properties, for non-federal permittees the ''Historic Properties'' general condition requires submission of a PCN to the Corps if ''the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.'' The ''Historic Properties'' general condition also prohibits the proponent from conducting the NWP activity ''until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed.'' (See paragraph (c) of the ''Historic Properties'' general condition.) The PCN must ''state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property.'' (See paragraph (b)(8) of the ''Pre-Construction Notification'' general condition.)

During the process for developing regional conditions, Corps districts can coordinate or consult with State Historic Preservation Officers, Tribal Historic Preservation Officers, and tribes to identify regional conditions that can provide additional assurance of compliance with the ''Historic Properties'' general condition and 33 CFR 330.4(g)(2) for NWP activities undertaken by non-federal permittees. Such regional conditions can add PCN requirements to one or more NWPs where historic properties occur. Corps districts will continue to consider through regional consultations, local initiatives, or other cooperative efforts and additional information and measures to ensure protection of historic properties, the requirements established by the ''Historic Properties'' general condition (which apply to all uses of all NWPs), and other provisions of the Corps regulations and guidance ensure full compliance with NHPA section 106.

Based on the fact that NWP issuance or reissuance has no potential to cause effects on historic properties and that any activity that ''has the potential to cause effects'' to historic properties will undergo activity-specific NHPA section 106 consultation, there is no requirement that the Corps undertake programmatic consultation for the NWP program. Regional programmatic agreements can be established by Corps districts and State Historic Preservation Officers and/or Tribal Historic Preservation Officers to comply with the requirements of section 106 of the NHPA.

One commenter stated the reissuance of the NWPs does not require Section 106 NHPA consultation, but specific activities may require section 106 consultation. One commenter said the Corps should programmatically address the potential adverse effects from undertakings permitted pursuant to the NWPs either by creating a national programmatic agreement or a division-specific programmatic agreement. One commenter stated that the Corps' position that effects to historic properties would be evaluated on an individual activity phase is not consistent with the 36 CFR part 800 regulations. One commenter disagreed with the Corps' position that the issuance or reissuance of the NWPs has ''no potential to cause effect'' on historic properties and does not require compliance with Section 106 of the NHPA. This commenter said that reliance on general conditions 20, 21, and 32 is not a substitute for appropriate compliance with section 106 in individual cases.

For most NWP activities, the need to conduct NHPA section 106 is determined on a case-by-case basis, as district engineers evaluate PCNs for proposed NWP activities, including PCNs submitted by non-federal permittees under paragraph (c) of general condition 20. The Corps believes that programmatic agreements for section 106 compliance are more appropriately developed at a regional level, between Corps districts and State Historic Preservation Officers and Tribal Historic Preservation Officers. The Advisory Council on Historic Preservation's regulations provide for section 106 consultation on a case-by-case basis, although it includes provisions for federal agency program alternatives, including alternative procedures and programmatic agreements (see 36 CFR 800.14). With respect to section 106 of the NHPA, the only activities immediately authorized by an NWP are those activities that have no potential to cause effects to historic properties. Paragraph (c) of general condition 20 requires non-federal permittees to submit PCNs for any proposed NWP activities that might have the potential to cause effects to historic properties. District engineers review these PCNs to determine whether NHPA section 106 consultation is required for a proposed NWP activity.

Several commenters stated that Appendix C to 33 CFR part 325 and the 2005 and 2007 interim guidance documents issued by the Corps does not constitute an acceptable federal agency program alternative under 36 CFR 800.14. One commenter said that the Corps does not have the authority under the Clean Water Act and the River and Harbors Act of 1899 to promulgate its own regulations for compliance with Section 106 of the National Historic Preservation Act (*i.e.,* Appendix C to 33 CFR part 325) rather than complying with 36 CFR part 800.

The Corps continues to use Appendix C and the 2005 and 2007 interim guidance to comply with section 106 of the NHPA. Section 110(a)(2)(E)(i) of the NHPA states that federal agencies can develop their own procedures for complying with section 106 as long as those procedures are consistent with the regulations issued by the Advisory Council on Historic Preservation.

A few commenters stated the NWPs and the general conditions violate the NHPA by delegating the effects determination to non-federal permittees by allowing permittees to make a determination of effect for NWP activities that do not require PCNs. Several commenters said that general condition 20 is inconsistent with the 36 CFR part 800 regulations. One commenter stated that general condition 20 does not provide a standard by which the permittee must determine a PCN is necessary because of potential effects to historic properties.

The NWPs and their general conditions do not delegate effects determinations under section 106 of the NHPA to non-federal permittees. Paragraph (c) of general condition 20 requires non-federal permittees to submit PCNs to district engineers for any proposed NWP activity that might have the potential to cause effects to historic properties. District engineers will review those PCNs and determine whether section 106 NHPA consultation is required for proposed NWP activities. The ''might have the potential to cause effects'' to any historic property is a standard to guide permittees as to when they need to submit PCNs so that district engineers can determine whether section 106 consultation is required for a proposed NWP activity.

A few commenters said that the Corps' permit area (area of potential effects) for section 106 compliance should not be limited to the activity within waters of the United States that requires DA authorization, and that the area of potential effects should encompass the entire project that requires the permit. One commenter stated that the Corps' limited permit area causes costly delays to the project proponent when section 106 disputes are triggered, and that by limiting the permit area, the Corps undertaking does not adequately consider direct or indirect effect on historic properties.

The Corps' permit area or area of potential effects is limited to those areas and activities where the Corps has control and responsibility to address effects to historic properties through its permitting authorities under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. District engineers work with permit applicants and other consulting parties to resolve disagreements about permit areas for section 106 compliance. When evaluating PCNs, district engineers consider direct and indirect effects to historic properties.

A few commenters said that a federal agency must consult with the Advisory Council on Historic Preservation, State Historic Preservation Offices, Tribal Historic Preservation Officers, tribes, and Native Hawaiian organization, where applicable, when effects to historic properties cannot be fully determined, and said that if a PCN is not warranted, these groups are not provided an opportunity to comment. One commenter said that the Corps must afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking, and when no PCN is required for an NWP activity, there is no consultation on the undertaking.

Non-federal permit applicants are responsible for complying with general condition 20, including the requirement to submit PCNs for any proposed NWP activity that might have the potential to cause effects to historic properties, so that the district engineer can determine whether section 106 consultation is required for proposed activity. If the district engineer determines section 106 consultation is necessary, she or he will identify consulting parties and initiate section 106 consultation with those consulting parties. District engineers provide the Advisory Council on Historic Preservation with a reasonable opportunity to comment when the Council enters the section 106 process in accordance with Appendix A to 36 CFR part 800.

G. Section 401 of the Clean Water Act

A water quality certification issued by a state, authorized tribe, or EPA, or a waiver thereof, is required by section 401 of the Clean Water Act, for an activity authorized by an NWP which may result in a discharge from a point source into waters of the United States. Water quality certifications may be granted without conditions, granted with conditions, denied, or waived for specific NWPs.

Nationwide permits 21, 29, 39, 40, 42, 43, and 50 would authorize activities that may result in discharges to waters

of the United States and therefore section 401 water quality certification or waiver is required for those NWPs. Nationwide permits 12, 48, 51, 52, 57, and 58 would authorize various activities, some of which may result in a discharge to waters of the United States and require section 401 water quality certification or waiver, and others which may not. Nationwide permits 55, and 56 do not require section 401 water quality certification because they would authorize activities which, in the opinion of the Corps, could not reasonably be expected to result in a discharge into waters of the United States. In the case of NWP 8, it only authorizes activities seaward of the territorial seas where the Clean Water Act does not apply.

Prior to the issuance of the 16 NWPs, certifying authorities made their decisions on whether to issue, deny, or waive water quality certification (WQC) for the issuance of the NWPs. If a certifying authority issued water quality certifications with conditions for the issuance of these NWPs, district engineers reviewed the conditions in those water quality certifications to determine whether they comply with the requirements in 40 CFR 121.7(d). If the district engineer determines that any condition in the water quality certification for the issuance of the NWPs does not comply with the requirements of 40 CFR 121.7(d), and is waived pursuant to 40 CFR 121.9(d), the district engineer will notify the certifying authority and the EPA Administrator in accordance with 40 CFR 121.9(c). The conditions in the water quality certification for the issuance of the NWP that comply with the requirements of 40 CFR 121.7(d) and are not waived become conditions of the NWP authorization in accordance with Section 401(d) of the Clean Water Act.

If a certifying agency denies WQC for the issuance of an NWP, then the proposed discharges are not authorized by that NWP unless and until a project proponent obtains WQC for the specific discharge from the certifying authority, or a waiver of WQC occurs.

In the 2020 Proposal, the Corps noted that EPA issued revisions to its regulations governing the Clean Water Act section 401 certification process on June 1, 2020. In the future, it may be necessary or appropriate for the Corps to revise its own section 401 regulations, including 33 CFR 330.4, in light of EPA's Clean Water Act Section 401 Certification Rule. The Corps invited comments from the public on whether and, if so, when the Corps should revise those regulations in light of the new EPA regulations.

In response to the proposed rule and the associated requests for water quality certification, many certifying authorities requested an extension of the 60-day reasonable period of time to review and certify the proposed NWPs. A few commenters said that many states cannot comply with the 60 days provided due to public participation requirements, including public hearings. A few commenters stated that the 60-day review period is not sufficient time to review the proposed NWPs considering recent changes to EPA's regulations for Section 401 of the Clean Water Act and the issuance of the final Navigable Waters Protection Rule. One commenter voiced support for 60 days certifying their complete WQC decision for the proposed NWPs. One commenter stated that the 60-day reasonable period of time should be extended to 180 days to provide adequate time to review the proposed rule including the proposed NWPs. One commenter said that the abbreviated timeline undermines and limits state and tribal input. A few commenters said the Corps should request certification on the final NWPs. One commenter said that 60 days to act on the certification request is not consistent with the terms of a 1992 settlement agreement between the Pennsylvania Department of Environmental Resources and the Corps.

In light of the timeframe for issuing the final NWPs, the Corps did not grant extensions to the 60-day reasonable period of time for water quality certification. Section 401 of the Clean Water Act and EPA's regulations at 40 CFR 121.6 give the Corps the authority to establish the reasonable period of time. For this issuance of these NWPs, the Corps complied with EPA's final rule, which was published in the **Federal Register** on July 13, 2020, and went into effect on September 11, 2020. That final rule went into effect a few days before the proposed NWPs were published in the **Federal Register** for public comment. The Corps worked with the Commonwealth of Pennsylvania to address the 1992 settlement agreement.

Many commenters said that the reasonable period of time for certification of the NWPs should be extended until the final rule is issued. A few commenters stated that certifying the proposed NWPs prior to the NWPs being finalized is problematic as there are significant proposed changes in the NWPs. Several commenters said that the procedure is outside of the normal standard practice of certifying the NWPs after the final NWPs are issued. Many commenters expressed concern and disagreement over reviewing and certifying the proposed NWPs at the same time. Several commenters said that water quality certification conditions could change if the final NWPs are modified from the proposed NWPs.

Section 401 of the Clean Water Act states that no permit shall be issued until water quality certification has been obtained or waived. Therefore, the water quality certification process must be completed before the final NWPs are issued. That process is consistent with the Corps' NWP regulations at 33 CFR 330.4(c)(1), which says that ''water quality certification pursuant to section 401 of the Clean Water Act, or waiver thereof, is required prior to the issuance or reissuance of NWPs authorizing activities which may result in a discharge into waters of the United States.'' The water quality certification regulations issued by EPA this year also state that water quality certification requests are made for proposed general permits, not the final general permits. The regulations issued by EPA include no provisions for modifying water quality certifications after the certifying authority has acted on the federal agency's certification request. If the federal agency is planning to make changes to the general permit in response to public comments, those changes may trigger a requirement for a new certification before the federal agency can issue the final general permit (see 85 FR 42279).

A few commenters said that requesting state certification of the proposed NWPs does not recognize that there may be changes to the final NWPs based upon the public comments received. A few commenters stated that they should have the opportunity to fully evaluate the final version of the NWPs and modify their water quality certifications as necessary. A few commenters expressed disagreement with the request to certify the proposed NWPs and requested the Corps provide a reasonable review time and issue the WQC on the final NWPs after any changes have been made after considering public comments. A few commenters said that water quality certifications may be issued conditionally and only valid if the final NWPs are not different than the proposed NWPs. A few commenters noted that the Corps' request to certify the proposed NWPs is a departure from past practice whereby states issue water quality certifications on the final NWPs before those NWPs go into effect.

As discussed above, certifying authorities must act on certification requests before the Corps can issue the final NWPs. The Corps acknowledges

that the water quality certification process for the 2020 Proposal is a departure from past practice; however, it is consistent with section 401 and EPA's final certification regulation at 40 CFR part 121. In the 16 NWPs issued in this final rule, there were no substantive changes that trigger a requirement for the Corps to submit new certification requests for the NWPs.

A few commenters said that the separate review 60-day timeline for water quality certification and the 90-day timeline for CZMA consistency determinations bifurcates the review process and is unnecessarily cumbersome and suggested that a joint 90-day review period should be provided. The Corps established different review periods for water quality certification and CZMA consistency determinations because those are separate processes that are governed by distinctly different laws and regulations. Section 401 of the Clean Water Act gives the permitting authority the ability to establish the reasonable period of time for a certify authority to act on a request for water quality certification. The CZMA consistency determination process is governed by regulations issued by the Department of Commerce at 15 CFR part 930.

Several commenters stated that subsequent changes from the proposed NWPs to the final NWPs may result in in missing or inappropriate conditions and leave the certifying agencies with no opportunity to remedy a deficient certification. One commenter said that changes between the proposed NWPs and the final NWPs may require certifying authorities to deny certification due to insufficient information. One commenter stated that denying water quality certification for all of the proposed NWPs would have significant implications for streamlining federal permitting of discharges authorized by the NWPs. One commenter said that should water quality certification for the issuance of the NWPs be denied, there will be additional burdens on permittees. One commenter said the Corps would need to request water quality certification on the final NWPs to have valid water quality certifications. One commenter said that some states operate under state general permits where NWPs are revoked. This commenter noted that the denied certifications for NWPs will raise conflicts and issues when state general permits are reissued.

As discussed above, water quality certification decisions by certifying authorities must be made before the Corps issues the final NWPs. Certifying authorities can deny water quality certifications if they believe they do not have sufficient information to issue water quality certification (see 40 CFR 121.7(e)(2)). The Corps acknowledges that denial of water quality certifications for the issuance of the NWPs creates burdens on the regulated public in terms of having to obtain water quality certifications or waivers for specific discharges authorized by NWPs. The issuance of the NWPs by Corps Headquarters is an independent process from the issuance of regional general permits by district engineers.

One commenter stated a website where all final WQC conditions are posted would be helpful. One commenter said the Corps should provide proposed water quality certification conditions for the NWPs and let the state agencies review those proposed conditions to make the certification process for the NWPs. One commenter stated that the Corps should not revise its water quality certification regulations.

After the final NWPs are issued and division engineers have approved the final regional conditions for the NWPs, Corps districts will issue public notices announcing the final regional conditions for the NWPs and the disposition of water quality certifications and CZMA consistency concurrences for the final NWPs. The Corps will post copies of these district public notices in the *www.regulations.gov* docket for this rulemaking action (docket number COE–2020–0002). It is the certifying authorities' responsibility to develop conditions for their water quality certifications for the issuance of the NWPs. The Corps will be revising the provisions in its regulations for water quality certification, to be consistent with EPA's new water quality certification regulations.

H. Section 307 of the Coastal Zone Management Act (CZMA)

Any state with a federally-approved CZMA program must concur with the Corps' determination that activities authorized by NWPs which are within, or will have reasonably foreseeable effects on any land or water uses or natural resources of, the state's coastal zone, are consistent with the CZMA program to the maximum extent practicable. Coastal Zone Management Act consistency concurrences may be issued without conditions, issued with conditions, or denied for specific NWPs.

Prior to the issuance of the 16 NWPs, states made their decisions on whether to concur with or object to the Corps' CZMA consistency determination for the issuance of the NWPs. If a state issued a concurrence with conditions for the issuance of these NWPs, district engineers reviewed the conditions in those consistency concurrences to determine whether they comply with the Corps' regulations for permit conditions at 33 CFR 325.4. If a state objected to the Corps' CZMA consistency determination for the issuance of an NWP, then the activity is not authorized by that NWP unless and until a project proponent obtains a consistency concurrence from the state or a presumption of concurrence occurs.

The Corps' CZMA consistency determination only applied to NWP authorizations for activities that are within, or affect, any land, water uses or natural resources of a State's coastal zone. A state's coastal zone management plan may identify geographic areas in federal waters on the outer continental shelf, where activities that require federal permits conducted in those areas require consistency certification from the state because they affect any coastal use or resource. In its coastal zone management plan, the state may include an outer continental shelf plan. An outer continental shelf plan is a plan for ''the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act'' and regulations issued under that Act (see 15 CFR 930.73). Activities requiring federal permits that are not identified in the state's outer continental shelf plan are considered unlisted activities. If the state wants to review an unlisted activity under the CZMA, then it must notify the applicant and the federal permitting agency that it intends to review the proposed activity. Nationwide permit authorizations for activities that are not within or would not affect a state's coastal zone do not require the Corps' CZMA consistency determinations and thus are not contingent on a State's concurrence with the Corps' consistency determinations.

If a state objects to the Corps' CZMA consistency determination for an NWP, then the affected activities are not authorized by an NWP within that state until a project proponent obtains an individual CZMA consistency concurrence, or sufficient time (*i.e.,* six months) passes after requesting a CZMA consistency concurrence for the applicant to make a presumption of consistency, as provided in 33 CFR 330.4(d)(6). However, when applicants request NWP verifications for activities that require individual consistency concurrences, and the Corps determines that those activities meet the terms and conditions of the NWP, in accordance

with 33 CFR 330.6(a)(3)(iii) the Corps will issue provisional NWP verification letters. The provisional verification letter will contain general and regional conditions as well as any activity-specific conditions the Corps determines are necessary for the NWP authorization. The Corps will notify the applicant that he or she must obtain an activity-specific CZMA consistency concurrence or a presumption of concurrence before he or she is authorized to start work in waters of the United States. That is, NWP authorization will be contingent upon obtaining the necessary CZMA consistency concurrence from the state, or a presumption of concurrence. Anyone wanting to perform such activities where pre-construction notification to the Corps is not required has an affirmative responsibility to present a CZMA consistency determination to the appropriate state agency for concurrence. Upon concurrence with such CZMA consistency determinations by the state, the activity would be authorized by the NWP. This requirement is provided at 33 CFR 330.4(d).

In response to the 2020 proposal several commenters said that the Corps is providing a CZMA federal consistency determination for the proposed rule and is asking the states to concur with a federal action that is not final. These commenters said that if there are changes in the final NWPs, those changes may result in missing or inappropriate conditions and leave states with no opportunity to remedy deficiencies. Several commenters stated that the Corps should have allowed comment on the proposed rule prior to initiating the federal consistency review process. A few commenters said there is a disconnect between the 60-days allowed for water quality certifications and the 90-days allowed for CZMA consistency reviews. One commenter requested an extension of time until mid-January 2021 for the state to complete its review and make its determinations.

The CZMA consistency concurrence process for the issuance of the NWPs must be completed before the final NWPs are issued. The Department of Commerce's CZMA regulations at 15 CFR 930.36(b)(1) state that the federal agency's consistency determination shall be provided to state agencies at least 90 days before final approval of the federal agency's activity unless both the federal agency and the state agency agree to an alternative notification schedule. Therefore, the CZMA consistency concurrence process must be completed before the Corps issues the final NWPs. If the Corps were to make substantial changes to the proposed NWPs, then the Corps would conduct supplemental coordination with the states. In these 16 final NWPs, the Corps did not make any substantial changes that would trigger supplemental coordination with states. The Corps acknowledges that under 15 CFR 930.41(a), it could have requested responses from state agencies within 60 days of receipt of the Corps' consistency determination and supporting information. Under 15 CFR 930.41(b), federal agencies are required to approve one extension period of 15 days or less, if the state agency requests an extension of time within the 60-day review period. The WQC and CZMA consistency concurrence review periods are different because they are governed by different regulations.

IV. Economic Impact

The NWPs are expected to increase the number of activities eligible for NWP authorization, and reduce the number of activities that require individual permits. The Corps estimates that the proposed NWPs will authorize an 209 activities each year that would have otherwise required an individual permit. While applying for a NWP may entail some burden (namely, in the form of a PCN, when applicable), by authorizing more activities by NWP, this proposal will reduce net burden for the regulated public. Specifically, increasing the number of activities that can be authorized by NWPs is expected to decrease compliance costs for permit applicants since, as discussed below, the compliance costs for obtaining NWP authorization are less than the compliance costs for obtaining individual permits. In addition, the NWPs can incentivize some project proponents to design their projects in such a way that they would qualify for a NWP thereby reducing impacts to jurisdictional waters and wetlands. In FY2018, the average time to receive an NWP verification was 45 days from the date the Corps district receives a complete PCN, compared to 264 days to receive a standard individual permit after receipt of a complete permit application (see table 1.2 of the regulatory impact analysis for this final rule, which is available in the *www.regulations.gov* docket (docket number COE–2020–0002)).

As discussed in the Regulatory Impact Analysis for this proposed rule, the Corps estimates that a permit applicant's compliance cost for obtaining NWP authorization in 2019$ ranges from $4,412 to $14,705 (Institute for Water Resources (2001),[5] adjusted for inflation using the GDP deflator approach). The Corps estimates that a permit applicant's compliance costs for obtaining an individual permit for a proposed activity impacting up to 3 acres of wetland ranges from $17,646 to $35,293 in 2019$. Considering how the proposed NWPs will increase the number of activities authorized by an NWP each year, the Corps estimates that the 16 final NWPs, when compared with the 2017 NWPs, will decrease compliance costs for the regulated public by approximately $3 million per year. The Corps invited comment on the assumptions and methodology used to calculate the compliance costs and burden in general associated with the NWP and received no comments.

Nationwide permit(s)	Changes	Anticipated impacts
• NWP 21 • NWP 29. • NWP 39. • NWP 40. • NWP 42. • NWP 43. • NWP 44. • NWP 50. • NWP 51. • NWP 52.	Removed 300 linear foot limit for losses of stream bed and rely on ½-acre limit, pre-construction notification (PCN) review process, and other tools to comply with Clean Water Act Section 404(e).	Increase number of activities authorized by an NWP; decrease number of activities requiring individual permits.

[5] Institute for Water Resources (IWR). 2001. Cost analysis for the 2000 issuance and modification of nationwide permits. Institute for Water Resources (Alexandria, VA). 29 pp. plus appendices.

Nationwide permit(s)	Changes	Anticipated impacts
• NWP 12 • NWP 57. • NWP 58.	Issued separate NWPs for oil or natural gas pipeline activities, electric utility line and telecommunications activities, and utility lines for water and other substances; reduced number of PCN thresholds.	No change in number of NWP authorizations.
• NWP 21 • NWP 49. • NWP 50.	Removed requirement for written authorization before commencing authorized activity.	No change in number of NWP authorizations.
• NWP 48	Changed PCN threshold to require PCNs for activities directly impacting more than ½-acre of submerged aquatic vegetation. Removed ½-acre limit for impacts to submerged aquatic vegetation.	Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits.
• NWP 55	Issued new NWP to authorize seaweed mariculture activities and multi-trophic mariculture activities.	Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits.
• NWP 56	Issued new NWP to authorize finfish mariculture activities and multi-trophic mariculture activities.	Increased number of activities authorized by an NWP; decreased number of activities requiring individual permits.
• General condition 17, tribal rights	Restored text of general condition in 2012 NWPs.	No change in number of NWP authorizations.
• General condition 18, endangered species	Revised to address 2019 changes to 50 CFR part 402. Clarified PCN requirements for species proposed for listing and proposed critical habitat to be consistent with 33 CFR 330.4(f)(2).	No change in number of NWP authorizations.
• General condition 23, mitigation	Added 3/100-acre threshold for compensatory mitigation for losses of stream bed.	No change in number of NWP authorizations.
• General condition 25, water quality	Clarified that if NWP activity does not comply with conditions of a general water quality certification, an individual certification is required, unless a waiver occurs. Require permittee to provide district engineer with copy of water quality certification for individual discharge authorized by an NWP.	No change in number of NWP authorizations.
• General condition 26, coastal zone management.	Clarified that if NWP activity does not comply with conditions of a general consistency concurrence, and individual consistency concurrence is required, unless presumption occurs.	No change in number of NWP authorizations.
• General condition 28, use of multiple NWPs	Modified general condition to clarify application to NWPs with different numeric limits.	No change in number of NWP authorizations.
• General condition 32, pre-construction notification.	Modified to encourage use of Form ENG 6082 for NWP pre-construction notifications.	No change in number of NWP authorizations.

Several commenters stated that the Corps' Regulatory Impact Analysis should include estimates of costs to the public due to losses of wetland and stream functions and losses of ecosystem services caused by activities authorized by NWPs. These commenters also said the Regulatory Impact Analysis should address flooding that is exacerbated by development in and around stream and wetland habitats. In addition, these commenters stated that the Regulatory Impact Analysis should evaluate the effect the proposed 1/10-acre threshold for stream mitigation in general condition 23 would have in terms of a reduction in stream compensatory mitigation for NWP activities, and increases in losses of headwater streams. These commenters also stated that the Corps should analyze the effects of removing the PCN threshold for mechanized land clearing of forested wetlands in oil or natural gas pipeline rights-of-way from NWP 12. Several commenters said the Regulatory Impact Analysis should also analyze the economic impacts of the 2020 Proposal on the ecological restoration industry. One commenter said that a cost-benefit analysis or reissuing the NWPs ahead of schedule should be performed.

The Regulatory Impact Analysis prepared by the Corps for this final rule was prepared in accordance with the Office of Management and Budget's (OMB) Circular A–4 and OMB's Memorandum M–17–21 for implementing E.O. 13771. The Regulatory Impact Analysis provides some general information on the value of ecosystem services provided by general categories of aquatic resources that may be impacted by activities authorized by NWPs and thus result in some degree of loss of ecosystem services. Other activities authorized by NWPs (*e.g.,* aquatic resource restoration and enhancement activities authorized by NWP 27 and the removal of low-head dams authorized by NWP 53) are generally expected to result in gains in some ecosystem services. Any consideration of ecosystem services lost as a result of activities authorized by NWPs must also take into account any gains in goods and services provided by activities authorized by NWPs or the operation of those activities, such as housing, food production, energy generation and transmission, transportation, public safety, providing potable water, removing sewage, etc. In the Regulatory Impact Analysis for this final rule, the Corps has added a general discussion of the goods and services that activities authorized by the NWPs provide for human well-being.

Increases in downstream flooding are usually caused by development activities (*e.g.,* the construction of houses, commercial buildings,

educational buildings, manufacturing buildings, roads, parking lots, etc.) that reduce the land area in a watershed where precipitation can infiltrate into the soil, and subsequently cause increases in surface runoff to downstream waters that increase the frequency and severity of flooding (NRC 2009). Upland development activities provide a significant contribution to these changes in watershed hydrology, because wetlands and streams occupy a relatively small percentage of land area in a watershed (*e.g.,* Zedler and Kercher et al. 2005, Butman and Raymond 2011). State and local government agencies may require developers to construct stormwater management facilities and green infrastructure (*e.g.,* rain gardens) to provide water storage and water infiltration within the watershed to reduce potential changes in downstream flooding.

Stream compensatory mitigation was added to the mitigation general condition for the NWPs in 2007 (see general condition 20 in the 2007 NWP final rule at 72 FR 11193). That general condition did not have an acreage-based or linear foot based threshold for stream mitigation. In the 2012 and 2017 final rules for the issuance and reissuance of the NWPs (77 FR 10184 and 82 FR 1860, respectively), there was no acreage-based or linear foot based threshold for stream mitigation. Under the 2007, 2012, and 2017 NWPs, district engineers determined on a case-by-case basis whether stream compensatory mitigation is required for an NWP activity. The 2020 Proposal is the first time the Corps proposed a threshold in the mitigation general condition for the NWPs for stream compensatory mitigation. In response to comments received on the 2020 Proposal, the Corps changed the proposed 1/10-acre stream mitigation threshold to 3/100-acre to be consistent with the current practices of numerous Corps districts for when they require stream compensatory mitigation for proposed NWP activities. Therefore, the changes to general condition 23 are not expected to reduce stream compensatory mitigation for NWP or have substantive economic impacts on the compensatory mitigation industry.

The removal of the PCN threshold in the 2017 NWP 12 for mechanized land clearing of a forested wetland in a utility line right-of-way will not eliminate compensatory mitigation requirements for those activities. If the impacts to forested wetlands caused by mechanized land clearing for an oil or natural gas pipeline right-of-way cannot be restored to pre-construction contours in waters of the United States, and there is a loss of greater than 1/10-acre of forested wetlands, then the project proponent is required to submit a PCN to the district engineer. The district engineer may require compensatory mitigation to offset those losses of waters of the United States. The district engineer may also require compensatory mitigation to offset losses of specific wetland functions (see paragraph (i) of general condition 23).

The Corps does not believe it is necessary to prepare a cost-benefit analysis for reissuing the NWPs earlier than many of the users of the NWPs expected. One of the reasons the Corps is conducting this rulemaking is to address recent court decisions.

V. Administrative Requirements

Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31885, June 10, 1998) regarding plain language, this preamble is written using plain language. In writing this final rule, the Corps used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The paperwork burden associated with the NWP relates exclusively to the preparation of the PCN. While different NWPs require that different information be included in a PCN, the Corps estimates that a PCN takes, on average, 11 hours to complete. The 16 final NWPs would decrease the total paperwork burden associated with this program because the Corps estimates that under this final rule 59 more PCNs would be required each year. This increase is due to the number of activities that would be authorized under the 16 NWPs that previously required individual permits, and the changes in the PCN thresholds for NWP 48 for commercial shellfish mariculture activities and the modified PCN thresholds for NWP 12 (oil and natural gas pipeline activities). The paperwork burden associated with the 16 final NWPs is expected to increase by approximately 99 hours per year from 160,677 hours to 160,776 hours.

The following table summarizes the projected changes in paperwork burden from the 2017 NWPs to the 16 NWPs issued in this final rule.

	Number of NWP PCNs per year	Number of NWP activities not requiring PCNs per year	Estimated changes in NWP PCNs per year	Estimated changes in number of authorized NWP activities	Estimated changes in number of standard individual permits per year
2017 NWPs	14,607	2,655			
16 NWPs	14,616	2,855	+591	+209	−209

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710–0003).

Executive Order 12866

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993) that was submitted to the Office of Management and Budget (OMB) for review.

Executive Order 13771

This final rule is considered an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in the rule's economic analysis.

Executive Order 13132

Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' The issuance and modification of NWPs does not have federalism implications. The Corps does

not believe that the final NWPs will have substantial direct effects on the states, on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. These NWPs will not impose any additional substantive obligations on state or local governments. Therefore, Executive Order 13132 does not apply to this proposal.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act 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 proposed 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 the issuance and modification of NWPs on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (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 which is independently owned and operated and is not dominant in its field.

The statues under which the Corps issues, reissues, or modifies NWPs are Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403). Under section 404, Department of the Army (DA) permits are required for discharges of dredged or fill material into waters of the United States. Under section 10, DA permits are required for any structures or other work that affect the course, location, or condition of navigable waters of the United States. Small entities proposing to discharge dredged or fill material into waters of the United States and/or install structures or conduct work in navigable waters of the United States must obtain DA permits to conduct those activities, unless a particular activity is exempt from those permit requirements. Individual permits and general permits can be issued by the Corps to satisfy the permit requirements of these two statutes. Nationwide permits are a form of general permit issued by the Chief of Engineers.

Nationwide permits automatically expire and become null and void if they are not modified or reissued within five years of their effective date (see 33 CFR 330.6(b)). Furthermore, section 404(e) of the Clean Water Act states that general permits, including NWPs, can be issued for no more than five years. If the 2017 NWPs are not modified or reissued, they will expire on March 18, 2022, and small entities and other project proponents would be required to obtain alternative forms of DA permits (*i.e.,* standard permits, letters of permission, or regional general permits) for activities involving discharges of dredged or fill material into waters of the United States or structures or work in navigable waters of the United States. Regional general permits that authorize similar activities as the NWPs may be available in some geographic areas, but small entities conducting regulated activities outside those geographic areas would have to obtain individual permits for activities that require DA permits.

When compared with the compliance costs for individual permits, most of the terms and conditions of the NWPs are expected to result in decreases in the costs of complying with the permit requirements of sections 10 and 404. The anticipated decrease in compliance cost results from the lower cost of obtaining NWP authorization instead of standard permits. Unlike standard permits, NWPs authorize activities without the requirement for public notice and comment on each proposed activity.

Another requirement of section 404(e) of the Clean Water Act is that general permits, including NWPs, authorize only those activities that result in no more than minimal adverse environmental effects, individually and cumulatively. The terms and conditions of the NWPs, such as acreage limits and the mitigation measures in some of the NWP general conditions, are imposed to ensure that the NWPs authorize only those activities that result in no more than minimal adverse effects on the aquatic environment and other public interest review factors.

After considering the economic impacts of the NWPs on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. Small entities may obtain required DA authorizations through the NWPs, in cases where there are applicable NWPs authorizing those activities and the proposed work will result in only minimal adverse effects on the aquatic environment and other public interest review factors. The terms and conditions of the revised NWPs will not impose substantially higher costs on small entities than those of the existing NWPs. If an NWP is not available to authorize a particular activity, then another form of DA authorization, such as an individual permit or a regional general permit authorization, must be secured. However, as noted above, the Corps estimates an increase in the number of activities than can be authorized through NWPs, because the Corps made some modifications to the NWPs to authorize additional activities. Because those activities required authorization through other forms of DA authorization (*e.g.,* individual permits or regional general permits) the Corps expects a concurrent decrease in the numbers of individual permit and regional general permit authorizations required for these activities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''federal mandates'' that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal

intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The Corps has determined that the NWPs do not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. The NWPs are generally consistent with current agency practice, do not impose new substantive requirements and therefore do not contain a federal mandate that may result in expenditures of $100 million or more for state, local, and tribal governments, in the aggregate, or the private sector in any one year. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, the Corps has determined that the NWPs contain no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the issuance and modification of NWPs is not subject to the requirements of section 203 of UMRA.

Executive Order 13045

Executive Order 13045, ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be ''economically significant'' as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The NWPs are not subject to this Executive Order because they are not economically significant as defined in Executive Order 12866. In addition, the proposed NWPs do not concern an environmental health or safety risk that the Corps has reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires 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.'' The phrase ''policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Tribes, on the relationship between the federal government and the Tribes, or on the distribution of power and responsibilities between the federal government and Tribes.''

The issuance of these NWPs is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. Therefore, Executive Order 13175 does not apply to this final rule. However, in the spirit of Executive Order 13175, the Corps specifically requested comments from tribal officials on the proposed rule. Their comments were fully considered during the preparation of this final rule. Each Corps district conducted government-to-government consultation with tribes, to identify regional conditions, other local NWP modifications to protect aquatic resources of interest to tribes, and coordination procedures with tribes, as part of the Corps' responsibility to protect tribal trust resources and fulfill its tribal trust responsibilities.

Many commenters stated that they disagreed with the Corps' determination that the proposal to reissue and issue the NWPs would not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. Most of these commenters said that the Corps is required to consult and coordinate with the tribes on the proposed rule. Many commenters stated that meaningful consultation with tribes is not possible given the short time frames set by the administration, lack of information, and complications resulting from the COVID pandemic. One commenter stated that the Corps should extend its comment period 60 days or should withdraw its proposal to allow early tribal engagement.

While the NWPs are regulations, the Corps believe the final NWPs will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. In response to the proposed rule, the Corps received comments from 35 tribes and tribal organizations. The Corps has taken, and will continue to take, measures (such as Corps districts consulting with tribes on specific NWP activities that may have adverse effects on tribal rights and tribal trust resources) to ensure that the NWPs will not have substantial direct effects on tribal governments, on the relationship between the federal government and the tribes, or on the distribution of power and responsibilities between the federal government and tribes. General condition 17 has been modified to state that no NWP activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights. Tribes use NWPs for activities they conduct that require DA authorization under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act of 1899. For example, tribes that conduct commercial shellfish mariculture activities have used NWP 48, and tribes that conduct aquatic habitat restoration activities have used NWP 27.

For 16 NWPs issued in this final rule, Corps districts conducted consultations with tribes to identify regional conditions to ensure that NWP activities comply with general conditions 17 and 20. Through those consultations, district engineers can also develop coordination procedures with tribes to provide tribes with opportunities to review proposed NWP activities and provide their views on whether those activities will cause more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands. When a Corps district receives a pre-construction notification that triggers a need to consult with one or more tribes, that consultation will be completed before the district engineer makes his or her decision on whether to issue the NWP verification. If, after considering mitigation, the district engineer determines the proposed NWP activity will have more than minimal adverse effects on tribal rights (including treaty rights), protected tribal resources, or tribal lands, he or she will exercise discretionary authority and require an individual permit. Division engineers can modify, suspend, or revoke one or more NWPs in a region to protect tribal rights. A district engineer can modify, suspend, or revoke an NWP to protect tribal rights, protected tribal resources, and tribal lands.

For the 2020 Proposal, the Corps provided a 60-day public comment period, which is consistent with the length of the comment period provided for past NWP rulemaking efforts. After the comment period for the 2020 Proposal ended on November 16, 2020, there was some additional time for Corps districts to conduct consultation

and coordination with tribes. For Corps district consultation and coordination with tribes, the Corps provided information similar to the information provided during past NWP rulemaking efforts. The Corps acknowledges that the pandemic complicated tribal consultation and coordination activities, but the rulemaking effort needed to be completed by the required time frame.

Environmental Documentation

A decision document has been prepared for each of the 16 NWPs being issued in this final rule. Each decision document includes an environmental assessment and public interest review determination. If an NWP authorizes discharges of dredged or fill material into waters of the United States, the decision document includes a 404(b)(1) Guidelines analysis. These decision documents are available at: *www.regulations.gov* (docket ID number COE–2020–0002). They are also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street NW, Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The Corps will submit a report containing the final 16 NWPs and other required information to the U.S. Senate, the U.S. House of Representatives, and the Government Accountability Office. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The 16 NWPs are not a ''major rule'' as defined by 5 U.S.C. 804(2), because they are not likely to result in: (1) An annual effect on the economy of $100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies, or geographic regions; or (3) 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.

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The NWPs are not expected to have any discriminatory effect or disproportionate negative impact on any community or group, and therefore are not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

Executive Order 13211

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy and has not otherwise been designated by the OIRA Administrator as a significant energy action.

VI. References

A complete list of all references cited in this document is available on the internet at *http://www.regulations.gov* in docket number COE–2020–0002 or upon request from the U.S. Army Corps of Engineers (see **FOR FURTHER INFORMATION CONTACT**).

Authority

The Corps is reissuing 12 existing NWPs and issuing 4 new NWPs under the authority of Section 404(e) of the Clean Water Act (33 U.S.C. 1344(e)) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*).

William H. Graham,

Major General, U.S. Army, Deputy Commanding General for Civil and Emergency Operations.

Nationwide Permits, Conditions, Further Information, and Definitions

A. Index of Nationwide Permits, Conditions, District Engineer's Decision, Further Information, and Definitions

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Definitions

Best management practices (BMPs)
Compensatory mitigation
Currently serviceable
Direct effects
Discharge
Ecological reference
Enhancement
Establishment (creation)

High Tide Line
Historic property
Independent utility
Indirect effects
Loss of waters of the United States
Navigable waters
Non-tidal wetland
Open water
Ordinary high water mark
Perennial stream
Practicable
Pre-construction notification
Preservation
Re-establishment
Rehabilitation
Restoration
Riffle and pool complex
Riparian areas
Shellfish seeding
Single and complete linear project
Single and complete non-linear project
Stormwater management
Stormwater management facilities
Stream bed
Stream channelization
Structure
Tidal wetland
Tribal lands
Tribal rights
Vegetated shallows
Waterbody

B. Nationwide Permits

12. *Oil or Natural Gas Pipeline Activities.* Activities required for the construction, maintenance, repair, and removal of oil and natural gas pipelines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

Oil or natural gas pipelines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of oil and natural gas pipelines. There must be no change in pre-construction contours of waters of the United States. An ''oil or natural gas pipeline'' is defined as any pipe or pipeline for the transportation of any form of oil or natural gas, including products derived from oil or natural gas, such as gasoline, jet fuel, diesel fuel. heating oil, petrochemical feedstocks, waxes, lubricating oils, and asphalt.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Oil or natural gas pipeline substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities (*e.g.,* oil or natural gas or gaseous fuel custody transfer stations, boosting stations, compression stations, metering stations, pressure regulating stations) associated with an oil or natural gas pipeline in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for above-ground oil or natural gas pipelines: This NWP authorizes the construction or maintenance of foundations for above-ground oil or natural gas pipelines in all waters of the United States, provided the foundations are the minimum size necessary.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of oil or natural gas pipelines, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize oil or natural gas pipelines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Oil or natural gas pipelines routed in, over, or under section 10 waters without a discharge of dredged or fill material may require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing oil or natural gas pipelines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the oil or natural gas pipeline activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; (2) the discharge will result in the loss of greater than ⅒-acre of waters of the United States; or (3) the proposed oil or natural gas pipeline activity is associated with an overall project that is greater than 250 miles in length and the project purpose is to install new pipeline (vs. conduct repair or maintenance activities) along the majority of the distance of the overall project length. If the proposed oil or gas pipeline is greater than 250 miles in length, the pre-construction

notification must include the locations and proposed impacts (in acres or other appropriate unit of measure) for all crossings of waters of the United States that require DA authorization, including those crossings authorized by an NWP would not otherwise require pre-construction notification. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the oil or natural gas pipeline is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the oil or natural gas pipeline to protect navigation.

Note 2: For oil or natural gas pipeline activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Oil or natural gas pipeline activities must comply with 33 CFR 330.6(d).

Note 3: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the oil or natural gas pipeline must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such oil or natural gas pipelines will require a section 404 permit (see NWP 15).

Note 5: This NWP authorizes oil or natural gas pipeline maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For NWP 12 activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

21. *Surface Coal Mining Activities.* Discharges of dredged or fill material into waters of the United States associated with surface coal mining and reclamation operations, provided the following criteria are met:

(a) The activities are already authorized, or are currently being processed by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 or by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement;

(b) The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into tidal waters or non-tidal wetlands adjacent to tidal waters; and

(c) The discharge is not associated with the construction of valley fills. A ''valley fill'' is a fill structure that is typically constructed within valleys associated with steep, mountainous terrain, associated with surface coal mining activities.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.) (Authorities: Sections 10 and 404)

29. *Residential Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of a single residence, a multiple unit residential development, or a residential subdivision. This NWP authorizes the construction of building foundations and building pads and attendant features that are necessary for the use of the residence or residential development. Attendant features may include but are not limited to roads, parking lots, garages, yards, utility lines, storm water management facilities, septic fields, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development).

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Subdivisions: For residential subdivisions, the aggregate total loss of waters of United States authorized by this NWP cannot exceed ½-acre. This includes any loss of waters of the United States associated with development of individual subdivision lots.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

39. *Commercial and Institutional Developments.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, storm water management facilities, wastewater treatment facilities, and recreation facilities such as playgrounds and playing fields. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The construction of new golf courses and new ski areas is not authorized by this NWP.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

Note: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

40. *Agricultural Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for agricultural activities, including the

construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized land clearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities.

This NWP also authorizes the construction of farm ponds in non-tidal waters of the United States, excluding perennial streams, provided the farm pond is used solely for agricultural purposes. This NWP does not authorize the construction of aquaculture ponds.

This NWP also authorizes discharges of dredged or fill material into non-tidal jurisdictional waters of the United States to relocate existing serviceable drainage ditches constructed in non-tidal streams.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

Note: Some discharges of dredged or fill material into waters of the United States for agricultural activities may qualify for an exemption under Section 404(f) of the Clean Water Act (see 33 CFR 323.4). This NWP authorizes the construction of farm ponds that do not qualify for the Clean Water Act section 404(f)(1)(C) exemption because of the recapture provision at section 404(f)(2).

42. *Recreational Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of recreational facilities. Examples of recreational facilities that may be authorized by this NWP include playing fields (*e.g.,* football fields, baseball fields), basketball courts, tennis courts, hiking trails, bike paths, golf courses, ski areas, horse paths, nature centers, and campgrounds (excluding recreational vehicle parks). This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables that are directly related to the recreational activity, but it does not authorize the construction of hotels, restaurants, racetracks, stadiums, arenas, or similar facilities.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authority: Section 404)

43. *Stormwater Management Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction of stormwater management facilities, including stormwater detention basins and retention basins and other stormwater management facilities; the construction of water control structures, outfall structures and emergency spillways; the construction of low impact development integrated management features such as bioretention facilities (*e.g.,* rain gardens), vegetated filter strips, grassed swales, and infiltration trenches; and the construction of pollutant reduction green infrastructure features designed to reduce inputs of sediments, nutrients, and other pollutants into waters, such as features needed to meet reduction targets established under Total Maximum Daily Loads set under the Clean Water Act.

This NWP authorizes, to the extent that a section 404 permit is required, discharges of dredged or fill material into non-tidal waters of the United States for the maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features. The maintenance of stormwater management facilities, low impact development integrated management features, and pollutant reduction green infrastructure features that are not waters of the United States does not require a section 404 permit.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize discharges of dredged or fill material for the construction of new stormwater management facilities in perennial streams.

Notification: For discharges of dredged or fill material into non-tidal waters of the United States for the construction of new stormwater management facilities or pollutant reduction green infrastructure features, or the expansion of existing stormwater management facilities or pollutant reduction green infrastructure features, the permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) Maintenance activities do not require pre-construction notification if they are limited to restoring the original design capacities of the stormwater management facility or pollutant reduction green infrastructure feature. (Authority: Section 404)

44. *Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States for mining activities, except for coal mining activities, provided the activity meets all of the following criteria:

(a) For mining activities involving discharges of dredged or fill material into non-tidal jurisdictional wetlands, the discharge must not cause the loss of greater than ½-acre of non-tidal jurisdictional wetlands;

(b) For mining activities involving discharges of dredged or fill material in non-tidal jurisdictional open waters (*e.g.,* rivers, streams, lakes, and ponds) or work in non-tidal navigable waters of the United States (*i.e.,* section 10 waters), the mined area, including permanent and temporary impacts due to discharges of dredged or fill material into jurisdictional waters, must not exceed ½-acre; and

(c) The acreage loss under paragraph (a) plus the acreage impact under paragraph (b) does not exceed ½-acre.

This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) If reclamation is required by other statutes, then a copy of the final reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

48. *Commercial Shellfish Mariculture Activities.* Structures or work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States necessary for new and continuing commercial shellfish mariculture operations (*i.e.,* the cultivation of bivalve molluscs such as oysters, mussels, clams, and scallops) in authorized project areas. For the purposes of this NWP, the project area is the area in which the operator is authorized to conduct commercial shellfish mariculture activities, as identified through a lease or permit issued by an appropriate state or local government agency, a treaty, or any easement, lease, deed, contract, or other legally binding agreement that

establishes an enforceable property interest for the operator.

This NWP authorizes the installation of buoys, floats, racks, trays, nets, lines, tubes, containers, and other structures into navigable waters of the United States. This NWP also authorizes discharges of dredged or fill material into waters of the United States necessary for shellfish seeding, rearing, cultivating, transplanting, and harvesting activities. Rafts and other floating structures must be securely anchored and clearly marked.

This NWP does not authorize:

(a) The cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody;

(b) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990; or

(c) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas, or the deposition of shell material back into waters of the United States as waste.

Notification: The permittee must submit a pre-construction notification to the district engineer if the activity directly affects more than ½-acre of submerged aquatic vegetation. If the operator will be conducting commercial shellfish mariculture activities in multiple contiguous project areas, he or she can either submit one PCN for those contiguous project areas or submit a separate PCN for each project area. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

50. *Underground Coal Mining Activities.* Discharges of dredged or fill material into non-tidal waters of the United States associated with underground coal mining and reclamation operations provided the activities are authorized, or are currently being processed by the Department of the Interior, Office of Surface Mining Reclamation and Enforcement, or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters. This NWP does not authorize coal preparation and processing activities outside of the mine site.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.) If reclamation is required by other statutes, then a copy of the reclamation plan must be submitted with the pre-construction notification. (Authorities: Sections 10 and 404)

51. *Land-Based Renewable Energy Generation Facilities.* Discharges of dredged or fill material into non-tidal waters of the United States for the construction, expansion, or modification of land-based renewable energy production facilities, including attendant features. Such facilities include infrastructure to collect solar (concentrating solar power and photovoltaic), wind, biomass, or geothermal energy. Attendant features may include, but are not limited to roads, parking lots, and stormwater management facilities within the land-based renewable energy generation facility.

The discharge must not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if the discharge results in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Electric utility lines constructed to transfer the energy from the land-based renewable energy generation facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

Note 2: If the only activities associated with the construction, expansion, or modification of a land-based renewable energy generation facility that require Department of the Army authorization are discharges of dredged or fill material into waters of the United States to construct, maintain, repair, and/or remove electric utility lines and/or road crossings, then NWP 57 and/or NWP 14 shall be used if those activities meet the terms and conditions of NWPs 57 and 14, including any applicable regional conditions and any case-specific conditions imposed by the district engineer.

Note 3: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

52. *Water-Based Renewable Energy Generation Pilot Projects.* Structures and work in navigable waters of the United States and discharges of dredged or fill material into waters of the United States for the construction, expansion, modification, or removal of water-based wind, water-based solar, wave energy, or hydrokinetic renewable energy generation pilot projects and their attendant features. Attendant features may include, but are not limited to, land-based collection and distribution facilities, control facilities, roads, parking lots, and stormwater management facilities.

For the purposes of this NWP, the term ''pilot project'' means an experimental project where the water-based renewable energy generation units will be monitored to collect information on their performance and environmental effects at the project site.

The placement of a transmission line on the bed of a navigable water of the United States from the renewable energy generation unit(s) to a land-based collection and distribution facility is considered a structure under Section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR 322.2(b)), and the placement of the transmission line on the bed of a navigable water of the United States is not a loss of waters of the United States for the purposes of applying the ½-acre limit.

For each single and complete project, no more than 10 generation units (*e.g.,* wind turbines, wave energy devices, or hydrokinetic devices) are authorized. For floating solar panels in navigable waters of the United States, each single and complete project cannot exceed ½-acre in water surface area covered by the floating solar panels.

This NWP does not authorize activities in coral reefs. Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

Upon completion of the pilot project, the generation units, transmission lines, and other structures or fills associated with the pilot project must be removed to the maximum extent practicable unless they are authorized by a separate Department of the Army authorization, such as another NWP, an individual permit, or a regional general permit. Completion of the pilot project will be identified as the date of expiration of the Federal Energy Regulatory Commission (FERC) license, or the expiration date of the NWP authorization if no FERC license is required.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Electric utility lines constructed to transfer the energy from the land-based collection facility to a distribution system, regional grid, or other facility are generally considered to be linear projects and each separate and distant crossing of a waterbody is eligible for treatment as a separate single and complete linear project. Those electric utility lines may be authorized by NWP 57 or another Department of the Army authorization.

Note 2: An activity that is located on an existing locally or federally maintained U.S. Army Corps of Engineers project requires separate review and/or approval from the Corps under 33 U.S.C. 408.

Note 3: If the pilot project generation units, including any transmission lines, are placed in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, copies of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration, National Ocean Service, for charting the generation units and associated transmission line(s) to protect navigation.

Note 4: Hydrokinetic renewable energy generation projects that require authorization by the Federal Energy Regulatory Commission under the Federal Power Act of 1920 do not require separate authorization from the Corps under section 10 of the Rivers and Harbors Act of 1899.

Note 5: For any activity that involves the construction of a wind energy generating structure, solar tower, or overhead transmission line, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

55. *Seaweed Mariculture Activities.* Structures in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for seaweed mariculture activities. This NWP also authorizes structures for bivalve shellfish mariculture if shellfish production is a component of an integrated multi-trophic mariculture system (*e.g.,* the production of seaweed and bivalve shellfish on the same structure or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of buoys, long-lines, floats, anchors, rafts, racks, and other similar structures into navigable waters of the United States. Rafts, racks and other floating structures must be securely anchored and clearly marked. To the maximum extent practicable, the permittee must remove these structures from navigable waters of the United States if they will no longer be used for seaweed mariculture activities or multi-trophic mariculture activities.

Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the preconstruction notification must also include the following information: (1) A map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the seaweed mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the project.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

56. *Finfish Mariculture Activities.* Structures in marine and estuarine waters, including structures anchored to the seabed in waters overlying the outer continental shelf, for finfish mariculture activities. This NWP also authorizes structures for bivalve shellfish mariculture and/or seaweed mariculture if the structures for bivalve shellfish and/or seaweed production are a component of an integrated multi-trophic mariculture structure (*e.g.,* the production of bivalve shellfish or seaweed on the structure used for finfish mariculture, or a nearby mariculture structure that is part of the single and complete project).

This NWP authorizes the installation of cages, net pens, anchors, floats, buoys, and other similar structures into navigable waters of the United States. Net pens, cages, and other floating

structures must be securely anchored and clearly marked. To the maximum extent practicable, the permittee must remove these structures from navigable waters of the United States if they will no longer be used for finfish mariculture activities or multi-trophic mariculture activities.

This NWP does not authorize the construction of land-based fish hatcheries or other attendant features.

Structures in an anchorage area established by the U.S. Coast Guard must comply with the requirements in 33 CFR 322.5(l)(2). Structures may not be placed in established danger zones or restricted areas designated in 33 CFR part 334, Federal navigation channels, shipping safety fairways or traffic separation schemes established by the U.S. Coast Guard (see 33 CFR 322.5(l)(1)), or EPA or Corps designated open water dredged material disposal areas.

This NWP does not authorize:

(a) The cultivation of an aquatic nuisance species as defined in the Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 or the cultivation of a nonindigenous species unless that species has been previously cultivated in the waterbody; or

(b) Attendant features such as docks, piers, boat ramps, stockpiles, or staging areas.

Notification: The permittee must submit a pre-construction notification to the district engineer. (See general condition 32.)

In addition to the information required by paragraph (b) of general condition 32, the pre-construction notification must also include the following information: (1) A map showing the locations and dimensions of the structure(s); (2) the name(s) of the species that will be cultivated during the period this NWP is in effect; and (3) general water depths in the project area(s) (a detailed survey is not required). No more than one pre-construction notification per structure or group of structures should be submitted for the finfish mariculture operation during the effective period of this NWP. The pre-construction notification should describe all species and culture activities the operator expects to undertake during the effective period of this NWP. (Authority: Section 10)

Note 1: The permittee should notify the applicable U.S. Coast Guard office regarding the finfish mariculture activity.

Note 2: To prevent introduction of aquatic nuisance species, no material that has been taken from a different waterbody may be reused in the current project area, unless it has been treated in accordance with the applicable regional aquatic nuisance species management plan.

Note 3: The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 defines ''aquatic nuisance species'' as ''a nonindigenous species that threatens the diversity or abundance of native species or the ecological stability of infested waters, or commercial, agricultural, aquacultural, or recreational activities dependent on such waters.''

57. *Electric Utility Line and Telecommunications Activities.* Activities required for the construction, maintenance, repair, and removal of electric utility lines, telecommunication lines, and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

Electric utility lines and telecommunication lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of electric utility lines and telecommunication lines. There must be no change in pre-construction contours of waters of the United States. An ''electric utility line and telecommunication line'' is defined as any cable, line, fiber optic line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and internet, radio, and television communication.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the electric utility line or telecommunication line crossing of each waterbody.

Electric utility line and telecommunications substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with an electric utility line or telecommunication line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for overhead electric utility line or telecommunication line towers, poles, and anchors: This NWP authorizes the construction or maintenance of foundations for overhead electric utility line or telecommunication line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of electric utility lines or telecommunication lines, including overhead lines and substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize electric utility lines or telecommunication lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Electric utility lines or telecommunication lines constructed over section 10 waters and electric utility lines or telecommunication lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing electric utility lines or telecommunication lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the electric utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than 1/10-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the electric utility line is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the electric utility line to protect navigation.

Note 2: For electric utility line or telecommunications activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Electric utility line and telecommunications activities must comply with 33 CFR 330.6(d).

Note 3: Electric utility lines or telecommunication lines consisting of aerial electric power transmission lines crossing navigable waters of the United States (which are defined at 33 CFR part 329) must comply with the applicable minimum clearances specified in 33 CFR 322.5(i).

Note 4: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the electric utility line or telecommunication line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 5: This NWP authorizes electric utility line and telecommunication line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For overhead electric utility lines and telecommunication lines authorized by this NWP, a copy of the PCN and NWP verification will be provided by the Corps to the Department of Defense Siting Clearinghouse, which will evaluate potential effects on military activities.

Note 7: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

58. *Utility Line Activities for Water and Other Substances.* Activities required for the construction, maintenance, repair, and removal of utility lines for water and other substances, excluding oil, natural gas, products derived from oil or natural gas, and electricity. Oil or natural gas pipeline activities or electric utility line and telecommunications activities may be authorized by NWPs 12 or 57, respectively. This NWP also authorizes associated utility line facilities in waters of the United States, provided the activity does not result in the loss of greater than ½-acre of waters of the United States for each single and complete project.

Utility lines: This NWP authorizes discharges of dredged or fill material into waters of the United States and structures or work in navigable waters for crossings of those waters associated with the construction, maintenance, or repair of utility lines for water and other substances, including outfall and intake structures. There must be no change in pre-construction contours of waters of the United States. A ''utility line'' is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquescent, or slurry substance, for any purpose that is not oil, natural gas, or petrochemicals. Examples of activities authorized by this NWP include utility lines that convey water, sewage, stormwater, wastewater, brine, irrigation water, and industrial products that are not petrochemicals. The term ''utility line'' does not include activities that drain a water of the United States, such as drainage tile or french drains, but it does apply to pipes conveying drainage from another area.

Material resulting from trench excavation may be temporarily sidecast into waters of the United States for no more than three months, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The district engineer may extend the period of temporary side casting for no more than a total of 180 days, where appropriate. In wetlands, the top 6 to 12 inches of the trench should normally be backfilled with topsoil from the trench. The trench cannot be constructed or backfilled in such a manner as to drain waters of the United States (*e.g.,* backfilling with extensive gravel layers, creating a french drain effect). Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

Utility line substations: This NWP authorizes the construction, maintenance, or expansion of substation facilities associated with a utility line in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not result in the loss of greater than ½-acre of waters of the United States. This

NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters of the United States to construct, maintain, or expand substation facilities.

Foundations for above-ground utility lines: This NWP authorizes the construction or maintenance of foundations for above-ground utility lines in all waters of the United States, provided the foundations are the minimum size necessary.

Access roads: This NWP authorizes the construction of access roads for the construction and maintenance of utility lines, including utility line substations, in non-tidal waters of the United States, provided the activity, in combination with all other activities included in one single and complete project, does not cause the loss of greater than ½-acre of non-tidal waters of the United States. This NWP does not authorize discharges of dredged or fill material into non-tidal wetlands adjacent to tidal waters for access roads. Access roads must be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes any adverse effects on waters of the United States and must be as near as possible to pre-construction contours and elevations (*e.g.,* at grade corduroy roads or geotextile/gravel roads). Access roads constructed above pre-construction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

This NWP may authorize utility lines in or affecting navigable waters of the United States even if there is no associated discharge of dredged or fill material (see 33 CFR part 322). Overhead utility lines constructed over section 10 waters and utility lines that are routed in or under section 10 waters without a discharge of dredged or fill material require a section 10 permit.

This NWP authorizes, to the extent that Department of the Army authorization is required, temporary structures, fills, and work necessary for the remediation of inadvertent returns of drilling fluids to waters of the United States through sub-soil fissures or fractures that might occur during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines. These remediation activities must be done as soon as practicable, to restore the affected waterbody. District engineers may add special conditions to this NWP to require a remediation plan for addressing inadvertent returns of drilling fluids to waters of the United States during horizontal directional drilling activities conducted for the purpose of installing or replacing utility lines.

This NWP also authorizes temporary structures, fills, and work, including the use of temporary mats, necessary to conduct the utility line activity. Appropriate measures must be taken to maintain normal downstream flows and minimize flooding to the maximum extent practicable, when temporary structures, work, and discharges of dredged or fill material, including cofferdams, are necessary for construction activities, access fills, or dewatering of construction sites. Temporary fills must consist of materials, and be placed in a manner, that will not be eroded by expected high flows. After construction, temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The areas affected by temporary fills must be revegetated, as appropriate.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the activity if: (1) A section 10 permit is required; or (2) the discharge will result in the loss of greater than ⅒-acre of waters of the United States. (See general condition 32.) (Authorities: Sections 10 and 404)

Note 1: Where the utility line is constructed, installed, or maintained in navigable waters of the United States (*i.e.,* section 10 waters) within the coastal United States, the Great Lakes, and United States territories, a copy of the NWP verification will be sent by the Corps to the National Oceanic and Atmospheric Administration (NOAA), National Ocean Service (NOS), for charting the utility line to protect navigation.

Note 2: For utility line activities crossing a single waterbody more than one time at separate and distant locations, or multiple waterbodies at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. Utility line activities must comply with 33 CFR 330.6(d).

Note 3: Access roads used for both construction and maintenance may be authorized, provided they meet the terms and conditions of this NWP. Access roads used solely for construction of the utility line must be removed upon completion of the work, in accordance with the requirements for temporary fills.

Note 4: Pipes or pipelines used to transport gaseous, liquid, liquescent, or slurry substances over navigable waters of the United States are considered to be bridges, not utility lines, and may require a permit from the U.S. Coast Guard pursuant to the General Bridge Act of 1946. However, any discharges of dredged or fill material into waters of the United States associated with such pipelines will require a section 404 permit (see NWP 15).

Note 5: This NWP authorizes utility line maintenance and repair activities that do not qualify for the Clean Water Act section 404(f) exemption for maintenance of currently serviceable fills or fill structures.

Note 6: For activities that require pre-construction notification, the PCN must include any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings that require Department of the Army authorization but do not require pre-construction notification (see paragraph (b)(4) of general condition 32). The district engineer will evaluate the PCN in accordance with Section D, ''District Engineer's Decision.'' The district engineer may require mitigation to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see general condition 23).

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard,

through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his or her authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species. If a bottomless culvert cannot be used, then the crossing should be designed and constructed to minimize adverse effects to aquatic life movements.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.,* through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (*e.g.,* trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization, storm water management activities, and temporary and permanent road crossings, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if it benefits the aquatic environment (*e.g.,* stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Structures and Fills.* Temporary structures must be removed, to the maximum extent practicable, after their use has been discontinued. Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No NWP activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. Permittees shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (*e.g.,* National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: *http://www.rivers.gov/.*

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation,

as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify designated critical habitat or critical habitat proposed for such designation. No activity is authorized under any NWP which ''may affect'' a listed species or critical habitat, unless ESA section 7 consultation addressing the consequences of the proposed activity on listed species or critical habitat has been completed. See 50 CFR 402.02 for the definition of ''effects of the action'' for the purposes of ESA section 7 consultation, as well as 50 CFR 402.17, which provides further explanation under ESA section 7 regarding ''activities that are reasonably certain to occur'' and ''consequences caused by the proposed action.''

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA (see 33 CFR 330.4(f)(1)). If pre-construction notification is required for the proposed activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed such designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat or critical habitat proposed for such designation, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation), the pre-construction notification must include the name(s) of the endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or that utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. The district engineer will determine whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. For activities where the non-Federal applicant has identified listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such designation) that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification that the proposed activity will have ''no effect'' on listed species (or species proposed for listing or designated critical habitat (or critical habitat proposed for such designation), or until ESA section 7 consultation or conference has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation or conference with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by an NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.,* an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word ''harm'' in the definition of ''take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.

(f) If the non-federal permittee has a valid ESA section 10(a)(1)(B) incidental take permit with an approved Habitat Conservation Plan for a project or a group of projects that includes the proposed NWP activity, the non-federal applicant should provide a copy of that ESA section 10(a)(1)(B) permit with the PCN required by paragraph (c) of this general condition. The district engineer will coordinate with the agency that issued the ESA section 10(a)(1)(B) permit to determine whether the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation conducted for the ESA section 10(a)(1)(B) permit. If that coordination results in concurrence from the agency that the proposed NWP activity and the associated incidental take were considered in the internal ESA section 7 consultation for the ESA section 10(a)(1)(B) permit, the district engineer does not need to conduct a separate ESA section 7 consultation for the proposed NWP activity. The district engineer will notify the non-federal applicant within 45 days of receipt of a complete pre-construction notification whether the ESA section 10(a)(1)(B) permit covers the proposed NWP activity or whether additional ESA section 7 consultation is required.

(g) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide web pages at *http://www.fws.gov/* or *http://www.fws.gov/ipac* and *http://www.nmfs.noaa.gov/pr/species/esa/* respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring that an action authorized by an NWP complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting the appropriate local office of the U.S. Fish and Wildlife Service to determine what measures, if any, are necessary or appropriate to reduce adverse effects to migratory birds or eagles, including whether ''incidental take'' permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) No activity is authorized under any NWP which may have the potential to cause effects to properties listed, or eligible for listing, in the National Register of Historic Places until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)(1)). If pre-construction notification is required for the proposed NWP activity, the Federal permittee must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate

documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the NWP activity might have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties might have the potential to be affected by the proposed NWP activity or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of, or potential for, the presence of historic properties can be sought from the State Historic Preservation Officer, Tribal Historic Preservation Officer, or designated tribal representative, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts commensurate with potential impacts, which may include background research, consultation, oral history interviews, sample field investigation, and/or field survey. Based on the information submitted in the PCN and these identification efforts, the district engineer shall determine whether the proposed NWP activity has the potential to cause effects on the historic properties. Section 106 consultation is not required when the district engineer determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). Section 106 consultation is required when the district engineer determines that the activity has the potential to cause effects on historic properties. The district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c) when he or she makes any of the following effect determinations for the purposes of section 106 of the NHPA: No historic properties affected, no adverse effect, or adverse effect.

(d) Where the non-Federal applicant has identified historic properties on which the proposed NWP activity might have the potential to cause effects and has so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that NHPA section 106 consultation has been completed. For non-federal permittees, the district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. If NHPA section 106 consultation is required, the district engineer will notify the non-Federal applicant that he or she cannot begin the activity until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (54 U.S.C. 306113) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* Permittees that discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by an NWP, they must immediately notify the district engineer of what they have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal, and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, 52, 57 and 58 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and 54, notification is required in accordance with general condition 32, for any activity proposed by permittees in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after she or he determines that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the

district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) Compensatory mitigation at a minimum one-for-one ratio will be required for all losses of stream bed that exceed 3/100-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. This compensatory mitigation requirement may be satisfied through the restoration or enhancement of riparian areas next to streams in accordance with paragraph (e) of this general condition. For losses of stream bed of 3/100-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided, if practicable, through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.,* conservation easements) of riparian areas next to open waters. In some cases, the restoration or maintenance/protection of riparian areas may be the only compensatory mitigation required. If restoring riparian areas involves planting vegetation, only native species should be planted. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to restore or maintain/protect a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or maintaining/protecting a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.,* riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of minimization or compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)). However, if an appropriate number and type of mitigation bank or in-lieu credits are not available at the time the PCN is submitted to the district engineer, the district engineer may approve the use of permittee-responsible mitigation.

(2) The amount of compensatory mitigation required by the district engineer must be sufficient to ensure that the authorized activity results in no more than minimal individual and cumulative adverse environmental effects (see 33 CFR 330.1(e)(3)). (See also 33 CFR 332.3(f).)

(3) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, aquatic resource restoration should be the first compensatory mitigation option considered for permittee-responsible mitigation.

(4) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)). If permittee-responsible mitigation is the proposed option, and the proposed compensatory mitigation site is located on land in which another federal agency holds an easement, the district engineer will coordinate with that federal agency to determine if proposed compensatory mitigation project is compatible with the terms of the easement.

(5) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan needs to address only the baseline conditions at the impact site and the number of credits to be provided (see 33 CFR 332.4(c)(1)(ii)).

(6) Compensatory mitigation requirements (*e.g.,* resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan (see 33 CFR 332.4(c)(1)(ii)).

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. When developing a compensatory mitigation proposal, the permittee must consider appropriate and practicable options consistent with the framework at 33 CFR 332.3(b). For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and

performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state or federal, dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* (a) Where the certifying authority (state, authorized tribe, or EPA, as appropriate) has not previously certified compliance of an NWP with CWA section 401, a CWA section 401 water quality certification for the proposed discharge must be obtained or waived (see 33 CFR 330.4(c)). If the permittee cannot comply with all of the conditions of a water quality certification previously issued by certifying authority for the issuance of the NWP, then the permittee must obtain a water quality certification or waiver for the proposed discharge in order for the activity to be authorized by an NWP.

(b) If the NWP activity requires pre-construction notification and the certifying authority has not previously certified compliance of an NWP with CWA section 401, the proposed discharge is not authorized by an NWP until water quality certification is obtained or waived. If the certifying authority issues a water quality certification for the proposed discharge, the permittee must submit a copy of the certification to the district engineer. The discharge is not authorized by an NWP until the district engineer has notified the permittee that the water quality certification requirement has been satisfied by the issuance of a water quality certification or a waiver.

(c) The district engineer or certifying authority may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). If the permittee cannot comply with all of the conditions of a coastal zone management consistency concurrence previously issued by the state, then the permittee must obtain an individual coastal zone management consistency concurrence or presumption of concurrence in order for the activity to be authorized by an NWP. The district engineer or a state may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its CWA section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is authorized, subject to the following restrictions:

(a) If only one of the NWPs used to authorize the single and complete project has a specified acreage limit, the acreage loss of waters of the United States cannot exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed ⅓-acre.

(b) If one or more of the NWPs used to authorize the single and complete project has specified acreage limits, the acreage loss of waters of the United States authorized by those NWPs cannot exceed their respective specified acreage limits. For example, if a commercial development is constructed under NWP 39, and the single and complete project includes the filling of an upland ditch authorized by NWP 46, the maximum acreage loss of waters of the United States for the commercial development under NWP 39 cannot exceed ½-acre, and the total acreage loss of waters of United States due to the NWP 39 and 46 activities cannot exceed 1 acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

''When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.''

_____

(Transferee)

_____

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation, whichever occurs later.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires review by, or permission from, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a ''USACE project''), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission and/or review is not authorized by an NWP until the appropriate Corps office issues the section 408 permission or completes its review to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or are in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity might have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is ''no effect'' on listed species or ''no potential to cause effects'' on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation Act (see 33 CFR 330.4(g)) has been completed. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) (i) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of wetlands, other special aquatic sites, and other waters expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; and any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures.

(ii) For linear projects where one or more single and complete crossings require pre-construction notification, the PCN must include the quantity of anticipated losses of wetlands, other special aquatic sites, and other waters for each single and complete crossing of those wetlands, other special aquatic sites, and other waters (including those single and complete crossings authorized by an NWP but do not require PCNs). This information will be used by the district engineer to evaluate the cumulative adverse environmental effects of the proposed linear project, and does not change those non-PCN NWP activities into NWP PCNs.

(iii) Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (*e.g.,* a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial and intermittent streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many wetlands, other special aquatic sites, and other waters. Furthermore, the 45-day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-federal permittees, if any listed species (or species proposed for listing) or designated critical habitat (or critical habitat proposed for such

designation) might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat (or critical habitat proposed for such designation), the PCN must include the name(s) of those endangered or threatened species (or species proposed for listing) that might be affected by the proposed activity or utilize the designated critical habitat (or critical habitat proposed for such designation) that might be affected by the proposed activity. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-federal permittees, if the NWP activity might have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property might have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the ''study river'' (see general condition 16); and

(10) For an NWP activity that requires permission from, or review by, the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from, or review by, the Corps office having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The nationwide permit pre-construction notification form (Form ENG 6082) should be used for NWP PCNs. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials if the district engineer has established tools and procedures for electronic submittals.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than ½-acre of waters of the United States; (ii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iii) NWP 54 activities in excess of 500 linear feet, or that extend into the waterbody more than 30 feet from the mean low water line in tidal waters or the ordinary high water mark in the Great Lakes.

(3) When agency coordination is required, the district engineer will immediately provide (*e.g.,* via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to notify the district engineer via telephone, facsimile transmission, or email that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure that the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the NWP verification for that activity if it meets the terms and conditions of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal individual and cumulative adverse effects on the aquatic environment and other aspects of the public interest and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the single and complete crossings of waters of the United States that require PCNs to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings of waters of the United States authorized by an NWP. If an applicant requests a waiver of an applicable limit, as provided for in NWPs 13, 36, or 54, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal individual and cumulative adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. He or she will also consider the cumulative adverse environmental effects caused by activities authorized by an NWP and whether those cumulative adverse

environmental effects are no more than minimal. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands or 3/100-acre of stream bed, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters. The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure that the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse environmental effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse environmental effects, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse environmental effects so that they are no more than minimal. When compensatory mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term ''discharge'' means any discharge of dredged or fill material into waters of the United States.

Ecological reference: A model used to plan and design an aquatic habitat and riparian area restoration, enhancement, or establishment activity under NWP 27. An ecological reference may be based on the structure, functions, and dynamics of an aquatic habitat type or a riparian area type that currently exists in the region where the proposed NWP 27 activity is located. Alternatively, an ecological reference may be based on a conceptual model for the aquatic habitat type or riparian area type to be restored, enhanced, or established as a result of the proposed NWP 27 activity. An ecological reference takes into account the range of variation of the aquatic habitat type or riparian area type in the region.

Enhancement: The manipulation of the physical, chemical, or biological

characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: 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.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. The loss of stream bed includes the acres of stream bed that are permanently adversely affected by filling or excavation because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters or wetlands for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act, are not considered when calculating the loss of waters of the United States.

Navigable waters: Waters subject to section 10 of the Rivers and Harbors Act of 1899. These waters are defined at 33 CFR part 329.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.,* spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of ''open waters'' include rivers, streams, lakes, and ponds.

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.

Perennial stream: A perennial stream has surface water flowing continuously year-round during a typical year.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is

divided into two categories: Re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term ''single and complete project'' is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.,* a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ''independent utility''). Single and complete non-linear projects may not be ''piecemealed'' to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or improve the quality (*i.e.,* by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized jurisdictional stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a jurisdictional wetland that is inundated by tidal waters. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line.

Tribal lands: Any lands title to which is either: (1) Held in trust by the United States for the benefit of any Indian tribe or individual; or (2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Tribal rights: Those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and that give rise to legally enforceable remedies.

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a ''water of the United States.'' If a wetland is adjacent to a waterbody determined to be a water of the United States, that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)).

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Part III

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1223

Pecan Promotion, Research, and Information Order; Final Rule

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1223

[Document Number AMS–SC–20–0013; FR]

Pecan Promotion, Research, and Information Order

AGENCY: Agricultural Marketing Service.

ACTION: Final rule.

SUMMARY: This rule establishes the Pecan Promotion, Research, and Information Order (Order). This rule also establishes the procedures for conducting a referendum to determine whether the continuation of the proposed Order is favored by domestic producers and importers of pecans. In addition, this rule announces the Agricultural Marketing Service's (AMS) approval of new pecan information collection requirements by the Office of Management and Budget (OMB) for the operation of the Order.

DATES: Effective Date February 12, 2021. Collection of assessments as required by §§ 1223.52 and 1223.53 and compliance with reporting and recordkeeping requirements under §§ 1223.60 and 1223.61 will begin October 1, 2021.

FOR FURTHER INFORMATION CONTACT: Andrea Ricci, Marketing Specialist, Promotion and Economics Division, Specialty Crops Program, AMS, USDA, 755 E Nees Avenue, #25985, Fresno, CA 93720; telephone: (202) 572–1442; or electronic mail: *Andrea.Ricci@usda.gov.*

SUPPLEMENTARY INFORMATION: This is issued pursuant to the Commodity Promotion, Research, and Information Act of 1996 (1996 Act) (7 U.S.C. 7411–7425).

As part of this rulemaking process, a proposed rule was published in the **Federal Register** on September 22, 2020 (85 FR 59610). That rule provided for a 60-day comment period, which ended on November 23, 2020. Fifty-four comments were received. All comments are addressed later in this final rule.

Executive Orders 12866, 13563, and 13771

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this rule does not meet the definition of a significant regulatory action, it does not trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled ''Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs' '' (February 2, 2017).

Executive Order 13175

This action has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this regulation will not have substantial and direct effects on Tribal governments and will not have significant Tribal implications.

Executive Order 12988

This action has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. Section 524 of the 1996 Act (7 U.S.C. 7423) provides that it shall not affect or preempt any other Federal or State law authorizing promotion or research relating to an agricultural commodity.

Section 519 of the 1996 Act (7 U.S.C. 7418) provides that a person subject to an order may file a written petition with the U.S. Department of Agriculture (USDA) stating that an order, any provision of an order, or any obligation imposed in connection with an order, is not established in accordance with the law, and request a modification of an order or an exemption from an order. Any petition filed challenging an order, any provision of an order, or any obligation imposed in connection with an order, must be filed within two years after the effective date of an order, provision, or obligation subject to challenge in the petition. The petitioner would have the opportunity for a hearing on the petition. Thereafter, USDA will issue a ruling on the petition. The 1996 Act provides that the district court of the United States for any district in which the petitioner resides or conducts business shall have the jurisdiction to review a final ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of USDA's final ruling.

Background

This rule establishes the Pecan Promotion, Research, and Information Order (7 CFR part 1223) (Order). The purpose of the program is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. The proposal was submitted to USDA by the National Pecan Federation (NPF), an organization representing pecan growers and shellers across the United States whose mission is to promote, protect, and improve business conditions for the pecan industry. The program will be financed by an assessment on producers and importers and will be administered by a board of industry members selected by the Secretary. The initial assessment rate will be $0.02 per pound of inshell pecans and $0.04 per pound of shelled pecans produced within or imported to the United States. Entities that produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) will be exempt from the payment of assessments. Assessment collection, along with the appropriate reporting and recordkeeping, will become effective October 1, 2021. This date aligns with the Order's fiscal period.

A referendum will be conducted among producers and importers to determine if pecan producers and importers favor the continuation of the program three years after the collection of assessment begins.

Legal Basis for Action

The Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities.

The 1996 Act provides several optional provisions that allow the tailoring of orders for different commodities. Section 516 of the 1996 Act provides permissive terms for orders, and other sections provide for alternatives. For example, section 514 of the 1996 Act provides for orders applicable to (1) producers, (2) first handlers and others in the marketing chain as appropriate, and (3) importers (if imports are subject to assessments).

Section 516 states that an order may include an exemption of de minimis quantities of an agricultural commodity; different payment and reporting schedules; coverage of research, promotion, and information activities to expand, improve, or make more efficient the marketing or use of an agricultural commodity in both domestic and foreign markets; a provision for reserve funds; a provision for credits for generic and branded activities; and assessment of imports.

In addition, section 518 of the 1996 Act provides for referenda to ascertain approval of an order to be conducted either prior to its going into effect or within three years after assessments first begin under the order. Pursuant to section 518 of the 1996 Act, an order may also provide for its approval in a referendum based upon different voting patterns. Section 515 provides for establishment of a board from among producers, first handlers and others in the marketing chain as appropriate, and importers, if imports are subject to assessment.

USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, (7 CFR part 986) which is authorized under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problems, and to improve profitability. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

The purpose of research and promotion programs, in general, is to provide a framework for agricultural industries to pool their resources and combine efforts to develop new markets, strengthen existing markets and conduct important research and promotion activities. The pecan research and promotion program will be national in scope, financed by an assessment on pecan producers and importers, and authorize research and promotion activities. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Industry Background

The pecan industry is comprised of producers, shellers, accumulators, wholesalers, and importers that produce, process, and supply pecans for market. Pecans include any and all varieties or subvarieties, inshell or shelled, of *Carya illinoinensis*. Pecans are grown primarily in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. According to the most recent Census of Agriculture (2017), there are 15,608 operations with bearing acreage of pecans. Bearing acreage is greatest in Georgia with about 30 percent of the nationwide total, followed by Texas at 27 percent, Oklahoma at 22 percent, New Mexico at 11 percent, and Arizona at 4 percent. These five states generally account for about 95 percent of U.S. pecan production.

U.S. Supply and Consumption

Pecans are an alternate bearing crop, causing variability in production from year to year. Based on data from the National Agricultural Statistics Service (NASS), the 2014 to 2019 six-year average of total U.S. pecan production was almost 265 million pounds on an inshell basis, as shown in Table 1. Together, Georgia and New Mexico produced more than half of pecan volume nationwide.

From 2013 through 2016, pecan production averaged about 263 million pounds per year, and reached a peak in 2017 at nearly 305 million pounds. The following year, however, domestic production dropped 21 percent due to the destruction of the Georgia pecan crop by Hurricane Michael. The trend of U.S. pecan production is depicted in Chart 1.

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Table 1. State Pecan Production	
State	1,000 Lbs. Inshell basis
Georgia	88,000
New Mexico	80,150
Texas	42,517
Arizona	26,717
Oklahoma	13,533
Louisiana	7,406
California	4,686
Arkansas	2,850
Alabama	1,850
Mississippi	1,150
Missouri	1,090
South Carolina	350
Florida	145
Total U.S.[1]	264,765
Source: NASS, 2014-2019 average. Note: [1]Sum may not equal Total U.S. due to rounding.	

In 2018, Hurricane Michael swept across the southern half of Georgia as a Category 3 storm. According to the University of Georgia Pecan Extension, this storm resulted in a loss of nearly half the expected 2018 crop and a loss of 17 percent of the state's pecan acreage. The effects of Hurricane Michael remain present as the 2019 Georgia crop was down nearly 30 percent from the average production of the six years prior to the storm. Prior to Hurricane Michael, Georgia was the top pecan-producing state in the U.S. Considering this, along with the state's recovery efforts, the University of Georgia Pecan Extension expects Georgia pecan production to rebound in the coming years. Pecan production nationwide began to increase in 2019, climbing six percent from 2018.

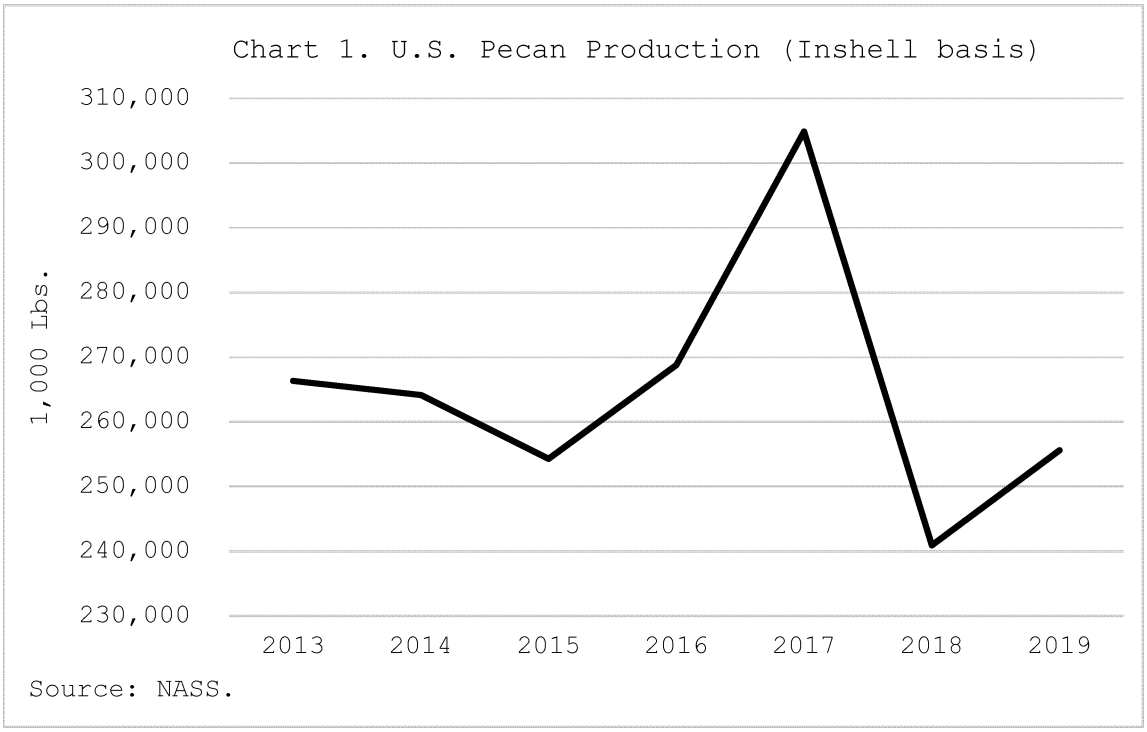


Table 2 shows U.S. pecan supply and utilization. Domestic production generally accounts for about 40 percent of the domestic supply, while imports account for nearly one-third, with beginning stocks just under 30 percent. Almost all pecans imported into the U.S. are from Mexico. Of these, 70 percent are shelled, and 30 percent are inshell.

Table 2. U.S. Supply and Utilization of Pecans (1,000 Lbs., Inshell basis)

Year	Production[1]	Beginning Stocks[1]	Imports[2]	Supply[3]	Ending Stocks[1]	Exports[4]	Utilization[5]	Per Capita Consumption (Lbs.)[6]
2013	266,330	183,840	143,285	593,455	166,909	156,450	270,095	0.85
2014	264,150	166,909	186,619	617,678	174,874	167,701	275,103	0.86
2015	254,290	174,874	170,574	599,738	181,390	157,208	261,140	0.81
2016	268,770	181,390	220,069	670,229	204,288	160,469	305,471	0.95
2017	304,850	204,288	176,122	685,260	183,984	188,116	313,160	0.96
2018	240,930	183,984	230,899	655,813	203,341	135,256	317,216	0.97
2019	255,600	203,341	265,287	724,228	180,055	151,370	392,803	1.20
2014-2019 6-yr avg	264,765	185,798	208,262	658,824	187,989	160,020	310,815	0.96
Pct of supply	40%	28%	32%		29%	24%	47%	
2019 v 2018	6%	11%	15%	10%	-11%	12%	24%	23%
2019 v 2013-2018 6-yr avg	-4%	11%	41%	14%	-3%	-6%	35%	33%

Sources: [1]NASS; [2]Customs and Border Protection; [4]Foreign Agricultural Service.
Notes: [3]Production + Beginning Stocks + Imports; [5]Supply - (Ending Stocks + Exports); [6]Utilization / U.S. Population.

Nearly half of the U.S. supply of pecans is consumed domestically each year. Per capita consumption has trended upward for the last four years, reaching a high of 1.20 inshell pounds in 2019. Compared to 2018 and to the 2013 to 2018 six-year average, 2019 per capita consumption is up 23 percent and 33 percent, respectively.

Exports

The U.S. exports about 24 percent of its pecan supply on average each year. Shelled pecans make up 60 percent of U.S. pecan exports, while inshell are 40 percent. Europe and Canada are the primary markets for shelled pecans with, on average, 49 percent and 24 percent, respectively, of total shelled exports. In Europe, the largest consumers of U.S. shelled pecans are the Netherlands, the United Kingdom, and Germany with 39 percent, 24 percent, and 15 percent, respectively, of total shelled exports to Europe. On average, about 94 percent of U.S. inshell exports go to Asia. Together, Hong Kong and China make up 72 percent of the Asian market for inshell pecan exports from the United States.

Competition

The pecan industry competes with other tree nut industries such as almonds, pistachios and walnuts. As Table 3 illustrates, sales by volume of pecans are 95 percent lower than sales of almonds, 74 percent lower than sales of walnuts, but 40 percent higher than sales of pistachios.

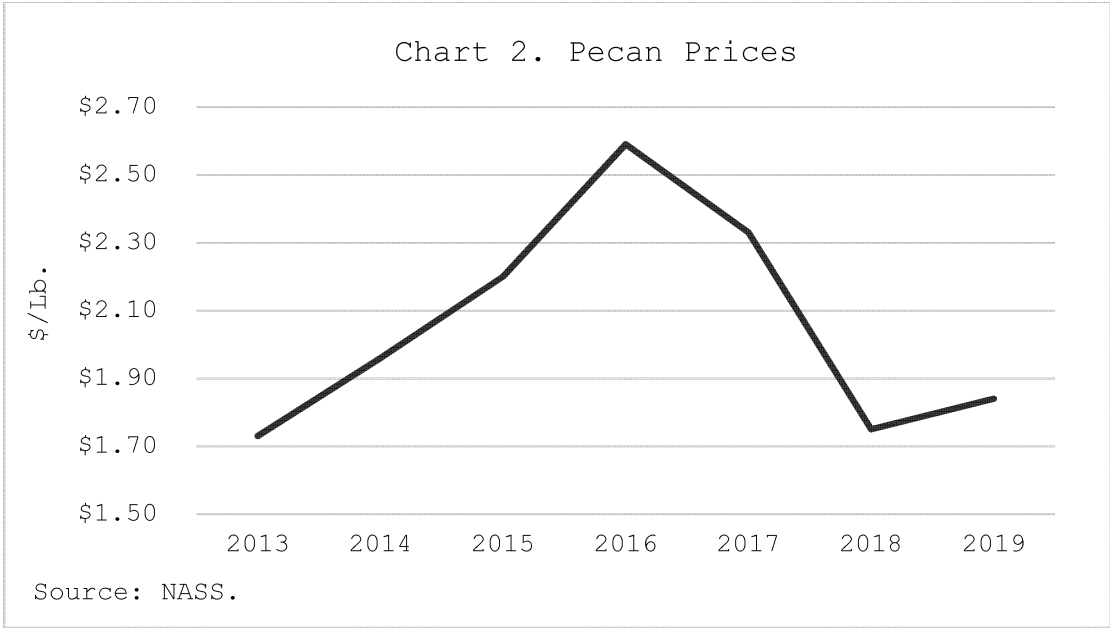
Table 3. Shelled Nut Sales (1,000 Lbs.)				
Year	Pecans	Almonds[1]	Pistachios	Walnuts
2013	106,569	2,010,000	45,400	306,000
2014	101,858	1,870,000	50,800	374,000
2015	87,225	1,900,000	33,100	400,000
2016	116,930	2,140,000	114,400	438,000
2017	126,396	2,270,000	52,807	390,000
2018	88,373	2,280,000	121,000	450,000
2019	115,937	2,550,000	82,000	412,000
2014-2019 6-yr avg	106,120	2,168,333	75,685	410,667
Pecan comparison		-95%	40%	-74%
Source: NASS.				
Note: [1]Almonds is shelled utilized production.				

Prices received by growers, as shown in Table 4, are 25 percent lower for pecans than for almonds. Compared to other nuts, grower-received prices for pecans are 18 percent lower than those for pistachios, but double those for walnuts.

Table 4. Grower-Received Prices ($/Lb.)				
Year	Pecans	Almonds	Pistachios	Walnuts
2013	$ 1.73	$ 3.21	$ 3.48	$ 1.86
2014	$ 1.96	$ 4.00	$ 3.57	$ 1.67
2015	$ 2.20	$ 3.13	$ 3.29	$ 0.84
2016	$ 2.59	$ 2.39	$ 1.68	$ 0.93
2017	$ 2.33	$ 2.53	$ 1.69	$ 1.25
2018	$ 1.75	$ 2.50	$ 2.65	$ 0.68
2019	$ 1.84	$ 2.43	$ 2.62	$ 0.99
2014-2019 6-yr avg	$ 2.11	$ 2.83	$ 2.58	$ 1.06
Pecan comparison		-25%	-18%	100%
Source: NASS.				

Price Trends

Chart 2 shows the trend of prices for pecans from 2013 to 2019. In recent years, pecan prices were at their highest in 2016 before dropping in the following two years. Prices increased slightly between 2018 and 2019 but are still down about 12 percent compared to the average of the previous six years.



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Need for a Program

According to the NPF, the greatest challenge the pecan industry is facing is supply surpassing demand. Data from the International Nut and Dried Fruit Council and from the research compiled by the Boston Consulting Group, contracted by the NPF, show that the supply of pecans may exceed demand by 19 percent in 2028.[1] The NPF believes the establishment of a national research and promotion program for pecans will help the industry address this challenge. NPF concluded that without a program funded by assessments from both domestically produced and imported pecans, the industry will not be able to meet the challenge of the approaching supply and demand imbalance.

In 2016, the U.S. pecan industry favored the establishment of a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The program authorizes collection of industry data; research and promotion activities; regulation of grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area. Over the past several years the marketing order program has launched marketing campaigns to increase demand for pecans. According to the NPF, the research and promotion program will benefit domestic producers and importers of pecans, thereby justifying the collection of assessments on both domestic production and imports.

The NPF proposal indicates that imported product accounts for approximately 39 percent of pecans being supplied to the U.S., with domestic production accounting for the other 61 percent. With mandatory assessments being collected only on domestic production, this has created a gap in the dollars available to fund marketing campaigns focused on creating increased demand for pecans in the U.S. and globally. Per the NPF, the increase in domestic production and imports has created the need for a robust promotion campaign, which would only be accomplished through financial contribution by both domestic producers and importers. The NPF concluded that the marketing order would continue to have an important role within the industry and the intent is that the two programs would work together to benefit the entire pecan industry.

Provisions of Program

Pursuant to section 513 of the 1996 Act, §§ 1223.1 through 1223.25 of 7 CFR part 1223 (referred to as the ''Order'') define certain terms that will be used throughout the Order. Several of the terms are common to all research and promotion programs authorized under the 1996 Act, while other terms are specific to the pecans Order.

Pursuant to section 515 of the 1996 Act, §§ 1223.40 through 1223.47 of the Order detail the establishment of the American Pecan Promotion Board (Board), nominations and appointments, the term of office, removal and vacancies, procedure, compensation and reimbursement, powers and duties, and prohibited activities.

Pursuant to sections 516 and 517 of the 1996 Act, §§ 1223.50 through 1223.54 of the Order detail requirements regarding the Board's budget and expenses, financial statements, assessments, and exemption from assessments.

The Board's programs and expenses shall be funded through assessments on producers and importers, other income, and other funds available to the Board. The Order provides for an initial assessment rate of $0.02 per pound on all inshell pecans and $0.04 per pound on all shelled pecans. Each producer will pay on the amount of pecans produced in the United States. The importer of record will pay assessments based on the amount of pecans imported to the United States.

The Order provides that it is the responsibility of the first handler to collect and remit assessments owed to the Board. First handlers will collect assessments from each producer based on pounds of pecans received. The first handler will remit those assessments, along with the required reports, to the Board. If a producer is acting as its own first handler, the producer will be required to remit its individual assessments. Assessments owed will be due to the Board by the 10th calendar day of the month following the end of

[1] Based on historic compound annual growth rates (CAGR's) in global pecan supply and demand for 10 years from 2008 to 2018; resultant CAGR's of 6 percent for global supply and demand applied to 2018 estimates to forecast 2028 figures.

the previous month. As an example, assessments for pecans received in June will be due to the Board by July 10th.

Importer assessments will be collected through Customs and Border Protection (Customs). If Customs does not collect the assessment from an importer, the importer will be responsible for paying the assessment directly to the Board by the 10th calendar day of the month following the month the pecans were imported into the United States.

The Order provides authority for the Board to impose a late payment charge and interest for assessments not received within 30 calendar days of the date assessments were due. The late payment charge and rate of interest are prescribed in Subpart C of the Order.

The Order provides for two exemptions from assessment requirements. First, producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) will be exempt. Producers or importers seeking an exemption shall apply to the Board for an exemption prior to the start of the fiscal period. This is an annual exemption; entities must reapply each year. The Board will issue, if deemed appropriate, a certificate of exemption to the eligible producer or importer.

The second exemption under the Order is for organic pecans. The exemption applies to all certified ''organic'' or ''100 percent organic'' pecans, regardless of whether the pecans are produced by a person who produces conventional or nonorganic pecans. Likewise, an importer who imports pecans that are certified as ''organic'' or ''100 percent organic'' under the NOP, or certified as ''organic'' or ''100 percent organic'' under a U.S. equivalency arrangement established under the NOP, will be exempt from the payment of assessments.

Pursuant to section 516 of the 1996 Act, §§ 1223.55 through 1223.57 of the Order detail requirements regarding promotion, research and information programs, plans and projects authorized under the Order.

Pursuant to section 515 of the 1996 Act, §§ 1223.60 through 1223.62 of the Order specify the reporting and recordkeeping requirements under the Order as well as requirements regarding confidentiality of information.

Pursuant to section 518 of the 1996 Act, § 1223.71(a)(1) of the Order specifies that a referendum will be conducted not later than three years after assessments first begin under the Order. The Order will not continue unless it is approved by a majority of those persons voting in the referendum for approval.

Section 1223.71(b) of the Order specifies criteria for subsequent referenda. Under the Order, a referendum will be held to ascertain whether the program should continue, be amended, or terminated.

Sections 1223.70 and 1223.72 through 1223.78 describe the rights of the Secretary; authorize the Secretary to suspend or terminate the Order when deemed appropriate; prescribe proceedings after termination; address personal liability, separability, and amendments; and provide OMB control numbers. These provisions are common to all research and promotion programs authorized under the 1996 Act.

Sections 1223.100 through 1223.107 of the Order specify procedures for the conduct of referenda. The sections cover the definitions, voting instructions, use of subagents, ballots, the referendum report, and confidentiality of information.

Regulatory Flexibility Analysis

Pursuant to the requirements set forth in the Regulatory Flexibility Act (5 U.S.C. 601–612), USDA has considered the economic impact of this action on small entities. USDA has prepared this Final Regulatory Flexibility Analysis, the purpose of which is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened.

Need for Regulation

NPF stated in its proposal that the greatest challenge facing the pecan industry is supply outpacing demand. Based on worldwide planting and crop data, NPF estimated that supply would exceed demand by 15 percent in 2027. NPF believes that the establishment of a national research and promotion program for pecans, funded by assessments on both domestic producers and importers, will help the industry address this challenge.

In 2016, the U.S. pecan industry favored the establishment of a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas. The program authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area. Over the past several years, the marketing order program has launched marketing campaigns to increase demand for pecans.

According to the NPF, the research and promotion program will benefit domestic producers and importers of pecans, thereby justifying the collection of assessments on both domestic production and imports. The NPF proposal indicates that imported product accounts for approximately 39 percent of pecans being supplied to the United States. With mandatory assessments applied to both domestic production and imports, the Order will be able to fund marketing campaigns focused on creating increased demand for pecans in the United States and globally. The NPF concluded that the marketing order would continue to have an important role within the industry and the intent is that the two programs would work together for the benefit of the entire pecan industry. The research and promotion program would concentrate its efforts on activities that would maintain and expand markets for pecans, strengthening its position in the marketplace. The marketing order would continue its primary responsibility of collection and distribution of industry data to empower stakeholders with accurate and timely information. Additionally, the marketing order provides the authority for the pecan industry to make recommendations on grade, size, quality, pack and container requirements.

Objectives of the Action

The purpose of the Order is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans.

Legal Basis for Action

The Order is authorized under the 1996 Act which authorizes USDA to establish agricultural commodity research and promotion orders which may include a combination of promotion, research, industry information, and consumer information activities funded by mandatory assessments. These programs are designed to maintain and expand markets and uses for agricultural commodities.

USDA currently administers a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas which is authorized under the Agricultural Marketing

Agreement Act of 1937. The purpose of marketing orders, in general, is to stabilize market conditions, allowing industries to work together to solve marketing problem, improving profitability. Marketing order programs' mandatory assessments are paid by handlers within the designated production areas. The pecan marketing order authorizes collection of industry data; research and promotion activities; regulations on grade, size, quality, pack and container; and is financed by assessments paid by handlers of pecans grown in the production area.

The pecan research and promotion program is national in scope, financed by an assessment on pecan producers and importers, and authorizes research and promotion activities. The purpose of the Order is to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

Potentially Affected Small Entities

In 13 CFR part 121, the Small Business Administration (SBA) defines the threshold at which an operation would be considered ''small'' based on its North American Industry Classification System (NAICS) Code. For Tree Nut Farming operations (NAICS Code 111335) and Fruit and Tree Nut Combination Farming operations (NAICS Code 111336), an operation is considered to be ''small'' if its annual receipts total no more than $1 million. This standard applies to U.S. pecan producers.

Importers and first handlers of inshell and shelled pecans (HTS Codes 0802901000 and 0802901500, respectively) belong to the industry classification of Postharvest Crop Activities (NAICS Code 115114). ''Postharvest crop activities'' include nut hulling and shelling, sorting, grading, packing, and cooling. An operation that meets this definition is considered to be ''small'', per the SBA, if its annual receipts equal no more than $30 million. Table 5 depicts the number of pecan producers, importers, and handlers that would be considered small under these SBA standards.

According to the 2017 Census of Agriculture, published by NASS in 2019, there were 15,608 farms with pecan bearing acreage. Of these 15,608 farms, 440 sold pecans whose market value met or exceeded $1 million. Based on these figures, 97 percent of U.S. pecan producers are considered to be ''small'' under the SBA standards. USDA recognizes the potential inclusion in its count of ''small'' farms those farms whose sales of pecans were exactly $1 million in market value; however, USDA lacks the data to remedy this, and the number of farms who meet this criterion is likely quite small.

Table 5. Entities Considered Small According to SBA Size Standards

Entities	Total	Small	Large
Producers[1]	15,608	15,168	440
Importers[2]	190	186	4
Handlers[3]	104	78	26
Total	15,902	15,432	470

Sources: [1]NASS 2017 Census of Agriculture; [2]Customs and Border Protection, 2014-2019 average; [3]American Pecan Council, 2018 crop year.
Notes: [1]Small is annual receipts no greater than $1 million; [2,3]Small is annual receipts no greater than $30 million.

According to data from Customs, there were 190 importers of inshell and shelled pecans from 2014 to 2019. Of these, four importers had a six-year average sales value of pecans which exceeded $30 million. The portion of pecan importers that would be considered to be ''small'' under the SBA standards, therefore, is 98 percent.

The definition of a ''small'' importer also applies to a first handler; that is, annual receipts which exceed $30 million. According to the American Pecan Council (APC), there were 104 first handlers who reported pecans handled in crop year 2018. Of these, the APC estimates that about 75 percent recorded annual receipts exceeding $30 million.

Of the 15,902 total entities expected to be impacted by this action, including producers, importers, and first handlers, about 97 percent would be considered to be ''small'' according to their respective SBA size standards. While the benefits of the Order are difficult to quantify, the benefits are expected to outweigh the program's costs.

Compliance Requirements

This action imposes a reporting and recordkeeping burden on producers, importers, and first handlers of pecans. Producers and importers who domestically produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) may submit to the Board an application for exemption from paying assessments. Of the 15,168 domestic producers considered to be small under SBA standards, 14,618 of them, or 96 percent, produced less than 50,000 pounds, inshell, of pecans, and will be exempt from assessment. Of the 186 importers considered to be small under SBA standards, 119 of them, or 64 percent, imported less than 50,000 pounds, inshell of pecans, and will also be exempt from assessment. The reporting and recordkeeping burden to file an application for exemption from assessment will impact a total of 14,737 producers and importers considered to be small under their respective SBA size standards. Importers, and first handlers, who collect the assessments from producers, will be required to file a report listing pecans imported or received from each producer. This report will place a reporting and recordkeeping burden on a total of 149 importers and first handlers considered to be small under their SBA size standard of annual receipts of no more than $30 million.

These forms have been submitted to OMB for approval under OMB Control No. 0581–NEW. Specific burdens for the forms are detailed later in this document in the section titled Paperwork Reduction Act. As with all Federal promotion programs, reports and forms are periodically reviewed to reduce information requirements and

duplication by industry and public sector agencies.

Alternatives To Minimize Impacts of the Rule

Regarding alternatives, USDA considered de minimis exemptions of 30 acres of pecans, 1,000 pounds, inshell, of pecan volume, and $1 million in annual pecan sales receipts. These alternatives, which are fully discussed in the section titled De Minimis in the proposed rule, were rejected in favor of the industry-proposed de minimis exemption of 50,000 pounds, inshell, or 25,000 pounds, shelled. USDA also considered the alternative of no action; that is, the status quo. This alternative, however, would leave the pecan industry without the tools of a research and promotion program to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans. In place of a research and promotion program, the NPF discussed amending the Agricultural Marketing Agreement Act of 1937, which provides authority for the pecan marketing order. The NPF stated in its proposal for a pecan research and promotion program that it decided not to move forward with this alternative due to the time and costs involved in amending U.S. law.

Outreach

Regarding outreach efforts, NPF conducted sessions earlier in 2020 throughout the United States in different States and regions. Many were held in conjunction with regional and state organization meetings where both pecan producers and importers participated. They also presented at the National Pecan Shellers Association (NPSA) mid-winter conference. NPSA supports and promotes the interest of pecan shellers and the global industry. Approximately 13 sessions were held across the United States. NPF also had information regarding the proposed program published in April 2020 editions of the ''The Pecan Grower'' and ''Pecan South'' magazines. ''The Pecan Grower'' is the official publication of the Georgia Pecan Growers Association, with nearly three thousand subscribers including growers, researchers, extension agents and agribusinesses. ''Pecan South'' is a magazine for growers, processors, commercial vendors, and those interested in pecans. It provides to its more than forty-six hundred subscribers U.S. pecan production information; industry news and events; and market-related issues, both domestic and international. In the articles, NPF elaborated the work it has been doing to establish a research and promotion program for pecans that would assess producers and importers.

On June 9, 2020, AMS published a Notice to Trade alerting the industry that it had received a proposal from the NPF requesting the establishment of a research and promotion program for pecans. A proposed rule providing a 60-day comment period was published in the **Federal Register** on September 22, 2020 (85 FR 59610). AMS published a Notice to Trade on September 22, 2020, alerting the industry that it was seeking comments on the proposal. Subsequently, AMS sent a postcard and an email to all known pecan producers and importers notifying them of the **Federal Register** published proposal.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. Chapter 35), AMS requested approval of new information collection and recordkeeping requirements for the pecan program.

Title: Advisory Committee or Research and Promotion Background Information.

OMB Number for background form AD–755: (Approved under OMB No. 0505–0001).

Expiration Date of Approval: 03/31/2022.

Title: National Research, Promotion, and Consumer Information Programs.

Expiration Date of Approval: 3 years from approval date.

Type of Request: New information collection for research and promotion programs.

Abstract: The information collection requirements in the request are essential to carry out the intent of the 1996 Act. The information collection concerns a new national research and promotion program for the pecan industry. The program will be financed by an assessment on pecan producers and importers and will be administered by a board of industry members selected by the Secretary. The program will provide for an exemption for producers who produce domestically and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). A referendum will be held among eligible producers and importers to determine whether they favor implementation of the program not later than three years after assessments first begin under the Order. The purpose of the program will be to strengthen the position of pecans in the marketplace, maintain and expand markets for pecans, and develop new uses for pecans within the United States.

In summary, the information collection requirements under the program concern Board nominations, exemption applications, the collection and refund of assessments, and referenda. For Board nominations, producers and importers interested in serving on the Board will be asked to submit a ''Nomination Form'' to the Board indicating their desire to serve or to nominate another industry member to serve on the Board. Interested persons may also submit a background statement outlining qualifications to serve on the Board. Except for the initial Board nominations, producers and importers will have the opportunity to submit a ''Nomination Ballot'' to the Board where they will vote for candidates to serve on the Board. Nominees will also have to submit a background information form, ''AD–755,'' to the Secretary to ensure they are qualified to serve on the Board. Organizations representing importers will be able to be certified by the Secretary and have an opportunity to nominate importer members. Those such organizations must submit the form ''Application for Certification of Organization.''

Regarding assessments, producers and importers who domestically produce and import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods), will be exempt from assessments. Producers or importers shall apply to the Board for an exemption prior to the start of the fiscal period. This will be an annual exemption; entities will have to reapply each year. Producers or importers may submit a request, ''Application for Exemption from Assessments,'' to the Board for an exemption from paying assessments. Producers and importers who qualify as ''organic'' or ''100 percent organic'' under the NOP may submit an ''Organic Exemption Form'' to the Board and request an exemption from assessments.

First handlers who receive assessments from producers will be asked to submit a ''First Handler/Importer Report'' that will accompany their assessments paid to the Board and report the quantity of pecans received

during the applicable period, the quantity for which assessments were paid, contact information for whom they collected the assessment, and the country of export (for imports). Additionally, only importers who pay their assessments directly to the Board will be required to submit a report. As previously mentioned, the majority of importer assessments will be collected by Customs. Customs will remit the funds to the Board and the other information will be available from Customs (*i.e.,* country of export, quantity of pecans imported).

Importers and producers who are exempt and whose assessments were collected, either by Customs or a first handler, may also request a refund of any assessments paid to the Board. Producers and importers may also file a form to request a refund of assessments paid if the referendum fails to pass. A referendum will be conducted not later than three years after the assessments first begin to determine if producers and importers favor continuance of the Order.

Lastly, producers and importers eligible to vote in a referendum will have to complete a ballot to determine whether the research and promotion program would continue.

Information collection requirements that are included in this rule include:

(1) Nomination Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 12.5 hours.

(2) Background Statement

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 12.5 hours.

(3) Nomination Ballot

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.25 hour per application.

Respondents: Producers and importers.

Estimated Number of Respondents: 900.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 225 hours.

(4) Background Information Form AD–755 (OMB Form No. 0505–0001)

Estimate of Burden: Public reporting for this collection of information is estimated to average 0.5 hour per response for each Board nominee.

Respondents: Producers and importers.

Estimated number of Respondents: 11 (34 for initial nominations to the Board, 0 for the second year, and up to 11 annually thereafter).

Estimated number of Responses per Respondent: 1 every 3 years. (0.3)

Estimated Total Annual Burden on Respondents: 17 hours for the initial nominations to the Board, 0 hours for the second year of operation, and up to 5.5 hours annually thereafter.

(5) Application for Certification of Organization

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour.

Respondents: Importer organizations.

Estimated Number of Respondents: 5.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2.5 hours.

(6) Application for Exemption From Assessments

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour per producers or importer reporting on pecans produced domestically or imported. Upon approval of an application, producers and importers would receive exemption certification.

Respondents: Producers and importers who produce or import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods).

Estimated number of Respondents: 14,737.

Estimated number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 3,684 hours.

(7) Organic Exemption Form

Estimate of Burden: Public recordkeeping burden for this collection of information is estimated to average 0.5 hours per exemption form.

Respondents: Organic producers and importers.

Estimated Number of Respondents: 50.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 25 hours.

(8) First Handler/Importer Report

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour per first handler or importer.

Respondents: First handlers who collect assessments from producers who produce over 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the current fiscal period and the previous three fiscal periods) and importers that do not remit through Customs.

Estimated number of Respondents: 175.

Estimated number of Responses per Respondent: 12.

Estimated Total Annual Burden on Respondents: 525 hours.

(9) Application for Reimbursement of Assessments

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour.

Respondents: Producers and importers.

Estimated Number of Respondents: 170.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 42.5 hours.

(10) Application for Refund of Assessments Paid From Escrow

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour.

Respondents: Producers and importers.

Estimated Number of Respondents: 900.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 225 hours.

(11) Referendum Ballot

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.25 hour.

Respondents: Producers and importers.

Estimated Number of Respondents: 900.

Estimated Number of Responses per Respondent: 0.14 (after first referendum one would occur once every 7 years).

Estimated Total Annual Burden on Respondents: 31.50 hours.

(12) A Requirement To Maintain Records Sufficient To Verify Reports Submitted Under the Order

Estimate of Burden: Public recordkeeping burden for keeping this information is estimated to average 0.5 hours per record keeper maintaining such records.

Recordkeepers: Producers, first handlers and importers.

Estimated number of recordkeepers: 15,902.

Estimated total recordkeeping hours: 7,951 hours.

As noted above, under the program, producers through first handlers, and importers will be required to pay assessments and file reports with and submit assessments to the Board (importers through Customs). While the Order will impose certain recordkeeping requirements on producers, first handlers, and importers, information required under the Order may be compiled from records currently maintained. Such records shall be retained for at least three years beyond the fiscal period of their applicability.

An estimated 15,902 respondents will provide information to the Board (15,608 producers, 104 first handlers, and 190 importers). The estimated cost of providing the information to the Board by respondents would be $606,046. This total has been estimated by multiplying 12,753.5 hours by ($36.08 hourly wage × 0.317 benefits = $11.44 (benefits) + $36.08 (wage) = $47.52), $47.52 for the average mean hourly earnings of producers and importers plus benefits.

Data for computation of the hourly rate for producers (Occupation Code 11–9013: Farmers, Ranchers, and other Agricultural Managers = $38.63) and importers (Occupation Code 13–1020: Buyers and Purchasing Agents = $33.53) was obtained from the U.S. Department of Labor's Bureau of Labor Statistics. The average of the producer and importer wages is $36.08. Data for computation of this hourly wage were obtained from the U.S. Department of Labor Statistics' publication, ''May 2019 National Occupation Employment and Wage Estimates in the United States,'' updated May 31, 2019. This publication can also be found at the following website: *https://www.bls.gov/oes/current/oes_nat.htm#45-0000*. Data for the benefit costs of 31.7 percent was obtained by U.S. Department of Labor's Bureau of Labor Statistics press release dated Dec. 14, 2018.

The Order's provisions have been carefully reviewed, and every effort has been made to minimize any unnecessary recordkeeping costs or requirements, including efforts to utilize information already submitted under other programs administered by USDA and other state programs. USDA currently oversees a marketing order for pecans grown in Alabama, Arkansas, Arizona, California, Florida, Georgia, Kansas, Louisiana, Missouri, Mississippi, North Carolina, New Mexico, Oklahoma, South Carolina, and Texas, which is authorized under the Agricultural Marketing Agreement Act of 1937. This program collects information to facilitate the administration of the program. The information collected by the marketing order has been carefully reviewed and it was determined that the information collected could not be utilized to facilitate the administration of the research and promotion program. The forms will require the minimum information necessary to effectively carry out the requirements of the program, and their use is necessary to fulfill the intent of the 1996 Act. Such information can be supplied without data processing equipment or outside technical expertise. In addition, there are no additional training requirements for individuals filling out reports and remitting assessments to the Board. The forms will be simple, easy to understand, and place as small a burden as possible on the person required to file the information.

Collecting information monthly will coincide with normal industry business practices. The timing and frequency of collecting information are intended to meet the needs of the industry while minimizing the amount of work necessary to fill out the required reports. The requirement to keep records for three years is consistent with normal industry practices. In addition, the information to be included on these forms is not available from other sources because such information relates specifically to individual producers, first handlers and importers who are subject to the provisions of the 1996 Act. Therefore, there is no practical method for collecting the required information without the use of these forms.

In the September 22, 2020, proposed rule, comments were also invited on the information collection requirements prescribed in the Paperwork Reduction Act section of this rule. Specifically, comments were solicited on: (a) Whether the collection of information is necessary for the proper performance of functions of the Order and USDA's oversight of the Order, including whether the information would have practical utility; (b) the accuracy of USDA's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used; (c) the accuracy of USDA's estimate of the principal producing areas in the United States for pecans; (d) the accuracy of USDA's estimate of the number of producers, first handlers and importers of pecans that will be covered under the program; (e) ways to enhance the quality, utility, and clarity of the information to be collected; and (f) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Four comments were received regarding information collection. All four commenters believed that the estimated recordkeeping burden of 7,951 hours was overstated by 100 percent. They reasoned that none of the information required by the Order would be in addition to any of the information normally kept and already required by normal accounting, state and Federal Tax preparation and other USDA programs. The estimated recordkeeping burden hours are the hours associated with maintaining records to verify reports required by the Order. While it is understood that some of the information required under the Order may be compiled from records currently maintained, there may be additional records not currently maintained that would be needed to verify the reports required by the Order. Furthermore, the estimated burden is nominal and is a customary estimated burden associated with programs such as these. In addition, three of the commenters stated that the First Handler/Importer Report should be estimated at .08333 hours per record keeper, not the .5 hours in the proposed rule. This was based on their experience of having to file similar forms as required by the Federal marketing order. After further review of the form and similar forms required under other research and promotion programs, USDA decreased the burden estimate to 0.25 hours. This has been reflected in the PRA section above.

Analysis of Comments

Fifty-four comments were received in response to the proposed rule. Of those 54 comments, 28 indicated support for the proposed action, 16 provided general feedback or suggested changes,

six opposed the action, two were outside the scope of the rulemaking, one was a duplicate, and there was one standalone comment regarding the PRA section.

General Comments in Support

A majority of the commenters expressed their confidence that the proposed program would grow consumer demand for pecans, expanding markets, while helping offset the current imbalance between supply and demand. Several commenters found that being able to assess both domestic and imported product would increase the resources available to create demand and would allow a more unified strategy. Comments were received from several state and national pecan associations voicing their support for the proposed program, agreeing that the proposed research and promotion program will provide the pecan industry with more funds to help promote and drive demand. Commenters discussed the challenges the pecan industry has faced the last several years, and that while the proposed program will not address all of these challenges, it is a step in the right direction. Six commenters simply expressed their support for the proposed program.

Comments in Opposition

Six comments received were opposed to the program. Four of the commenters stated that producers are already paying an assessment for the Federal marketing order program, which is tasked with promoting pecans, and are not in favor of having another promotion program that will assess producers. One commenter noted that the pecan industry already has many national and state level trade organizations and that the industry does not need another. Instead of the proposed program, the commenter advocated for a consolidated effort and strategy between these organizations to insure a more efficient research, promotion and marketing effort. As is addressed in this rule, Federal marketing orders and research and promotion orders are created pursuant to different laws and provide for different activities. The Federal marketing order assessment obligations are imposed on handlers, although some of the costs may be passed on to producers. Producers and importers are obligated to pay the assessment under the research and promotion Order. A comment submitted by the American Pecan Council (APC) (the Federal marketing order governing body) committed to ensuring, with the establishment of the new Order, that the domestic pecan industry does not pay more than the total assessment amount that is currently obligated under the Federal marketing order. It indicated it would therefore recommend reducing the assessment obligated under the Federal marketing order should the research and promotion program be established. Under Federal marketing orders assessment rates are intended to be applicable to each fiscal year. The pecan marketing order fiscal period is October 1 through September 30, which is the same as the Order. With the assessment obligation under the Order beginning October 1, 2021, this would allow the APC adequate time to review and recommend its assessment rate for its 2021–22 fiscal year, ensuring its commitment to the industry.

Commenters noted the continued decline in producer price over the last couple of years and that producers cannot afford to fund this program. According to NASS statistics, grower received price per pound (in shell basis) for the six-year period from 2013–2019, have ranged from a low of $1.73 in 2013, to a high of $2.59 in 2016, with the six-year average of $2.11. The reported prices for years 2017, 2018, and 2019, were $2.33, $1.75, and $1.84, respectively. Based on this historical information, pecan grower received prices for upcoming years could range between $1.73 and $2.59 per pound. Utilizing these historical figures, the estimated assessment cost as a percentage of grower received price, could range from approximately 1.15 percent to .78 percent ($0.02 divided by $1.73 and $2.59, respectively). While there is a cost associated with the program, they are expected to be offset by the identified benefits of the Order. As was stated previously, the purpose of the Order would be to create increased demand for pecans, strengthening the overall viability of the industry. One comment stated that the government should fund the program instead of producers. The 1996 Act prescribes that such programs are financed by an assessment on producers and importers, and does not provide the authority for the government to pay for such programs.

One commenter expressed concern that exempt producers will not be aware of the need to submit a form to apply for the exemption and that it is too much of a burden on the handler to secure those forms from the exempt producers. It would be the task of the Board to educate the industry on the Order provisions, working directly with producers who would be required to submit the exemption forms.

Several commenters expressed concern regarding the composition of the proposed Board, stating that assurances need to be made that for the producer member positions just growers, not dual-role entities such as grower/shellers or grower/marketers, are represented on the Board. In making recommendations to the Secretary for appointments to the Board, the Order states that industry members should consider operation size, production and distribution methods, and other factors to ensure adequate representation of assessed entities. In addition, the Order provides that the Board has the authority to consider recommending additional eligibility requirements for members of the Board.

General Comments and Suggested Modifications

Some comments provided general comments or/and suggested modifications to the Order. One commenter suggested that the establishment of the American Pecan Promotion Board should be apportioned equally among the three identified regions, citing that this adjustment accounts more fairly for the nature of pecan production as an alternate-year bearing crop. The 1996 Act requires that the composition of the board reflect the geographical distribution of production. As was discussed in the proposed rule in the *Establishment of the Board* section, USDA did an in-depth analysis of production data from the past six years to account for the nature of pecans being an alternate bearing crop. The analysis took into consideration the crop loss in Georgia due to the hurricane in 2018 by applying lesser weight to the production volumes of 2018 and 2019 and placing greater weight on the production volumes of 2014 through 2017. Based on the analysis of the available data, the distribution of seats among the regions reflects the distribution of production in those regions. The Order allows for the Board to revisit the distribution of seats on the Board at least once every five years and recommend any changes to the Secretary for consideration.

Three commenters suggested that eligible producer members should have a majority of their income derived from the production of pecans to ensure that producer interests are represented on the Board. The commenters noted that it is common to have vertically integrated businesses that do not solely identify as producers, but also as shellers. The commenters argued that to be eligible to represent producers on the Board, the majority of income derived needs to be from the production of pecans and not shelling. One commenter believed that industry

members should not be able to serve on the American Pecan Council and the Board at the same time. As was previously mentioned, the Order provides that when making recommendations to the Secretary for appointment of members to the Board industry members should consider size of operations, methods of production and distribution, and other factors to ensure adequate representation of assessed entities. The Order also provides that the Board may recommend amendments to the representation of membership provisions. Once the Board is established, it could consider recommending additional eligibility requirements for producer members.

Three commenters stated that the assessment should be higher on imported product. The 1996 Act requires that, should imports be assessed, the rate be comparable to that of the domestic product. Two commenters sought clarification regarding the entity obligated to pay the assessment rate required under the Federal marketing order in comparison to the assessment rate under the research and promotion program. Domestic handlers are obligated to pay assessments under the Federal marketing order. Domestic producers are obligated to pay assessments under the research and promotion program. In addition, the laws authorizing these programs do not allow for the assessment obligation to be met by a different entity than those subject to its respective law.

One commenter raised concerns over the entity that would conduct referenda under the Order, specifically stating that the proposed rule did not clearly define ''referendum agents.'' All referenda are administered by the USDA and its employees. Referendum agents are those USDA employees who conduct the referendum.

Several commenters expressed that the program should first and foremost support domestic producers. As was stated in the *Background* section of this rule, the purpose of research and promotion programs, in general, is to provide a framework for agricultural industries to pool their resources and combine efforts to develop new markets, strengthen existing markets and conduct important research and generic promotion activities.

One commenter expressed concerns regarding the proposed assessment's impact on small growers in Mexico. The commenter stated that while importers of record will be obligated to pay the assessment, the cost will eventually be passed-on to the grower. The Order obligates the importer of record to pay the assessment. Although, some of the costs may be passed on to producers, these costs are expected to be offset by the benefits derived by the operation of the Order. Furthermore, contracts between grower and importers are individual business decisions between the two parties. Such business decisions are outside the scope of the Order.

One commenter asked that all marketing logos and marketing materials be made available, with Board approval, to Mexican shellers and importers, for promoting pecans in the international marketplace. Once a Board is appointed, it will work with the industry to develop marketing materials and logos for industry use to generically promote pecans in the marketplace.

Two commenters asked several questions regarding the different initiatives regarding research, development of uses of pecans, and strategic planning. With the establishment of the Order and appointment of the Board, the Board will begin implementing programs, plans, and projects addressing research and marketing priorities.

Three commenters raised issues that are outside the scope of the authority of the Order. Two commenters voiced concerns regarding labeling regulations, while one commenter suggested working with Customs and Border Protection to develop new Harmonized Tariff codes for pecans.

In the proposed rule, USDA specifically requested comments on the proposed de minimis exemption, particularly on whether the proposed level was appropriate to ensure equitable contribution by and representation of both domestic producers and importers, or if modification to the exemption level was needed, asking commenters to provide data to substantiate any recommendations. One commenter opposed any exemption from the payment of assessments. The commenter did not provide data to substantiate its recommendation.

After review and consideration of the comments received, USDA is not making any changes to the proposed rule based on those comments. The USDA has determined that this Order is consistent with and will effectuate the purposes of the 1996 Act.

List of Subjects in 7 CFR Part 1223

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Pecan promotion, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, title 7, chapter XI of the Code of Federal Regulations is amended by adding part 1223 to read as follows:

PART 1223—PECAN PROMOTION, RESEARCH, AND INFORMATION ORDER

Subpart A—Pecan Promotion, Research, and Information Order

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Authority: 7 U.S.C. 7411–7425; 7 U.S.C. 7401.

Subpart A—Pecan Promotion, Research, and Information Order

Definitions

§ 1223.1 Act.

Act means the Commodity Promotion, Research, and Information Act of 1996 (7 U.S.C. 7411–7425), and any amendments thereto.

§ 1223.2 American Pecan Council.

American Pecan Council or *APC* means that governing body of the Federal Marketing Order established pursuant to 7 CFR part 986 unless otherwise noted.

§ 1223.3 American Pecan Promotion Board.

American Pecan Promotion Board or the *Board* means the administrative body established pursuant to § 1223.40.

§ 1223.4 Conflict of interest.

Conflict of interest means a situation in which a member or employee of the Board has a direct or indirect financial interest in a person who performs a service for, or enters into a contract with, the Board for anything of economic value.

§ 1223.5 Customs or CDP.

Customs or *CBP* means Customs and Border Protection, an agency of the United States Department of Homeland Security.

§ 1223.6 Department or USDA.

Department or *USDA* means the U.S. Department of Agriculture, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1223.7 First handler.

First handler means any person who receives, shells, cracks, accumulates, warehouses, roasts, packs, sells, consigns, transports, exports, or ships (except as a common or contract carrier of pecans owned by another person), or in any other way puts inshell or shelled pecans in the stream of commerce. The term first handler includes a producer who handles or markets pecans of the producer's own production.

§ 1223.8 Fiscal period.

Fiscal period means October 1 to September 30, or such other period as recommended by the Board and approved by the Secretary.

§ 1223.9 Importer.

Importer means any person who imports pecans into the United States as a principal or as an agent, broker, or consignee of any person who produces or handles pecans outside of the United States for sale in the United States, and who is listed in the import records as the importer of record for such pecans.

§ 1223.10 Information.

Information means information and programs that are designed to increase efficiency in processing and to develop new markets, marketing strategies, increase market efficiency, and activities that are designed to enhance the image of pecans on a national or international basis. These include:

(a) *Consumer information,* which means any action taken to provide information to, and broaden the understanding of, the general public regarding the consumption, use, nutritional attributes, and care of pecans; and

(b) *Industry information,* which means information and programs that will lead to the development of new markets, new marketing strategies, or increased efficiency for the pecan industry, and activities to enhance the image of the pecan industry.

§ 1223.11 Inshell pecans.

Inshell pecans are nuts whose kernel is maintained inside the shell.

§ 1223.12 Market or marketing.

(a) *Marketing* means the sale or other disposition of pecans in any channel of commerce.

(b) *To market* means to sell or otherwise dispose of pecans in interstate, foreign, or intrastate commerce.

§ 1223.13 Order.

Order means an order issued by the Secretary under section 514 of the Act that provides for a program of generic promotion, research, and information regarding agricultural commodities authorized under the Act.

§ 1223.14 Part and subpart.

This *part* is comprised of all rules, regulations, and supplemental orders issued pursuant to the Act and the Order. The Pecan Promotion, Research, and Information Order comprises *subpart A* of this part.

§ 1223.15 Pecans.

Pecans means and includes any and all varieties or subvarieties, inshell or shelled, of *Carya illinoinensis* grown or imported into the United States.

§ 1223.16 Person.

Person means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1223.17 Producer.

Producer is synonymous with grower and means any person engaged in the production and sale of pecans in the United States who owns, or who shares in the ownership and risk of loss of such pecans.

§ 1223.18 Programs, plans, and projects.

Programs, plans, and projects mean those research, promotion, and information programs, plans, or projects established pursuant to this subpart.

§ 1223.19 Promotion.

Promotion means any action taken to present a favorable image of pecans to the general public and the food industry for the purpose of improving the competitive position of pecans both in the United States and abroad and stimulating the sale of pecans. This includes paid advertising and public relations.

§ 1223.20 Research.

Research means any type of test, study, or analysis designed to advance the image, desirability, use, marketability, production, product development, or quality of pecans, including research relating to nutritional value, cost of production, new product development, varietal development, nutritional value, health research, and marketing of pecans.

§ 1223.21 Secretary.

Secretary means the Secretary of Agriculture of the United States, or any officer or employee of the Department to whom authority has heretofore been delegated, or to whom authority may hereafter be delegated, to act in the Secretary's stead.

§ 1223.22 Shelled pecans.

Shelled pecans are pecans whose shells have been removed leaving only edible kernels, kernel pieces or pecan

meal. One pound of shelled pecans is the equivalent of two pounds inshell pecans.

§ 1223.23 Suspend.

Suspend means to issue a rule under section 553 of title 5, U.S.C., to temporarily prevent the operation of an order or part thereof during a particular period of time specified in the rule.

§ 1223.24 Terminate.

Terminate means to issue a rule under section 553 of title 5, U.S.C., to cancel permanently the operation of an order or part thereof beginning on a date certain specified in the rule.

§ 1223.25 United States.

United States means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

American Pecan Promotion Board

§ 1223.40 Establishment and membership.

(a) *Establishment of the American Pecan Promotion Board.* There is hereby established an American Pecan Promotion Board, called the Board in this part, comprised of seventeen (17) members, appointed by the Secretary from nominations as follows:

(1) Ten (10) producer members: Three (3) each from the Eastern Region and Central Region and four (4) from the Western Region as follows:

(i) Eastern Region shall mean the States of Alabama, Florida, Georgia, North Carolina, South Carolina plus any states in the United States, the majority of whose land mass is in the Eastern Time Zone, plus any U.S. territories in the Atlantic Ocean;

(ii) Central Region shall mean the States of Arkansas, Kansas, Louisiana, Mississippi, Missouri, Oklahoma, Texas plus any states in the United States, the majority of whose land mass is in the Central Time Zone; and

(iii) Western Region shall mean the States of Arizona, California, New Mexico plus any states in the United States, the majority of whose land mass is in the Mountain or Pacific Time Zones, plus Alaska and Hawaii and any U.S. territories in the Pacific Ocean.

(2) Seven (7) importers.

(b) *Adjustment of membership.* At least once every five years, the Board will review the geographical distribution of United States production of pecans and the quantity or value of imports. The review will be conducted through an audit of state crop production and Customs figures and Board assessment records. If warranted, the Board will recommend to the Secretary that the membership on the Board be altered to reflect any changes in the geographical distribution of domestic pecan production and the quantity or value of imports. If the level of imports fluctuates versus domestic pecan production, importer members may be added to or reduced from the Board.

(c) *Board's ability to serve the diversity of the industry.* When making recommendations for appointments, the industry should take into account the diversity of the population served and the knowledge, skills, and abilities of the members to serve a diverse population, size of the operations, methods of production and distribution, and other distinguishing factors to ensure that the recommendations of the Board take into account the diverse interest of persons responsible for paying assessments, and others in the marketing chain, if appropriate.

§ 1223.41 Nominations and appointments.

(a) Initial nominations for producers will be submitted to the Secretary by the American Pecan Council (APC), or the Department if appropriate. Before considering any nominations, the APC shall publicize the nomination process, using trade press or other means it deems appropriate, to reach out to all known producers for the U.S. market. The APC may use regional caucuses, mail or other methods to elicit potential nominees. The APC shall submit the nominations to the Secretary and recommend two nominees for each Board position specified in paragraph (a)(1) of § 1223.40. The Department will conduct initial nominations for the importer members. The Secretary shall appoint the members of the Board.

(b) Subsequent nominations shall be conducted as follows:

(1) Nomination of producer members will be conducted by the Board. The Board staff will seek nominations for each vacant producer seat from each region from producers who have paid their assessments to the Board in the most recent fiscal period and who produced more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which nominations are being conducted and the previous three fiscal periods). Producers who produce pecans in more than one region may seek nomination only in the region in which they produce the majority of their pecans. Nominations will be submitted to the Board office and placed on a ballot that will be sent to producers in each region for a vote. Producers may only vote in the region in which they produce the majority of their pecans. The votes shall be tabulated for each region with the nominee receiving the highest number of votes at the top of the list in descending order by vote. Two candidates for each position shall be submitted to the Secretary; and

(2) Nomination of importer members will be conducted by the Board. All qualified national organizations representing importer interests will have the opportunity to nominate members to serve on the Board. If the Secretary determines that there are no qualified national organizations representing importer interests, individual importers who have paid assessments to the Board in the most recent fiscal period and imported more than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which nominations are being conducted and the previous three fiscal periods) may submit nominations. The names of importer nominees shall be placed on a ballot and mailed to importers for a vote. The votes shall be tabulated with the nominee receiving the highest number of votes at the top of the list in descending order by vote. Two candidates for each importer Board position shall be submitted to the Secretary. To be certified by the Secretary as a qualified national organization representing importer interests, an organization must meet the following criteria, as evidenced by a report submitted by the organization to the Secretary:

(i) The organization's voting membership must be comprised primarily of importers of pecans;

(ii) The organization has a history of stability and permanency and has been in existence for more than one year;

(iii) The organization must derive a portion of its operating funds from importers;

(iv) The organization must demonstrate it is willing and able to further the Act and Order's purposes; and

(v) To be certified by the Secretary as a qualified national organization representing importer interests, an organization must agree to take reasonable steps to publicize to non-members the availability of open Board importer positions.

(c) Producer and importer nominees may provide the Board a short background statement outlining their qualifications to serve on the Board.

(d) Nominees must be in compliance with the applicable provisions of this subpart.

(e) The Board must submit nominations to the Secretary at least six

months before the new Board term begins. The Secretary shall appoint the members of the Board.

(f) No two members shall be employed by a single corporation, company, partnership, or any other legal entity.

(g) The Board may recommend to the Secretary modifications to its nomination procedures as it deems appropriate. Any such modifications shall be implemented through rulemaking by the Secretary.

§ 1223.42 Term of office.

(a) With the exception of the initial Board, each Board member will serve a three-year term or until the Secretary selects his or her successor. Each term of office shall begin on October 1 and end on September 30. No member may serve more than two consecutive terms, excluding any term of office less than three years.

(b) For the initial board, the terms of Board members shall be staggered for two, three, and four years. Determination of which of the initial members shall serve a term of two, three, or four years shall be determined at random. Those members serving an initial term of two, three, or four years may serve one successive three-year term.

§ 1223.43 Vacancies.

(a) In the event that any member of the Board ceases to work for or be affiliated with the category of members from which the member was appointed to the Board, such position shall automatically become vacant.

(b) If a member of the Board consistently refuses to perform the duties of a member of the Board, or if a member of the Board engages in acts of dishonesty or willful misconduct, the Board may recommend to the Secretary that the member be removed from office. If the Secretary finds the recommendation of the Board shows adequate cause, the Secretary shall remove such member from office.

(c) Without recommendation of the Board, a member may be removed by the Secretary upon showing of adequate cause, including the continued failure by a member to submit reports or remit assessments required under this part, if the Secretary determines that such member's continued service would be detrimental to the achievement of the purposes of the Act.

(d) Should the position of a member become vacant, successors for the unexpired terms of such member shall be appointed in the manner specified in §§ 1223.40 and 1223.41, except that said nomination and replacement shall not be required if said unexpired terms are less than six months.

§ 1223.44 Procedure.

(a) At a Board meeting, it will be considered a quorum when a majority of members are present.

(b) At the start of each fiscal period, the Board will select a chairperson and vice chairperson who will conduct meetings and appoint committee membership throughout that period.

(c) All Board and committee members will receive a minimum of 10 days advance notice of all Board and committee meetings, unless an emergency meeting is declared by the Chairperson.

(d) Each member of the Board will be entitled to one vote on any matter put to the Board, and the motion will carry if supported by one vote more than 50 percent of the total votes represented by the Board members present.

(e) It will be considered a quorum at a committee meeting when at least one more than half of those assigned to the committee are present. Committees may also consist of individuals other than Board members and such individuals may vote in committee meetings. These committee members shall be appointed by the Chairperson and shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board.

(f) In lieu of voting at a properly convened meeting and, when in the opinion of the Chairperson of the Board such action is considered necessary, the Board may take action if supported by one vote more than 50 percent of the members by mail, telephone, electronic mail, facsimile, or any other means of communication, and all telephone votes shall be confirmed promptly in writing. In that event, all members and the Secretary must be notified, and all members must be provided the opportunity to vote. Any action so taken shall have the same force and effect as though such action had been taken at a properly convened meeting of the Board. All votes shall be recorded in Board minutes.

(g) There shall be no voting by proxy.

(h) The Chairperson shall be a voting member.

(i) The organization of the Board and the procedures for the conducting of meetings of the Board shall be in accordance with its bylaws, which shall be established by the Board and approved by the Secretary.

§ 1223.45 Compensation and reimbursement.

The members of the Board when acting as members, shall serve without compensation but shall be reimbursed for reasonable travel expenses, as approved by the Board, incurred by them in the performance of their duties as Board members.

§ 1223.46 Powers and duties.

The Board shall have the following powers and duties:

(a) To administer this subpart in accordance with its terms and conditions and to collect assessments;

(b) To develop and recommend to the Secretary for approval such bylaws as may be necessary for the functioning of the Board, and such rules as may be necessary to administer this subpart, including activities authorized to be carried out under this subpart;

(c) To meet, organize, and select from among the members of the Board a chairperson, other officers, committees, and subcommittees, as the Board determines to be appropriate;

(d) To employ persons, other than the Board members, or to enter into contracts, other than with Board members, as the Board considers necessary to assist the Board in carrying out its duties and to determine the compensation and specify the duties of such persons, or to determine the contractual terms of such parties;

(e) To develop programs and projects, and enter into contracts or agreements, which must be approved by the Secretary before becoming effective, for the development and carrying out of programs or projects of research, information, or promotion, and the payment of costs thereof with funds collected pursuant to this subpart. Each contract or agreement shall provide that any person who enters into a contract or agreement with the Board shall develop and submit to the Board a proposed activity; keep accurate records of all of its transactions relating to the contract or agreement; account for funds received and expended in connection with the contract or agreement; make periodic reports to the Board of activities conducted under the contract or agreement; and make such other reports available as the Board or the Secretary considers relevant. Any contract or agreement shall provide that:

(1) The contractor or agreeing party shall develop and submit to the Board a program, plan, or project together with a budget or budgets that shall show the estimated cost to be incurred for such program, plan, or project;

(2) The contractor or agreeing party shall keep accurate records of all its transactions and make periodic reports to the Board of activities conducted, submit accounting for funds received and expended, and make such other

reports as the Secretary or the Board may require;

(3) The Secretary may audit the records of the contracting or agreeing party periodically; and

(4) Any subcontractor who enters into a contract with a Board contractor and who receives or otherwise uses funds allocated by the Board shall be subject to the same provisions as the contractor;

(f) To prepare and submit for approval of the Secretary fiscal period budgets in accordance with § 1223.50;

(g) To invest assessments collected under this part in accordance with § 1223.50;

(h) To maintain such records and books and prepare and submit such reports and records from time to time to the Secretary as the Secretary may prescribe; to make appropriate accounting with respect to the receipt and disbursement of all funds entrusted to it; and to keep records that accurately reflect the actions and transactions of the Board;

(i) To cause its books to be audited by a competent auditor at the end of each fiscal period and at such other times as the Secretary may request, and to submit a report of the audit directly to the Secretary;

(j) To give the Secretary the same notice of meetings of the Board as is given to members in order that the Secretary's representative(s) may attend such meetings, and to keep and report minutes of each meeting of the Board to the Secretary;

(k) To act as intermediary between the Secretary and any producer, first handler, or importer;

(l) To furnish to the Secretary any information or records that the Secretary may request;

(m) To receive, investigate, and report to the Secretary complaints of violations of this subpart;

(n) To recommend to the Secretary such amendments to this subpart as the Board considers appropriate; and

(o) To work to achieve an effective, continuous, and coordinated program of promotion, research, consumer information, evaluation, and industry information designed to strengthen the pecan industry's position in the marketplace; maintain and expand existing markets and uses for pecans; and to carry out programs, plans, and projects designed to provide maximum benefits to the pecan industry.

§ 1223.47 Prohibited activities.

The Board may not engage in, and shall prohibit the employees and agents of the Board from engaging in:

(a) Any action that would be a conflict of interest; and

(b) Using funds collected by the Board under this subpart to undertake any action for the purpose of influencing legislation or governmental action or policy, by local, state, national, and foreign governments, other than recommending to the Secretary amendments to this subpart.

(c) No program, plan, or project including advertising shall be false or misleading or disparaging to another agricultural commodity. Pecans of all origins shall be treated equally.

Expenses and Assessments

§ 1223.50 Budget and expenses.

(a) At least 60 days prior to the beginning of each fiscal period, and as may be necessary thereafter, the Board shall prepare and submit to the Secretary a budget for the fiscal period covering its anticipated expenses and disbursements in administering this subpart. Each such budget shall include:

(1) A statement of objectives and strategy for each program, plan, or project;

(2) A summary of anticipated revenue, with comparative data for at least one preceding year (except for the initial budget);

(3) A summary of proposed expenditures for each program, plan, or project; and

(4) Staff and administrative expense breakdowns, with comparative data for at least one preceding year (except for the initial budget).

(b) Each budget shall provide adequate funds to defray its proposed expenditures and to provide for a reserve as set forth in this subpart.

(c) Subject to this section, any amendment or addition to an approved budget must be approved by the Secretary, including shifting funds from one program, plan, or project to another. Shifts of funds which do not cause an increase in the Board's approved budget and which are consistent with governing bylaws need not have prior approval by the Secretary.

(d) The Board is authorized to incur such expenses, including provision for a reasonable reserve, as the Secretary finds are reasonable and likely to be incurred by the Board for its maintenance and functioning, and to enable it to exercise its powers and perform its duties in accordance with the provisions of this subpart. Such expenses shall be paid from funds received by the Board.

(e) With approval of the Secretary, the Board may borrow money for the payment of administrative expenses, subject to the same fiscal, budget, and audit controls as other funds of the Board. Any funds borrowed by the Board shall be expended only for startup costs and capital outlays and are limited to the first year of operation of the Board.

(f) The Board may accept voluntary contributions, but these shall only be used to pay expenses incurred in the conduct of programs, plans, and projects. Such contributions shall be free from any encumbrance by the donor and the Board shall retain complete control of their use.

(g) The Board may also receive funds provided through the Department's Foreign Agricultural Service or from other sources, for authorized activities.

(h) The Board shall reimburse the Secretary for all expenses incurred by the Secretary in the implementation, administration, and supervision of this subpart, including all referendum costs in connection with this subpart.

(i) For fiscal periods beginning three (3) or more years after the date of the establishment of the Board, the Board may not expend for administration, maintenance, and functioning of the Board in any fiscal period an amount that exceeds 15 percent of the assessments and other income received by the Board for that fiscal period. Reimbursements to the Secretary required under paragraph (h) of this section are excluded from this limitation on spending.

(j) The Board may establish an operating monetary reserve and may carry over to subsequent fiscal periods excess funds in any reserve so established: *Provided* that the funds in the reserve do not exceed the last two fiscal periods' budget of expenses. Subject to approval by the Secretary, such reserve funds may be used to defray any expenses authorized under this part.

(k) Pending disbursement of assessments and all other revenue under a budget approved by the Secretary, the Board may invest assessments and all other revenues collected under this part in:

(1) Obligations of the United States or any agency of the United States;

(2) General obligations of any State or any political subdivision of a State;

(3) Interest bearing accounts or certificates of deposit of financial institutions that are members of the Federal Reserve System;

(4) Obligations fully guaranteed as to principal interest by the United States; or

(5) Other investments as authorized by the Secretary.

§ 1223.51 Financial statements.

(a) The Board shall prepare and submit financial statements to the Secretary on a monthly or quarterly basis or at any other time as requested by the Secretary. Each such financial statement shall include, but not be limited to, a balance sheet, income statement, and expense budget. The expense budget shall show expenditures during the time period covered by the report, year-to-date expenditures, and the unexpended budget.

(b) Each financial statement shall be submitted to the Secretary within 30 days after the end of the time period to which it applies.

(c) The Board shall submit annually to the Secretary an annual financial statement within 90 days after the end of the fiscal period to which it applies.

§ 1223.52 Assessments.

(a) The funds to cover the Board's expenses shall be paid from assessments on producers and importers, other income of the Board, and other funds available to the Board including those collected pursuant to § 1223.57 and subject to the limitations contained in § 1223.57.

(b) Each producer shall pay an assessment per pound of pecans produced in the United States. The collection of assessments on pecans produced in the United States will be the responsibility of the first handler receiving the pecans from producers. In the case of the producer acting as its own first handler, the producer will be required to collect and remit its individual assessments.

(1) First handlers may remit assessments to a third-party collection agent under this subpart.

(2) First handlers may also remit assessments directly to the Board.

(c) Such assessments shall be levied at $0.02 per pound on all inshell pecans and $0.04 per pound on all shelled pecans. The assessment rate may be reviewed and modified with the approval of the Secretary. A change in the assessment rate is subject to rulemaking by the Secretary.

(d) All assessment payments and reports will be submitted to the office of the Board. All assessment payments for a fiscal period are to be received no later than the 10th of the month following the end of the previous month. A late payment charge shall be imposed on any producer and importer who fails to remit to the Board, the total amount for which any such producer and importer is liable on or before the due date established by the Board on forms approved by the Secretary. In addition to the late payment charge, an interest charge shall be imposed on the outstanding amount for which the producer and importer is liable. The rate of interest shall be prescribed in regulations issued by the Secretary.

(e) Each importer of pecans shall pay an assessment to the Board on pecans imported for marketing in the United States, through Customs.

(1) The assessment rate for imported pecans shall be the same or equivalent to the rate for pecans produced in the United States.

(2) The import assessment shall be uniformly applied to imported pecans that are identified by the number 0802.90.10.00 and 0802.90.15.00 in the Harmonized Tariff Schedule (HTS) of the United States or any other numbers used to identify pecans in that schedule.

(3) In the event that any HTS number is subject to assessment is changed and such change is merely a replacement of a previous number and has no impact on the description of pecans, assessment will continue to be collected based on the new numbers.

(4) The assessment due on imported pecans shall be paid when they enter, or are withdrawn from warehouse, for consumption in the United States.

(5) If Customs does not collect an assessment from an importer, the importer is responsible for paying the assessment directly to the Board no later than the 10th of the month following the month the assessed pecans were imported into the United States.

(f) Persons failing to remit total assessments due in a timely manner may also be subject to actions under Federal debt collection procedures.

(g) The Board may authorize other organizations to collect assessments on its behalf with the approval of the Secretary.

§ 1223.53 Exemption procedures.

(a) *De minimis.* An exemption from payment of assessments as provided in § 1223.52, shall be provided to producers that domestically produce and importers that import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) as follows:

(1) Any producer who desires to claim an exemption from assessments shall file an application on a form provided by the Board, for a certificate of exemption for each fiscal period claiming an exemption. Such producer shall certify that it will domestically produce less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). It is the responsibility of the producer to retain a copy of the certificate of exemption.

(2) Any importer who desires to claim an exemption from assessments shall file an application on a form provided by the Board, for a certificate of exemption for each fiscal period claiming an exemption. Such importer shall certify that it will import less than 50,000 pounds of inshell pecans (25,000 pounds of shelled pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods). It is the responsibility of the importer to retain a copy of the certificate of exemption.

(3) On receipt of an exemption application, the Board shall determine whether an exemption may be granted for that fiscal period. The Board will then issue, if deemed appropriate, a certificate of exemption to the producer or importer which is eligible to receive one covering that fiscal period. The Board may request persons applying for the exemption to provide supporting documentation, such as past sales receipts or import data.

(4) The Board, with the Secretary's approval, may require persons receiving an exemption from assessments to provide to the Board reports on the disposition of exempt pecans and, in the case of importers, proof of payment of assessments.

(5) The exemption will apply immediately following the issuance of the certificate of exemption.

(6) Producers and importers who received an exemption certificate from the Board but domestically produced or imported more than 50,000 pounds of inshell pecans (25,000 shelled of pecans) on average for four fiscal periods (the fiscal period for which the exemption is claimed and the previous three fiscal periods) during the fiscal period shall pay the Board the applicable assessments owed and submit any necessary reports to the Board pursuant to § 1223.60.

(b) *Assessment refunds.* Importers and producers who are exempt from assessment shall be eligible for a refund of assessments collected, either by Customs or a first handler. Requests for such assessment refunds must be submitted to the Board within 90 days of the last day in the fiscal period when assessments were collected on such producer's or importer's pecans. No interest will be paid on such assessments. The Board shall refund such assessments no later than 60 calendar days after receipt by the Board

of information justifying the exemption from assessment.

(c) *Organic.* (1) A producer who domestically produces pecans under an approved National Organic Program (7 CFR part 205) (NOP) organic production system plan may be exempt from the payment of assessments under this part, provided that:

(i) Only agricultural products certified as ''organic'' or ''100 percent organic'' (as defined in the NOP) are eligible for exemption;

(ii) The exemption shall apply to all certified ''organic'' or ''100 percent organic'' (as defined in the NOP) products of a producer regardless of whether the agricultural commodity subject to the exemption is produced by a person that also produces conventional or nonorganic agricultural products of the same agricultural commodity as that for which the exemption is claimed;

(iii) The producer maintains a valid certificate of organic operation as issued under the Organic Foods Production Act of 1990 (7 U.S.C. 6501–6522) (OFPA) and the NOP regulations issued under OFPA (7 CFR part 205); and

(iv) Any producer so exempted shall continue to be obligated to pay assessments under this part that are associated with any agricultural products that do not qualify for an exemption under this section.

(2) To apply for exemption under this section, an eligible producer shall submit a request to the Board on an *Organic Exemption Request Form* (Form AMS–15) at any time during the fiscal period initially, and annually thereafter on or before the start of the fiscal period, for as long as the producer continues to be eligible for the exemption.

(3) A producer request for exemption shall include the following:

(i) The applicant's full name, company name, address, telephone and fax numbers, and email address;

(ii) Certification that the applicant maintains a valid certificate of organic operation issued under the OFPA and the NOP;

(iii) Certification that the applicant produces organic products eligible to be labeled ''organic'' or ''100 percent organic'' under the NOP;

(iv) A requirement that the applicant attach a copy of their certificate of organic operation issued by a USDA-accredited certifying agent;

(v) Certification, as evidenced by signature and date, that all information provided by the applicant is true; and

(vi) Such other information as may be required by the Board, with the approval of the Secretary.

(4) If a producer complies with the requirements of this section, the Board will grant an assessment exemption and issue a Certificate of Exemption to the producer within 30 days. If the application is disapproved, the Board will notify the applicant of the reason(s) for disapproval within the same timeframe.

(5) An importer who imports pecans that are eligible to be labeled as ''organic'' or ''100 percent organic'' under the NOP, or certified as ''organic'' or ''100 percent organic'' under a U.S. equivalency arrangement established under the NOP, may be exempt from the payment of assessments. Such importer may submit documentation to the Board and request an exemption from assessment on certified ''organic'' or ''100 percent organic'' pecans on an *Organic Exemption Request Form* (Form AMS–15) at any time initially, and annually thereafter on or before the beginning of the fiscal period, as long as the importer continues to be eligible for the exemption. This documentation shall include the same information required of a producer in paragraph (c)(3) of this section. If the importer complies with the requirements of this section, the Board will grant the exemption and issue a Certificate of Exemption to the importer within the applicable timeframe. Any importer so exempted shall continue to be obligated to pay assessments under this part that are associated with any imported agricultural products that do not qualify for an exemption under this section.

(6) If Customs collects the assessment on exempt product under paragraph (c)(5) of this section that is identified as ''organic'' by a number in the Harmonized Tariff Schedule, the Board must reimburse the exempt importer the assessments paid upon receipt of such assessments from Customs. For all other exempt organic product for which Customs collects the assessment, the importer may apply to the Board for a reimbursement of assessments paid, and the importer must submit satisfactory proof to the Board that the importer paid the assessment on exempt organic product.

(7) The exemption will apply immediately following the issuance of the Certificate of Exemption.

§ 1223.54 Refund escrow accounts.

(a) The Board shall establish an interest bearing escrow account with a financial institution that is a member of the Federal Reserve System and will deposit into such account an amount equal to 10 percent of the assessments collected during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum.

(b) If the Order is not approved by the required referendum, the Board shall promptly pay refunds of assessments to all producers and importers that have paid assessments during the period beginning on the effective date of the Order and ending on the date the Secretary announces the results of the required referendum in the manner specified in paragraph (c) of this section.

(c) If the amount deposited in the escrow account is less than the amount of all refunds that producers and importers subject to this subpart have a right to receive, the Board shall prorate the amount deposited in such account among all producers and importers who desire a refund of assessments paid no later than 90 days after the required referendum results are announced by the Secretary.

(d) Any producer or importer requesting a refund shall submit an application on the prescribed form to the Board within 60 days from the date the results of the required referendum are announced by the Secretary. The producer and importer shall also submit documentation to substantiate that assessments were paid. Any such demand shall be made by such producer or importer in accordance with the provisions of this subpart and in a manner consistent with the regulations in this part.

(e) If the Order is approved by the required referendum conducted under § 1223.71 then:

(1) The escrow account shall be closed; and,

(2) The funds shall be available to the Board for disbursement under § 1223.50.

Promotion, Research, and Information

§ 1223.55 Programs, plans, and projects.

(a) The Board shall receive and evaluate, or on its own initiative develop, and submit to the Secretary for approval any program, plan, or project authorized under this subpart. Such programs, plans, or projects shall provide for:

(1) The establishment, issuance, effectuation, and administration of appropriate programs for promotion, research, and information, including producer and consumer information, with respect to pecans; and

(2) The establishment and conduct of research with respect to the use, nutritional value, sale, distribution, and marketing of pecans, and the creation of new products thereof, to the end that the marketing and use of pecans may be

encouraged, expanded, improved, or made more acceptable and to advance the image, desirability, or quality of pecans.

(b) No program, plan, or project shall be implemented prior to its approval by the Secretary. Once a program, plan, or project is so approved, the Board shall take appropriate steps to implement it.

(c) Each program, plan, or project implemented under this subpart shall be reviewed or evaluated periodically by the Board to ensure that it contributes to an effective program of promotion, research, or information. If it is found by the Board that any such program, plan, or project does not contribute to an effective program of promotion, research, or information, then the Board shall terminate such program, plan, or project.

§ 1223.56 Independent evaluation.

The Board shall, not less often than every five years, authorize and fund, from funds otherwise available to the Board, an independent evaluation of the effectiveness of the Order and other programs conducted by the Board pursuant to the Act. The Board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this section.

§ 1223.57 Patents, copyrights, trademarks, information, publications, and product formulations.

Patents, copyrights, trademarks, information, publications, and product formulations developed through the use of funds received by the Board under this subpart shall be the property of the U.S. Government as represented by the Board and shall, along with any rents, royalties, residual payments, or other income from the rental, sales, leasing, franchising, or other uses of such patents, copyrights, trademarks, information, publications, or product formulations, inure to the benefit of the Board; shall be considered income subject to the same fiscal, budget, and audit controls as other funds of the Board; and may be licensed subject to approval by the Secretary. Upon termination of this subpart, § 1223.73 shall apply to determine disposition of all such property.

Reports, Books, and Records

§ 1223.60 Reports.

(a) Each first handler, producer, or importer subject to this subpart shall be required to provide to the Board periodically such information as required by the Board, with the approval of the Secretary, which may include but not be limited to the following:

(1) First handler must report or producer acting as its own first handler:

(i) Number of pounds handled;

(ii) Number of pounds on which an assessment was collected;

(iii) Name, address and other contact information from whom the first handler has collected the assessments on each pound handled; and

(iv) Date collection was made on each pound handled.

(2) Unless provided by Customs, importer must report:

(i) Number of pounds imported;

(ii) Number of pounds on which an assessment was paid;

(iii) Name, address, and other contact information of the importer; and

(iv) Date assessment was paid on each pound imported.

(b) These reports shall accompany the payment of the collected assessments.

§ 1223.61 Books and records.

Each producer, first handler, and importer subject to this subpart shall maintain and make available for inspection by the Secretary such books and records as are necessary to carry out the provisions of this part, including such records as are necessary to verify any reports required. Such records shall be retained for at least 3 years beyond the fiscal period of their applicability.

§ 1223.62 Confidential treatment.

All information obtained from books, records, or reports under the Act and this part shall be kept confidential by all persons, including all employees and former employees of the Board, all officers and employees and former officers and employees of contracting and subcontracting agencies or agreeing parties having access to such information. Such information shall not be available to Board members, producers, importers, or first handlers. Only those persons having a specific need for such information to effectively administer the provisions of this subpart shall have access to such information. Only such information so obtained as the Secretary deems relevant shall be disclosed by them, and then only in a judicial proceeding or administrative hearing brought at the direction, or on the request, of the Secretary, or to which the Secretary or any officer of the United States is a party and involving this subpart. Nothing in this section shall be deemed to prohibit:

(a) The issuance of general statements based upon the reports of the number of persons subject to this subpart or statistical data collected therefrom, which statements will not identify the information furnished by any person; and

(b) The publication, by direction of the Secretary, of the name of any person who has been adjudged to have violated this subpart, together with a statement of the particular provisions of this subpart violated by such person.

Miscellaneous

§ 1223.70 Right of the Secretary.

All fiscal matters, programs, plans, or projects, rules or regulations, reports, or other substantive actions proposed and prepared by the Board shall be submitted to the Secretary for approval.

§ 1223.71 Referenda.

(a) *Required referendum.* For the purpose of ascertaining whether the persons subject to this subpart favor the continuation, suspension, amendment, or termination of this subpart, the Secretary shall conduct a referendum among persons subject to assessments under § 1223.52 who, during a representative period determined by the Secretary, have engaged in the production or importation of pecans:

(1) The required referendum shall be conducted not later than 3 years after assessments first begin under the Order; and

(2) The Order will be approved in a referendum if a majority of producers and importers vote for approval in the referendum.

(b) *Subsequent referenda.* The Secretary shall conduct subsequent referenda:

(1) For the purpose of ascertaining whether producers and importers favor the continuation, suspension, or termination of the Order;

(2) Every seven years the Secretary shall hold a referendum to determine whether producers and importers of pecans favor the continuation of the Order. The Order shall continue if it is favored by a majority of producers and importers voting for approval in the referendum who have been engaged in the production or importation of pecans;

(3) At the request of the Board established in this subpart;

(4) At the request of 10 percent or more of the number of persons eligible to vote in a referendum as set forth under the Order; or

(5) At any time as determined by the Secretary.

§ 1223.72 Suspension and termination.

(a) The Secretary shall suspend or terminate this part or subpart or a provision thereof if the Secretary finds that this part or subpart or a provision thereof obstructs or does not tend to effectuate the purposes of the Act, or if

the Secretary determines that this part or subpart or a provision thereof is not favored by persons voting in a referendum conducted pursuant to the Act.

(b) The Secretary shall suspend or terminate this subpart at the end of the fiscal period whenever the Secretary determines that its suspension or termination is approved or favored by a majority of producers and importers voting for approval who, during a representative period determined by the Secretary, have been engaged in the production or importation of pecans.

(c) If, as a result of a referendum the Secretary determines that this subpart is not approved, the Secretary shall:

(1) Not later than 180 days after making the determination, suspend or terminate, as the case may be, collection of assessments under this subpart; and

(2) As soon as practical, suspend or terminate, as the case may be, activities under this subpart in an orderly manner.

§ 1223.73 Proceedings after termination.

(a) Upon the termination of this subpart, the Board shall recommend not more than three of its members to the Secretary to serve as trustees for the purpose of liquidating the affairs of the Board. Such persons, upon designation by the Secretary, shall become trustees of all of the funds and property then in the possession or under control of the Board, including claims for any funds unpaid or property not delivered, or any other claim existing at the time of such termination.

(b) The said trustees shall:

(1) Continue in such capacity until discharged by the Secretary;

(2) Carry out the obligations of the Board under any contracts or agreements entered into pursuant to this subpart;

(3) From time to time account for all receipts and disbursements and deliver all property on hand, together with all books and records of the Board and the trustees, to such person or persons as the Secretary may direct; and

(4) Upon request of the Secretary execute such assignments or other instruments necessary and appropriate to vest in such person's title and right to all funds, property, and claims vested in the Board or the trustees pursuant to this subpart.

(c) Any person to whom funds, property, or claims have been transferred or delivered pursuant to this subpart shall be subject to the same obligations imposed upon the Board and upon the trustees.

(d) Any residual funds not required to defray the necessary expenses of liquidation shall be turned over to the Secretary to be disposed of, to the extent practical, to the pecan producer organizations in the interest of continuing pecan promotion, research, and information programs.

§ 1223.74 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this part, or the issuance of any amendment to this part, shall not:

(a) Affect or waive any right, duty, obligation, or liability which shall have arisen, or which may thereafter arise in connection with any provision of this part; or

(b) Release or extinguish any violation of this part; or

(c) Affect or impair any rights or remedies of the United States, or of the Secretary or of any other persons, with respect to any such violation.

§ 1223.75 Personal liability.

No member or employee of the Board shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any person for errors in judgment, mistakes, or other acts, either of commission or omission, as such member or employee, except for acts of dishonesty or willful misconduct.

§ 1223.76 Separability.

If any provision of this subpart is declared invalid or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of this subpart or the applicability thereof to other persons or circumstances shall not be affected thereby.

§ 1223.77 Amendments.

Amendments to this subpart may be proposed from time to time by the Board or by any interested person affected by the provisions of the Act, including the Secretary.

§ 1223.78 OMB control numbers.

The control number assigned to the information collection requirements by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. Chapter 35, is OMB control number 0581–NEW, except for the Board nominee background statement form which is assigned OMB control number 0505–0001.

Subpart B—Referendum Procedures

§ 1223.100 General.

Referenda to determine whether eligible pecan producers and importers favor the issuance, amendment, suspension, or termination of the Pecan Promotion, Research, and Information Order shall be conducted in accordance with this subpart.

§ 1223.101 Definitions.

(a) *Administrator* means the Administrator of the Agricultural Marketing Service, with power to redelegate, or any officer or employees of the U.S. Department of Agriculture to whom authority has been delegated or may hereafter be delegated to act in the Administrator's stead.

(b) *Eligible importer* means any person who, during the representative period, was subject to the Order and required to pay assessments on pecans imported into the United States.

(c) *Eligible producer* means any person who, during the representative period, was subject to the Order and required to pay assessments on pecans produced in the United States.

(d) *Order* means subpart A of this part, the Pecan Promotion, Research, and Information Order.

(e) *Pecans* means and includes any and all varieties or subvarieties, inshell and shelled, of *Carya illinoinensis* grown or imported into the United States.

(f) *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity. For the purpose of this paragraph (f), the term ''partnership'' includes, but is not limited to:

(1) A husband and a wife who have title to, or leasehold interest in, a pecan farm as tenants in common, joint tenants, tenants by the entirety, or, under community property laws, as community property; and

(2) So-called ''joint ventures'' wherein one or more parties to an agreement, informal or otherwise, contributed land and others contributed capital, labor, management, or other services, or any variation of such contributions by two or more parties.

(g) *Referendum agent* or *agent* means the individual or individuals designated by the Secretary to conduct the referendum.

(h) *Representative period* means the period designated by the Secretary.

(i) *United States* means collectively the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

§ 1223.102 Voting.

(a) Each person who is an eligible producer or an eligible importer, as defined in this subpart, at the time of

the referendum and during the representative period, shall be entitled to cast only one ballot in the referendum. However, each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce pecans, in which more than one of the parties is a producer, shall be entitled to cast one ballot in the referendum covering only such producer's share of the ownership.

(b) Proxy voting is not authorized, but an officer or employee of a corporate producer or importer, or an administrator, executor, or trustee or an eligible entity may cast a ballot on behalf of such person. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the eligible entity, or an administrator, executive, or trustee of an eligible entity and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of such authority.

(c) All ballots are to be cast by mail, overnight delivery, electronic mail, facsimile, or by other means as instructed by the Secretary.

§ 1223.103 Instructions.

The referendum agent shall conduct the referendum, in the manner provided in this section, under the supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions in this section, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the period during which ballots may be cast.

(b) Provide ballots and related material to be used in the referendum. The ballot shall provide for recording essential information, including that needed for ascertaining whether the person voting, or on whose behalf the vote is cast, is an eligible voter.

(c) Give reasonable public notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible producers and eligible importers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

§ 1223.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing the referendum agent's functions listed in this subpart. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1223.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if the agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1223.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to the analysis of the referendum and its results.

§ 1223.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Act and the voting list shall be held confidential and shall not be disclosed.

Subpart C—Administrative Provisions

§ 1223.520 Late payment and interest charges for past due assessments.

(a) A late payment charge will be imposed on any producer, first handler or importer who fails to make timely remittance to the Board of the total assessments for which they are liable. The late payment will be imposed on any assessments not received within 30 calendar days of the date when assessments are due. This one-time late payment charge will be 5 percent of the assessments due before interest charges have accrued.

(b) In addition to the late payment charge, 1 percent per month interest on the outstanding balance, including any late payment and accrued interest, will be added to any accounts for which payment has not been received within 30 calendar days of the date when assessments are due. Interest will continue to accrue monthly until the outstanding balance is paid to the Board.

Bruce Summers,

Administrator, Agricultural Marketing Service.

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Part IV

Federal Communications Commission

47 CFR Parts 1 and 54

Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs; Final Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 54

[WC Docket No. 18–89; FCC 20–176; FRS 17361]

Protecting Against National Security Threats to the Communications Supply Chain Through FCC Programs

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) establishes rules to publish a list of covered communications equipment and services determined to be a risk to national security. Eligible telecommunications carriers (ETCs) that receive universal service funding to provide service in remote areas of the country must remove such equipment or services from their networks and properly dispose of it. This document also establishes the Secure and Trusted Communications Networks Reimbursement Program, which will provide funds to smaller providers of advanced communications services for the removal and replacement of covered communications equipment and services, conditioned on the appropriation of funds by Congress. Lastly, all providers of advanced communications services must report whether their networks include any covered communications equipment or services acquired after August 14, 2018.

DATES: Effective March 15, 2021, except for amendatory instruction 3 adding §§ 1.50004(c), (d)(1), (g), (h)(2), (j) through (n); amendatory instruction 5 adding § 1.50007; and amendatory instruction 7 adding § 54.11. The Commission will publish a document in the **Federal Register** announcing the effective date of those amendments.

FOR FURTHER INFORMATION CONTACT: For further information, please contact Brian Cruikshank, Competition Policy Division, Wireline Competition Bureau, at *brian.cruikshank@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order in WC Docket No. 18–89; FCC 20–176, adopted on December 10, 2020, and released on December 11, 2020. The full text of this document is available for public inspection on the Commission's website at *https://www.fcc.gov/document/fcc-adopts-rules-secure-communications-networks-and-supply-chain-0.*

I. Introduction

1. The Commission plays an important role in protecting America's communications networks and the Commission takes further steps toward securing its communications networks by implementing the Secure and Trusted Communications Networks Act of 2019 (Secure Networks Act). The Commission first adopts a rule that requires ETCs to remove and replace covered equipment from their networks. Second, the Commission establishes the Secure and Trusted Communications Networks Reimbursement Program to subsidize smaller carriers to remove and replace covered equipment, once Congress appropriates at least $1.6 billion that Commission staff estimate will be needed to reimburse providers eligible under current law. Third, the Commission establishes the procedures and criteria for publishing a list of covered communications equipment or services that pose an unacceptable risk to the national security of the United States or the security and safety of United States persons and prohibit Universal Service Fund (USF) support from being used for such covered equipment or services. Last, the Commission adopts a reporting requirement to ensure it is informed about the ongoing presence of covered equipment in communications networks.

II. Report and Order

2. In the *2019 Supply Chain Further Notice,* 85 FR 277, January 3, 2020, the Commission sought comment on the establishment of a reimbursement program to ''offset reasonable costs'' for ETCs to remove and replace covered communications equipment and services from their networks. The Wireline Competition Bureau (WCB) separately sought comment on section 4 of the Secure Networks Act, which created the Secure and Trusted Communications Networks Reimbursement Program. In the *2020 Supply Chain Second Further Notice,* 85 FR 48134, August 10, 2020, the Commission sought comment on how to implement the various provisions of the Secure Networks Act into the Commission's ongoing Supply Chain proceeding. Based on the Commission's review of the record created in response, it adopts several rules to protect the security of its communications networks and implement the Secure Networks Act.

3. In the *2019 Supply Chain Further Notice,* the Commission proposed to require ETCs receiving USF support to remove and replace covered equipment and services from their network operations, contingent on the availability of a funded reimbursement program. The Commission based the scope of the proposed requirement on its view that sections 201(b) and 254 of the Communications Act provides the Commission the legal authority to condition receipt of USF support to advance universal service principles grounded in the provision of ''[q]uality services . . . at just, reasonable, and affordable rates,'' while furthering the public interest and the promotion of nationwide access to advanced telecommunications and information services, and sought comment on that rationale. Following the passage of the Secure Networks Act, which, among other provisions, established a reimbursement program for the removal, replacement, and disposal of covered equipment and services, the Commission modified its proposal and sought further comment on implementation of the Secure Networks Act and, specifically, whether it provided the Commission independent authority to require ETCs or other providers to remove and replace equipment on the Covered List.

4. Consistent with the Commission's proposal in the *2019 Supply Chain Further Notice* and the directives of the Secure Networks Act, it requires recipients of reimbursement funds under the Reimbursement Program and ETCs receiving USF support to remove and replace from their network and operations environments equipment and services included on the covered list required by section 2 of the Secure Networks Act (Covered List). The Commission conditions this obligation to remove and replace covered equipment and services upon a congressional appropriation to fund the Reimbursement Program. The Commission also adopts deadlines consistent with those for reimbursement funding recipients. This requirement, and the steps the Commission takes towards its implementation, will further its goal of protecting its communications networks and supply chains from communications equipment and services that pose a national security threat while facilitating the transition to safer and more secure alternatives.

5. The obligation to remove and replace covered equipment and services on the Covered List applies to recipients of reimbursement funds from the Reimbursement Program and ETCs receiving universal service support. The Commission's authority to require these entities to remove and replace covered equipment and services arises from both

the Secure Networks Act and sections 201(b) and 254(b) of the Communications Act. By limiting the requirement to these recipients, the Commission protects the nation's networks from a substantial amount of equipment and services that pose a threat to the security of its communications networks while minimizing the financial and logistical challenges of removal and replacement on providers.

6. The Secure Networks Act requires any recipient of Reimbursement Program funding to remove all existing covered equipment or services in their networks as a condition of receiving reimbursement funds. The Secure Networks Act prohibits recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered equipment or services with reimbursement funds or any other funding, including private funds. Recipients must also certify that they will permanently remove, replace, and dispose of all covered equipment or services that are in the recipient's network as of the date of submission of the application for reimbursement. Also, recipients must certify that they have fully complied, or are in the process of complying, with all terms and conditions of the Reimbursement Program, all commitments made in the application, and the timeline submitted with the application. These provisions indicate congressional intent that recipients of Reimbursement Program funds are to be included within the scope of the Commission's remove-and-replace rule and must remove covered equipment. Additionally, commenters support a broad application of the Commission's remove-and-replace requirement to entities that meet the definitions contained in the Secure Networks Act. Because section 4 of the Secure Networks Act requires the removal and replacement of covered equipment and services from recipients' networks, the Commission finds sufficient support both in the language of the statute and the record to include recipients of reimbursement funding from the Reimbursement Program in the Commission's remove-and-replace requirement. No commenters in the record oppose this conclusion. While Huawei Technologies Company (Huawei) argues that the Secure Networks Act does not grant the Commission authority to mandate removal and replacement as proposed in the *2019 Supply Chain Further Notice,* it does not dispute that recipients of funding through the Reimbursement Program, who volunteer to participate in the Program, are required to remove covered equipment and services as a condition of receiving funding.

7. To ensure that USF funds are not supporting covered equipment and services, and that the Commission's rule effectively and broadly removes covered equipment and services from recipients' networks to the extent permissible under its legal authority, the Commission obligates ETCs receiving USF support to remove covered equipment and services throughout their entire network, not just in jurisdictions where they operate as an ETC, and irrespective of whether they receive reimbursement under the Reimbursement Program. This broad approach to removal greatly mitigates the identified risks to national security underlying both the Commission's rules and recognized by Congress. However, the scope of the rule does not extend to affiliates and subsidiaries of ETCs. The Commission's decision to require ETCs that receive USF support to remove covered equipment and services is also consistent with the scope of removal under the Reimbursement Program recipient obligations in the Secure Networks Act, which similarly requires recipients to permanently remove covered communications equipment or services contained on the Covered List from their networks. By aligning the scope of the Commission's removal requirement with the obligations under section 4 of the Secure Networks Act, its rules will best effectuate the congressional intent to ''mitigat[e] threats posed by vulnerable communications equipment and services'' throughout U.S. networks.

8. The Commission conditions the implementation of its remove-and-replace rule on the appropriation of funding by Congress for the Reimbursement Program, to ensure sufficient funding is available to pay for the removal and replacement of covered equipment. Several commenters support this proposal and encourage the Commission to wait until Congress has appropriated funding, and others express concern that any obligation to remove and replace covered equipment and services without reimbursement amounts to an unfunded mandate.

9. Pursuant to the Secure Networks Act, only providers with two million or fewer broadband customers are eligible for the Reimbursement Program, but the Commission finds no reason to accordingly limit the applicability of its remove-and-replace rule to only those ETCs which are eligible for the Reimbursement Program. Although the data shows the vast majority of ETCs will be eligible to receive funding under the Reimbursement Program, in line with the intended scope of eligible entities as set forth by Congress under the Secure Networks Act, some large ETCs receiving USF support may not be eligible for reimbursement under the Reimbursement Program due to the size of their broadband customer base. ETCs are providers of ''advanced communications services'' and, as such, are subject to the provisions of the Secure Networks Act, including prohibitions on Federal subsidy spending in section 3 and reimbursement in section 4 of the Secure Networks Act, where eligible. Regardless, the House Report suggests that Congress intended to focus on providing reimbursement for small providers, noting that larger communications companies ''generally have avoided installing and using Huawei and other suspect foreign equipment in their networks,'' while smaller providers with limited resources may have purchased such equipment because it was less expensive or they were unaware of the security risks, or both. Based on the data submitted pursuant to the Information Collection and subscription data from FCC Form 477, only two ETCs using suspect foreign equipment appear to fall outside the scope of reimbursement eligibility due to the number of broadband customers. Larger ETCs are also more likely to have resources to pay for removal, replacement, and disposal of covered communications equipment and services themselves, and not need taxpayer money to accomplish the objectives of the Commission's remove-and-replace requirement. The Commission clarifies that ETCs receiving USF support that do not receive funding through the Reimbursement Program are required to remove covered communications equipment and services from their networks, but whether they replace such equipment and services with alternatives from the Replacement List is within their discretion. Furthermore, nothing in the Secure Networks Act prevents the Commission from requiring removal from entities beyond those who receive reimbursement funding. Because of the serious risks that untrusted participants in the Commission's supply chain pose to the Commission's communications networks, the benefits to our national security of removing covered equipment and services from the Commission's communications networks far outweigh the burdens that compliance with the requirement may impose on a small number of large ETCs.

10. The Commission further clarifies that, consistent with the requirements for participation in the Reimbursement Program under the Secure Networks Act, it requires all ETCs receiving USF support to dispose of the removed covered equipment and services rather than resell, donate, or trade them. Similar to other applications of the rule, such as the certification requirement, this requirement synchronizes the disposal requirements for ETC recipients of USF support with those applicable to other reimbursement recipients and minimizes any burdens that may result from the administration of disparate regimes. Furthermore, allowing ETCs that receive USF support to resell covered equipment and services removed from their networks undermines the effectiveness of the rule and fails to effectively eliminate those products that pose national security risks from the Commission's communications networks and supply chain.

11. The application of the Commission's remove-and-replace requirement to both ETCs receiving USF support and recipients of reimbursement under the Reimbursement Program appropriately considers the benefits to our national security of a broader approach against the burdens to remove and replace covered communications equipment and services from networks. The Commission recognizes that the presence of products in communications networks that pose risks to our national security is not limited to ETCs and believe that the application of its remove-and-replace requirement to recipients of reimbursement funding in addition to ETCs receiving USF support encompasses a wide range of entities whose networks may contain covered equipment or services. Furthermore, while some commenters support an expansive application of the remove-and-replace rule to require all entities to replace covered equipment or services, rather than just the recipients described in this document, the Commission finds that the slightly more limited scope of its rule not only covers entities with flawed equipment and services, it also best captures the broadest application while staying within the bounds of the Commission's legal authority. Some commenters representing non-ETC USF recipients such as schools, libraries, and rural healthcare providers favor expanding the remove-and-replace requirement to non-ETC USF recipients because of the cyberthreats such recipients face when compromised equipment and services remain in their networks. While the Commission recognizes that the continued existence of such untrusted products in its communications networks and supply chains does introduce risks, it must, as USTelecom posits, consider the ''large administrative burdens'' that inclusion of non-ETC USF recipients would impose against the proportionate impact on national security. The Commission finds that limiting the requirement to recipients of the Reimbursement Program and ETC recipients of USF support, rather than all USF recipients, reduces the administrative burdens of removing and replacing covered equipment and services on non-ETC USF recipients while reducing national security threats to its communications supply chain. Eligible non-ETC USF recipients may voluntarily participate in the Reimbursement Program, which would subject them to the remove-and-replace requirement but also allow them to receive reimbursement for removal, replacement, and disposal of covered equipment and services; otherwise, non-ETC USF recipients are under no obligation to remove or replace covered equipment or services from their networks. The Commission draws this important distinction to avoid imposing an unfunded mandate on non-ETC USF recipients were the Commission to require the removal and replacement of covered equipment when such recipients are not eligible to participate in the Reimbursement Program. Nevertheless, because the record indicates very little covered equipment outside the USF programs requiring an ETC designation, the Commission will closely monitor future developments, including through the information collection adopted pursuant to section 5 of the Secure Networks Act, to determine whether addressing non-ETC USF recipients is necessary and appropriate. This information collection applies to all providers of advanced communications service, unlike the Commission's previous information collection adopted in the *2019 Supply Chain Information Collection Order,* 85 FR 230, January 3, 2020, which applied only to ETCs, thus providing a more expanded and comprehensive awareness of covered communications equipment and services in networks.

12. *Legal Authority.* A variety of separate and independent statutory provisions provide the Commission with the appropriate authority and ability to impose a remove-and-replace requirement. Section 4 of the Secure Networks Act expressly requires recipients of Reimbursement Program funding to ''permanently remove[ ]'' and replace ''all covered communications equipment or services'' in their networks as a condition of receiving reimbursement funds. The Secure Networks Act requires applicants to certify that they will permanently remove, replace, and dispose of covered equipment or services in the recipient's network as of the date of submission of the application for reimbursement and further requires recipients to submit a final certification to the Commission that they have permanently removed, replaced, and disposed of, or are in the process of doing so, all covered communications equipment or services from their networks. Relatedly, the Secure Networks Act prohibits recipients of reimbursement funds from purchasing, renting, leasing, or otherwise obtaining covered equipment or services with reimbursement funds or any other funding, including private funds, indicating congressional intent to have covered equipment and services eliminated from recipients' networks as a condition of receiving funding.

13. The requirement adopted is similarly consistent with the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (2019 NDAA), which directs the Commission to ''prioritize funding and technical support to assist affected . . . entities to transition from covered communications equipment [as defined by the statute], and to ensure that communications service to users and customers is sustained.'' While one commenter indicated that the Commission could rely on the 2019 NDAA to obligate removal and replacement of covered equipment and services, it finds that the provisions of the Secure Networks Act, discussed in this document, builds upon the goals of the 2019 NDAA and provides the Commission with express authority to require removal and replacement. As the Commission finds they have sufficient authority under sections 201(b) and 254 of the Communications Act and various provisions of the Secure Networks Act, it needs not consider whether the Communications Assistance and Law Enforcement Act or sections 316 or 214 of the Communications Act provide a legal basis for regulation.

14. In addition, the Communications Act provides legal authority for the application of the Commission's rule to ETCs that receive USF support. As the U.S. Court of Appeals for the Tenth Circuit has held, section 254(e) is reasonably interpreted as allowing the Commission ''to specify what a USF recipient may or must do with the

funds,'' consistent with the policy principles outlined in section 254(b). Section 254(b) requires the Commission to base its universal service policies on the principles of providing ''[q]uality services . . . at just, reasonable, and affordable rates,'' as well as promoting ''[a]ccess to advanced telecommunications and information services . . . in all regions of the Nation.'' Section 201(b) authorizes the Commission to ''prescribe such rules as may be necessary in the public interest to carry out the provisions of the [Communications] Act.'' By requiring ETCs that receive USF support to remove covered equipment and services, the Commission further advances the provision of quality services nationwide, and ensure the safety, reliability, and security of the nation's communications networks, which is necessary in the public interest in fulfillment of the purpose of the Communications Act.

15. The record also supports the Commission's determination that the Communications Act provides the Commission broad legal authority to require removal of covered equipment and services by ETCs that receive USF support. Telecommunications Industry Association states that the Commission is ''properly acting within its assigned responsibilities by promulgating rules that place conditions and restrictions on use of USF support.'' WTA and NCTA both note that the Commission has clear and well-established authority to impose public interest conditions on the use of USF. Furthermore, the provisions of the Communications Act tied to the Commission's administration of universal service programs provide well-established authority for imposing remove-and-replace requirements on ETCs receiving universal service funds.

16. The Commission rejects arguments that it lacks the authority to mandate removal and replacement of covered equipment and services. Huawei asserts that neither the Secure Networks Act nor any other statute provides the requisite authority to impose a remove-and-replace requirement. According to Huawei, nothing in the Secure Networks Act requires removal and replacement, nor does the Reimbursement Program, which is voluntary, mandate removal. The Commission disagrees. The Secure Networks Act conditions receipt of reimbursement funds on removal and disposal of all covered equipment from the recipient's network; put differently, section 4 obligates recipients of reimbursement funds to certify to the removal of all covered equipment and services from their network, then provides a means by which to replace such equipment and services through reimbursement. While providers' participation in the Reimbursement Program is not mandatory, the Secure Networks Act requires the Commission to mandate removal of covered equipment and services by any provider who does choose to participate.

17. The Commission also rejects International Technology and Trade Associates, Inc. (ITTA) and Huawei's arguments that the Communications Act does not provide the Commission legal authority to adopt its remove-and-replace rule. ITTA argues that the proposed requirement is beyond the Commission's authority under section 254 of the Communications Act. Huawei argues that the section 254(b) principles upon which the Commission must ''base policies for the preservation and advancement of universal service'' do not include the promotion of national security or equipment regulation applied to a subset of USF recipients. Conditioning the receipt of USF support on removal of covered equipment and services, however, ensures against the substantial security risks associated with such equipment and services and thereby promotes access to ''quality'' advanced telecommunications and information services. Moreover, while Huawei contends that section 201(b) alone does not empower the Commission to enact rules in the absence of other authority under the Communications Act, it finds that the combination of these Communications Act provisions grants the Commission the authority to adopt a remove-and-replace requirement for ETCs receiving USF support.

18. The Commission limits the scope of the remove-and-replace requirement to equipment and services on the Covered List. This approach aligns with the scope of equipment and services that Congress intended to restrict under the statute, as both the section 3 prohibition and the section 4 reimbursement eligibility apply to equipment and services added to the Covered List. The Commission's rules on publication of the Covered List also incorporate notice for updates to the covered equipment or services listed, and entities will therefore have notice with regard to the scope of equipment or services they are subsequently required to remove and replace. The Commission finds that using the Covered List better aligns compliance with removal and replacement obligations to the administration of the Reimbursement Program and creates a bright-line determination for ETCs receiving USF support and reimbursement recipients to easily identify equipment and services to remove and replace from their networks. Furthermore, the Commission ties administration of the remove-and-replace requirement to the administration of the Reimbursement Program; therefore, it finds it will not be overly burdensome for entities, including smaller carriers, to identify, remove, replace, and discard covered equipment and services from their networks.

19. Consistent with the provisions of the 2019 NDAA and Secure Networks Act, this rule represents a reasoned modification of the Commission's proposal in the *2019 Supply Chain Further Notice.* There, the Commission proposed to require the removal of all equipment and services from covered companies. To synchronize the requirement the Commission adopts with the scope of covered equipment and services under the Secure Networks Act, however, the Commission slightly modifies its rule from its original proposal. The Commission concludes upon review of the record in this proceeding and after considering the Secure Networks Act that its proposal risks being too broad and excessively burdensome. The Commission's slightly modified and more narrowly tailored rule instead supports a risk-based assessment of problematic equipment and services within a network, consistent with the approach taken in section 889 of the 2019 NDAA and ultimately incorporated into section 2 of the Secure Networks Act, rather than the proposed blanket prohibition to all equipment and services produced by a manufacturer. The Covered List is limited to such equipment and services that the federal government, including the U.S. intelligence community, has identified as national security threats and that are placed at the most vulnerable spots in the Commission's communications infrastructure. Equipment and services on the Covered List are also limited to certain operational functions such as routing or redirecting user data traffic, causing an advanced communications service provider's network to be remotely disrupted, or otherwise posing an unacceptable risk to United States national security. Secure Networks Act sections 2(b)(2)(A)–(C). As such, concerns raised in the record regarding inclusion of Lifeline end-user equipment are moot because they are outside the scope of the Secure Networks Act. Therefore, the Commission believes limiting the remove-and-replace requirement to

equipment and services on the Covered List advances its goals of protecting its communications networks and supply chains from those products that pose a risk to our national security while minimizing the financial, administrative, and logistical efforts entities may face in compliance. The Commission clarifies that, while there is nothing in § 54.9 of the Commission's rules that restricts the use of private funds to purchase, obtain, maintain, improve, modify, or otherwise support any equipment or services produced or provided by any company posing a national security threat to the integrity of communications networks or the communications supply chain, nor is there anything in § 54.10 of the Commission's rules that restricts the use of private funds to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, as identified and published on the Covered List, compliance with the remove-and-replace mandate requires ETCs receiving USF support and recipients of Reimbursement Program funding to remove all covered equipment and services from their network operations and to certify compliance. To the extent there are equipment or services not on the Covered List but fall within the scope of § 54.9, entities may continue to use private funds to purchase, obtain, maintain, improve, modify, or otherwise support such equipment or services.

20. USTelecom posits that the Commission's proposal to implement section 3 of the Secure Networks Act ''stands to create a significant gap in the scope of equipment that could be subject to replacement funding'' vis-à-vis the scope of covered equipment under the two prohibitions. According to USTelecom, the Commission should either reconsider the scope of § 54.9 of the Commission's rules to match the definition of ''covered communications equipment or service'' required by the Secure Networks Act, or it should clarify that equipment subject to § 54.9 is also eligible for funded removal and reimbursement under the Reimbursement Program; otherwise, USTelecom argues, failure to do either creates a *de facto* unfunded mandate.

21. The Commission disagrees with USTelecom that the interplay of § 54.9 and Reimbursement Program eligibility amounts to an unfunded mandate. First, section 3 of the Secure Networks Act does not, in itself, require the removal and replacement of covered equipment or services; it merely prohibits prospective use of certain Federal subsidies to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List. Second, the requirement to remove and replace, like the prohibition under § 54.10 and the equipment and services eligible for reimbursement under the Reimbursement Program, only applies to the products and services contained on the Covered List. To the extent there is equipment or service that is prohibited under § 54.9 but is not on the Covered List, it is not subject to the remove-and-replace requirement, and thus that rule does not constitute an unfunded mandate. The Commission does, however, acknowledge that the creation of two prohibitions will establish different parameters for designation of covered equipment or services.

22. The Commission disagrees with arguments raised by commenters that mandating removal and replacement is impermissibly retroactive or amounts to a regulatory taking. The Commission addresses these two concerns raised in the record in turn.

23. Pursuant to the Administrative Procedure Act (APA), in the absence of express statutory authority to promulgate retroactive rules, the Commission may only adopt legislative rules that apply prospectively. The Commission notes that the Secure Networks Act requires it to publish a list of any covered communications equipment or service produced by an entity that poses an unacceptable risk to national security or the security and safety of United States persons and to establish a reimbursement program for removal of such equipment purchased, rented, leased, or otherwise obtained before August 14, 2018. The Secure Networks Act requires the Commission to publish the list of covered communications equipment or services to its website and to complete a rulemaking to implement the reimbursement program by March 12, 2021. To the extent the rules adopted in this document serve to implement the rulemaking requirement of the Secure Networks Act, this APA limitation is inapplicable. A rule may be found to be impermissible as primarily retroactive ''if it impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.'' Additionally, a rule may be impermissible for secondary retroactivity, in which rules affect the future legal consequence of past or ongoing actions. Where a rule has secondary retroactive effect, it is permissible unless such effect is unreasonable. And the Takings Clause of the Fifth Amendment prohibits the government from taking ''private property . . . for public use, without just compensation.'' Notably, and relevant to any takings arguments, Commission and judicial precedent have established that carriers have no vested property interest in USF support.

24. *Retroactivity Claims.* Huawei argues that the Commission's proposal to mandate replacement of covered equipment and services would impose primary retroactivity and therefore be invalid under the APA and, further, would impose secondary retroactivity by adversely and unreasonably altering future legal consequences of past actions. According to Huawei, requiring removal of equipment and services installed before the adoption of § 54.9 of the Commission's rules would ''constitute a sanction on Huawei's past conduct'' and restrict its ability to supply equipment and services to telecommunications carriers. LATAM argues that a remove-and-replace requirement raises concerns about the retroactive impact of regulatory actions on private investment. PRTC states that the requirement raises the same prospective application concerns that the Commission found would not be impacted in the *2019 Supply Chain Order,* 85 FR 230, January 3, 2020, when adopting § 54.9 of the Commission's rules, thus contradicting the Commission's arguments in that *Order* that the rule would only be applied prospectively and not require carriers to remove or stop using existing equipment or services.

25. The Commission disagrees with commenters that the remove-and-replace requirement constitutes impermissible primary retroactivity. Huawei claims that the rule attaches a ''new disability'' or ''new burdens'' to past conduct. In support of its argument, Huawei cites *National Mining Association,* where the D.C. Circuit found that a Department of Interior rule was invalid because it imposed a ''new disability,'' namely permit ineligibility, based upon ''pre-rule violations by mine operators over whom permit operators acquired control before the rule's effective date.'' It also cites *Rock of Ages Corp.,* where the Second Circuit found a new regulation from the Department of Labor to be impermissibly retroactive because it required on-going inspections at blasting sites beginning a year before the effective date of the regulation that imposed the inspection requirement,

thus impermissibly imposing new duties on already completed transactions. Huawei also cites *AMC Entertainment, Inc.,* where the Ninth Circuit invalidated an agency's interpretation of a rule which would have required retrofitting movie theaters before the agency announced its interpretation. The Commission finds that Huawei's interpretation of these cases is incorrect as applied to the requirement at hand. The standard for primary retroactivity assesses whether a rule has changed the past legal consequences of past actions. Unlike the factual circumstances in the cases cited by Huawei, the remove-and-replace requirement does not attach a ''new disability'' before the rule goes into effect. Carriers will not be penalized for having covered equipment or services in their networks before the removal and replacement rule is effective, nor do they have to take action prior to the rule taking effect; therefore, the rule has no primary retroactive effect. Thus, while it ''changes the legal landscape,'' it has not ''rendered past actions illegal or otherwise sanctionable,'' even as to the carriers themselves—much less those from whom the carriers purchase equipment not governed by such rules, such as Huawei. As to Huawei, the new rules have no application at all. They apply only to carriers, requiring them to replace Huawei equipment only if and after reimbursement to the carriers for doing so becomes available. While collateral effects on its contracts with such carriers would not be cognizable as primary retroactivity under *NCTA,* in any event Huawei makes no claim that the Commission's action could result in any carrier claims against Huawei, much less any damages in support of any such claims notwithstanding the reimbursement program.

26. While the effect of the removal and replacement rule may alter the future legal consequence to certain carriers of having certain equipment or services in a network by making what was once permissible equipment and services to operate now impermissible to retain going forward, ''[i]t is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes.'' Such action ''has never been thought to constitute retroactive lawmaking, and indeed most economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.''

27. The Commission similarly finds Huawei's arguments regarding secondary retroactivity unpersuasive. Huawei argues that to compel equipment replacement would impose unreasonable secondary retroactivity on carriers and suppliers ''because such a requirement would adversely and unreasonably alter the future legal consequences of past actions'' and render covered equipment ''essentially useless.'' However, ''secondary activity—which occurs if an agency's rule affects a regulated entity's investment made in reliance on the regulatory status quo before the rule's promulgation—will be upheld if it is reasonable.'' First, the Commission disagrees with Huawei that this rule constitutes secondary retroactivity. The remove-and-replace requirement imposes a future obligation, albeit on existing property, by mandating removal, *as well as* replacement, of covered equipment and services; replacement can only occur once removal—a future action—occurs. As such, this requirement imposes a legal consequence on an action to occur at a future date, *i.e.,* should a reimbursement recipient or an ETC receiving USF support retain covered equipment or services in its networks past the certification requirement deadline for the rule. And the Commission, in creating the Reimbursement Program, has sought to mitigate any harm that the future effect of the rule may incur.

28. Second, even assuming *arguendo* that the removal-and-replacement requirement amounts to secondary retroactivity, it is reasonable and therefore permissible. The threat that the presence of covered equipment and services in the Commission's communications networks poses to our national security necessitates the prompt removal and replacement of such equipment, thereby supporting that this requirement is not arbitrary and capricious. Courts have held that the Commission ''is entitled to reconsider and revise its views as to the public interest and the means needed to protect that interest, though it must give a sufficient explanation of that change.'' The rule the Commission adopts facilitates the transition away from such identified equipment and services that threaten our nation's security to ensure entities are able to offer secure, reliable, and quality service over their networks. To that end, the Commission's rule is no different than other regulatory requirements which require regulated entities to upgrade their networks for the improved provision of services. For example, the Commission may require a common carrier subject to section 214 of the Communications Act to ''provide itself with adequate facilities for the expeditious and efficient performance of its service'' which, for some carriers, could require an upgrade of their equipment. Similarly, the remove-and-replace rule requires recipients of reimbursement funding and ETCs receiving USF support—which are, in fact, common carriers—to effectively upgrade their networks by removing compromised products and services and thus improve the provision of quality services at just, reasonable, and affordable rates, in accordance with section 254 of the Communications Act.

29. Third, providers may choose alternatives to removal and replacement of covered equipment and services to avoid compliance or avoid any perceived impact on private investment. Participation in the Reimbursement Program is voluntary; providers are under no obligation to accept reimbursement funding and the conditions associated with such support. Designation as an ETC, and the opportunity therefore to participate in USF programs, or acceptance of USF funds through those programs, is likewise voluntary, and providers that are currently designated as ETCs or that accept universal service funding may decline to participate in USF programs. To allow providers so inclined a reasonable opportunity to relinquish their ETC status or secure alternative funding to USF support, ETCs choosing this option must do so within one year after WCB issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. A state commission, or the Commission in the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a state commission, shall permit an ETC to relinquish its designation as such in any area served by more than one ETC. This time period is consistent with the amount of time that carriers participating in the Reimbursement Program and for ETCs receiving USF support that retain their designation or continue to accept universal service funding have to comply with the remove-and-replace requirement. Finally, the Commission reiterates that the applicability of this rule is within the bounds of its legal authority and, as such, only extends to recipients of reimbursement funds and ETCs receiving USF support; beyond this, the rule imposes no restriction on Huawei's ability to supply equipment and services to telecommunications carriers and other providers who are not subject to this requirement. ETCs that choose to forego their ETC designation

or disclaim USF support may avoid any impact that this rule may have on future legal consequences of past actions. While the rule no doubt may frustrate a business that undertook a course of conduct based on current law, only to have its expectations frustrated, when the law changes, ''this has never been thought to constitute retroactive lawmaking.''

30. Furthermore, the Commission disagrees with PRTC's assertion that the rule it adopts raises the same concerns regarding prospective application that the Commission addressed when adopting § 54.9 in the *2019 Supply Chain Order.* In that *Order,* the Commissions found that because the rule restricting use of USF support was prospective in effect, it therefore did ''not prohibit the use of existing services or equipment already deployed or in use.'' That finding is not contradicted here. The prohibition contained in § 54.9 of the Commission's rules prospectively limits the use of future USF support, whereas the requirement to remove and replace obligates recipients of reimbursement funding and ETCs receiving USF support to take action to remove covered equipment and services from their networks. Not only do the regulations impose different obligations, but, as stated in this document, the future receipt of USF support is not mandatory. Therefore, under both rules, affected entities may decline to accept USF support and avoid compliance with either rule.

31. *Unconstitutional Taking.* LATAM argues that the Commission's remove-and-replace requirement raises regulatory takings concerns. PRTC contends that this requirement raises the same regulatory takings arguments that the Commission addressed in the *2019 Supply Chain Order.* Huawei also argues that mandating removal and replacement would violate the Takings Clause and due process ''because carriers have vested property interests in already-purchased equipment, and mandating its removal would deny all economically beneficial or productive use or all economically viable use of the equipment.''

32. The Commission finds the arguments from LATAM, PRTC, and Huawei unpersuasive. As explained in the *2019 Supply Chain Order,* universal service support recipients do not have a property interest in maintaining particular levels of support notwithstanding changes in the program rules. Nor is the Commission persuaded that the effects on carriers' existing equipment represents a regulatory taking under the *Penn Central* framework. In assessing whether such a taking has occurred, courts consider: (1) The economic impact of the regulation on the regulated party; (2) the extent to which the regulation interferes with the regulated party's reasonable investment-backed expectations; and (3) the ''character'' of the government action. First, the economic impact on carriers is minimal, especially for reimbursement recipients who are eligible to receive reimbursement for reasonable costs incurred to remove, replace, and dispose of covered equipment through the Reimbursement Program. For those ETCs receiving USF support that do not receive reimbursement funding, the impact to replace covered equipment and services should not be severe because larger entities, who would otherwise be ineligible for reimbursement, are less likely to have covered equipment or services in their networks and otherwise have more opportunity to bear the cost of any such replacement due to their size. Second, the rule should not upend reasonable investment-backed expectations, as providers have been aware of the designation of certain products and manufacturers as covered equipment or services since the passage of the 2019 NDAA in 2018. And over the last decade, Congress and the Executive Branch have repeatedly stressed the importance of identifying and eliminating potential security vulnerabilities in communications networks and their supply chains. Third and finally, the requirement does not amount to a physical invasion of the property, especially when there is recourse for entities to relinquish their ETC designation or forego receiving future USF support in order to avoid any consequence of the rule upon physical property.

33. As an alternative basis for the Commission's conclusion, it is not persuaded that the regulatory takings precedent represents the appropriate manner of analyzing its action here. In particular, the restriction applies only as a condition on a provider's continued participation in the federal universal service program, including receipt of compensation from the federal universal service support mechanisms. However, recipients of Reimbursement Program funding are prohibited from using funding, including private funds to purchase, rent, lease, or otherwise obtain any covered communications equipment or service. Even assuming *arguendo* that the restriction resulted in some effect on providers' property interest in their existing equipment, there is a sufficient nexus and proportionality between the restriction and the providers' participation in the USF programs. The restriction on use of universal service support for equipment and services that pose an ongoing security risk has a clear nexus to the Commission's legitimate concerns, as explained in the *2019 Supply Chain Order.* By targeting the providers' actions only insofar as they would be using federal universal service support in a manner that perpetuates a security risk, the restriction is appropriately proportional to address that harm.

34. Separately, the Commission observes that these arguments only focus on the removal of the equipment and disregard the support provided for the replacement of the equipment and the availability of ''just compensation'' through reimbursement appropriations. Eligibility for providers of advanced communications service to participate in the Reimbursement Program is expansive, and the vast majority of affected entities required to remove and replace covered equipment and services under the Commission's rule by virtue of their continued receipt of universal service support will be eligible to receive reimbursement. Where recipients of reimbursement funding do have a property interest in the covered equipment the Commission requires them to remove, the Reimbursement Program offers just compensation.

35. In the *2019 Supply Chain Further Notice,* the Commission proposed making the remove-and-replace requirement contingent on the creation of a reimbursement program that would help ''mitigate the impact on affected entities, and in particular small, rural entities.'' Commenters supported this approach. Accordingly, the Commission will proceed as proposed and make compliance with the removal obligation that will coincide with the implementation of the Reimbursement Program, which the Commission separately establishes in the following. Specifically, the Commission will require ETC recipients of USF support to certify that they have complied with its new rule requiring the removal of equipment and services on the Covered List. The first certification will be required one year after WCB issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. Once the one-year period has expired, ETCs receiving USF support will then need to certify going forward that they are not using equipment or services identified on the Covered List before receiving USF support each funding year. Participants in the Reimbursement Program will not need to certify

compliance with the remove-and-replace rule until after the expiration of their removal, replacement, and disposal term.

36. The Commission finds that adopting a uniform certification requirement and transition period will promote equitable compliance deadlines for all entities subject to the remove-and-replace requirement, regardless of their participation in the Reimbursement Program. Additionally, as the threat to our national security is immediate, it better advances the Commission's goals to require entities to remove and replace covered equipment and services consistent with the transition periods for reimbursement in the Reimbursement Program, rather than permitting them to wait until such products are at end-of-life or replaced in the ordinary course of business.

37. The Secure Networks Act's requirements apply to ''communications equipment or service'' and to providers of ''advanced communications service.'' Although the Secure Networks Act defines ''communications equipment or service'' as ''any equipment or service that is essential to the provision of advanced communications service,'' it does not define which factors make equipment or service ''essential.'' Similarly, the Secure Networks Act defines ''advanced communications service'' as the ''advanced telecommunications capability'' described in section 706 of the Telecommunications Act of 1996, which encompasses ''high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology,'' but does not define how the Commission should determine what constitutes ''high-speed, switched, broadband telecommunications capability.'' In the *2020 Supply Chain Second Further Notice,* the Commission sought comment on how to interpret these two terms employed throughout the Secure Networks Act.

38. *Interpretations of ''communications equipment or service''.* Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice,* it interprets ''communications equipment and service'' as defined in section 9(4) to include all equipment or services used in fixed and mobile broadband networks, provided they include or use electronic components. Included in the definition of ''communications services'' is software and firmware used in broadband networks. This interpretation is consistent with Commission precedent regarding software's potential security risk. Also included in this definition is any optical switching equipment or services that include or use electronic components. The Commission believes that all equipment or services that include or use electronic components can be reasonably considered essential to broadband networks, and it further believes that the Commission's definition will provide a bright-line rule that will ease regulatory compliance and administrability. The Commission's proposed definition received support from several commenters in the record, who agreed that it provides regulatory certainty and as one commenter explained, ''would make it universally clear for compliance purposes.'' RWA also supports the definition because it ''provides the FCC with the flexibility it needs as technology evolves so that regulations do not lag behind technological developments.''

39. The Commission rejects arguments that it should interpret ''communications equipment or service'' more broadly or narrowly. Although the Commission agrees with CCA that it ''needs not adopt a cramped interpretation in order to implement the [Reimbursement] Program,'' the definition is appropriately tailored because it provides clear and simple guidance to regulated parties while still covering any equipment and service that could potentially pose a threat to national security. The Commission's decision to include in the definition of communications equipment or services any equipment or service that includes or uses electronic components does not alter or modify the statutory language, but instead interprets it in a way so as to ''most accurately reflect[ ] the broad participant pool Congress intended for the program.''

40. Alternatively, CTIA's argument that the Commission's definition is ''unduly broad'' conflates its interpretation of ''communications equipment or service'' with the separate inquiry in section 2(b)(2) of the Secure Networks Act. Section 2(b)(2) provides that, relying solely on determinations made by a list of enumerated sources, the Commission shall publish on the Covered List communications equipment or service that meet specific criteria. CTIA would read out the difference between ''communications equipment or service'' in section 9(4) of the Secure Networks Act and section 2(b)(2), which limits the Covered List, to communications equipment and services that possess certain capabilities. CTIA proposes to ''narrow the scope of the 'communications equipment or service' '' because ''not all equipment subcomponents are essential,'' and asks the Commission to ''develop a risk-based analysis relevant to the core layer, distribution layer, and access layer.'' The Commission disagrees because the Secure Networks Act already provides a definition for the subset of communications equipment and services that have been subjected to the section 2(b)(2) review. Section 9(5) defines ''covered communications equipment or service'' as ''any communications equipment or service that is on the [Covered List] . . . ,'' and, thus, subject to the section 2(b)(2) criteria. These factors, which determine which pieces of equipment or service should be considered ''covered communications equipment and services,'' and thus must be published on the Covered List, do not apply to the definition of ''communications equipment and services.''

41. *Definition of ''advanced communications service.''* Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice,* it interprets ''advanced communications service'' for the purposes of the Secure Networks Act to include services with any connection of at least 200 kbps in either direction. No commenter opposed this definition. This interpretation had unanimous support in the record and is consistent with the Commission's historic interpretation of section 706 of the Telecommunications Act. The Commission acknowledges that it has encouraged providers of advanced communications service to offer broadband service at greater speeds and adjusted over time its definition of advanced telecommunications capability in its annual Broadband Deployment Reports. However, the Commission's interpretation in this proceeding covers a broader array of equipment and services, consistent with congressional intent to identify and remove insecure equipment and, therefore, it believes establishing a standard that captures this broader number of providers is appropriate. Using the standard will maximize program participation to include providers with older, legacy technology.

42. The Commission agrees with Dell that its interpretation ''would ensure that insecure equipment is not left in our nation's interconnected broadband networks.'' The 200 kbps threshold is a familiar benchmark to current providers of advanced communications services, as it matches the definition of ''broadband services'' the Commission uses to determine which facilities-based broadband providers must file the

Commission's FCC Form 477 and which helps determine the availability of advanced communications services throughout the country. The Commission does not modify the definition of ''advanced communications service'' for any other purposes other than interpreting the Secure Networks Act. Using this standard will also allow the Commission to leverage available information on FCC Form 477 filers to verify applicant eligibility.

43. Section 2(a) of the Secure Networks Act directs the Commission to publish, no later than March 12, 2021, a list of covered communications equipment and services (Covered List). The Covered List, which will be publicly available, will serve as a reference for interested parties to indicate the communications equipment and services that certain providers must remove from their networks, as well as the equipment and services to which the section 3(a) prohibition applies, the communications equipment and services eligible for reimbursement pursuant to section 4, and the equipment and services that form the basis for the reporting requirements in section 5.

44. Consistent with the clear direction in the Secure Networks Act and the Commission's proposal in the *2020 Supply Chain Second Further Notice,* the Commission will publish on its website the Covered List of communications equipment or services determined to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons. Section 2(c) of the Secure Networks Act states that the ''Commission shall place'' on the Covered List ''any communications equipment or service that poses an unacceptable risk to the national security of the United States or the security and safety of United States persons based solely on one or more of the following determinations,'' and then lists four sources for such determinations:

- ''A specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council'';
- ''A specific determination made by the Department of Commerce pursuant to Executive Order No. 13873 . . . relating to securing the information and communications technology and services supply chain'';
- ''The communications equipment or service being covered telecommunications equipment or services, as defined in section 889(f)(3)'' of the 2019 NDAA; or
- ''A specific determination made by an appropriate national security agency.'' The Act defines ''appropriate national security agency'' to include the Department of Homeland Security, the Department of Defense, the Office of the Director of National Intelligence, the National Security Agency, and the Federal Bureau of Investigation.

45. *Requirement to accept determinations.* Consistent with the *2020 Supply Chain Second Further Notice,* the Commission interprets Congress's use of the words ''shall place'' to mean it has no discretion to disregard determinations from these enumerated sources. Huawei agrees, and stated in its comments that ''the Secure Networks Act's use of the term 'shall' provides the Commission no discretion'' when evaluating determinations for inclusion on the Covered List. The record supports the Commission's interpretation. For example, USTelecom contends that ''once one of the federal agencies, either enumerated or implied, make a granular determination about 'covered equipment', the Commission is bound to accept it.'' Similarly, NCTA explains that ''[the] Secure Networks Act did not grant the Commission plenary authority to regulate the communications network supply chain based upon its own assessment of national security risks posed by covered equipment and services.'' Thus, where there is a determination from one of these sources, the Commission must take action to publish or update the Covered List to incorporate communications equipment or services covered by that determination. While it is difficult for the Commission to calculate the national security benefits derived from removing covered communications equipment and services, the Secure Networks Act requires the Commission to rely on the judgment and expertise of those enumerated sources tasked with making this assessment.

46. *No deviation from enumerated sources.* Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice* and the record, it interprets Congress' use of the word ''solely'' in section 2(c) to mean the Commission can accept determinations only from these four categories of sources. ''In taking action under subsection (b)(1), the Commission shall place on the list any communications equipment or service that poses an unacceptable risk to the national security of the United States or the security and safety of United States persons based *solely* on one or more of the following determinations . . . .'' This interpretation is shared by multiple commenters, including USTelecom, NCTA, NTCA, CTIA, and Huawei.

47. *Determinations from any executive branch interagency body with appropriate national security expertise.* The Secure Networks Act directs the Commission to rely on ''a specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council'' to accept determinations. The Commission includes in this definition two cross-government groups: Team Telecom and the Committee on Foreign Investment in the United States (CFIUS), as these executive branch interagency bodies routinely provide expert advice to the Commission on national security-related questions. The members of Team Telecom are the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, and the head of any other executive department or agency, or any Assistant to the President, as the President determines appropriate. The Executive Order establishing Team Telecom explained that Team Telecom was created to ''assist the FCC in its public interest review of national security and law enforcement concerns that may be raised by foreign participation in the United States telecommunications services sector.'' The Executive Order creating CFIUS authorized it to conduct inquiries ''with respect to the potential national security risk posed by a transaction.''

48. The Commission has no discretion to ignore determinations from CFIUS and Team Telecom because they are plainly ''executive branch interagency bodies with appropriate national security expertise.'' For example, Team Telecom and the economic agencies (Department of Commerce, U.S. Trade Representative, and Department of State), recently recommended in 2018 that the Commission deny China Mobile USA's section 214 application, finding that allowing China Mobile USA to ''offer telecommunications services as a common carrier between the United States and international countries . . . would pose substantial and unacceptable national security and law enforcement risks'' because China Mobile USA is ''subject to exploitation, influence, and control by the Chinese Government.'' The Commission assessed this recommendation as part of its public interest analysis of the pending application and concluded that ''significant national security and law enforcement harms would arise from granting China Mobile USA an

international section 214 authorization'' and decided determined that a ''grant of the application would result in substantial and serious national security and law enforcement risks.'' And the Commission recently adopted rules streamlining the process by which it ''coordinates with [Team Telecom] for assessment of any national security, law enforcement, foreign policy, or trade policy issues regarding certain applications filed with the Commission.''

49. The Commission therefore disagrees with CTIA and NTCA that findings from Team Telecom or CFIUS ''are not structured to make determinations of general supply chain risk,'' because regardless of their structure, the Commission must incorporate any determinations they make into the Covered List. Huawei argues that relying on Team Telecom and CFIUS is unnecessary ''given the involvement of the agencies that comprise CFIUS and Team Telecom in other relevant bodies identified in the Secure Networks Act.'' But that argument fails to recognize that section 2(c)(1) of the Secure Networks Act specifically includes executive branch interagency bodies with appropriate national security expertise. The Commission also disagrees with CTIA's claim that determinations made by the [Federal Acquisition Security Council] should not ''result in automatic listing of items on the Covered List'' because the ''FASC does not operate in a public fashion.'' The Secure Networks Act specifically lists the Council as an executive branch interagency body with national security expertise, and the Commission has no authority to disregard Congress's clear direction. Moreover, any additions the Commission makes to the Covered List will be made public.

50. *Determinations from the Department of Commerce.* The Secure Networks Act directs the Commission to rely on determinations made by the Department of Commerce. Executive Order No. 13873 grants the Secretary of Commerce the authority to prohibit any transaction of any information and communications technology or service where the Secretary, in consultation with other relevant agency heads, determines that the transaction: (i) Involves property in which foreign country or national has an interest; (ii) includes information and communications technology or services designed, developed, manufactured, or supplied by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and (iii) poses certain undue risks to the critical infrastructure or the digital economy in the United States or certain unacceptable risks to U.S. national security or U.S. persons. In November 2019, the Department of Commerce commenced a rulemaking to implement Executive Order No. 13873. The proposed rule would authorize the Secretary to make a preliminary determination to prohibit or mitigate certain transactions, subject to a notice period before the Secretary issues a final determination.

51. Pursuant to this statutory requirement, the Commission will incorporate any final determinations from the Department of Commerce and add them to the Covered List once they are published in the **Federal Register**. Although CTIA contends that ''Commerce's implementation of the 2019 Supply Chain E.O. is replete with concerns about breadth and unpredictability,'' the Secure Networks Act does not permit the Commission the discretion to alter or ignore Department of Commerce determinations. Furthermore, administrative and judicial remedies are available should there be any disagreement with the Department of Commerce's implementation of its authority under the Secure Networks Act to make determinations, and those have no bearing here. The Commission will, therefore, comply with its statutory obligation to incorporate determinations from the Department of Commerce's proceeding into the Covered List.

52. *Determinations from the 2019 NDAA.* The third enumerated source for determinations is found in section 889(f)(3) of the 2019 NDAA. Each subpart of section 889(f)(3) contains determinations. Section 889(f)(3) of the 2019 NDAA defines ''covered telecommunications equipment or services'' to include ''(A) telecommunications equipment produced or provided by Huawei or ZTE Corporation (ZTE); (B) for the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation (Hytera), Hangzhou Hikvision Digital Technology Company (Hikvision), or Dahua Technology Company (Dahua); [and] (C) telecommunications or video surveillance services provided by such entities or using such equipment.'' Additionally, section 889(f)(3)(D) provides that covered telecommunications equipment or services includes ''[t]elecommunications or video surveillance equipment or services produced or provided by an entity that the Department of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the governments of [the People's Republic of China].''

53. As the Commission explained in the *2020 Supply Chain Second Further Notice,* the 2019 NDAA establishes four sources of determinations. The first is telecommunications equipment produced or provided by Huawei or ZTE capable of the functions outlined in sections 2(b)(2)(A)–(C) of the Secure Networks Act. The Commission ''shall place'' on the Covered List ''any communications equipment or service'' ''if, based exclusively on the determinations'' under section 2(c), such equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons'' and is ''capable'' of ''(A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles; (B) causing the network of a provider of advanced communications service to be disrupted remotely; or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.'' The Commission disagrees with NCTA and Huawei, which argue that the Commission must limit the scope of its designation because section 889(a)(2)(b) of the 2019 NDAA limits the restriction on the procurement of ''covered telecommunications equipment or services'' to equipment and services that can ''route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.'' This restriction to only certain types of equipment and services, however, applies only to section 889(a)(1) and does not extend to the definition section in section 889(f)(3). Nor does the restriction in section 889(b)(3)(B), which limits the scope of the prohibition on federal agency spending to equipment capable of routing or permitting network visibility, support NCTA or Huawei's argument. That restriction specifically applies only to subsection (b), not section 889(f). Congress explicitly limited the scope of its procurement restrictions to Huawei and ZTE equipment in subsections (a) and (b) of the 2019 NDAA to equipment

capable of routing or permitting network visibility, but did not include such a limitation in paragraph 889(f)(3), which governs the determination the Commission must incorporate onto the Covered List. To limit the NDAA determination to equipment capable of routing or permitting network visibility would both ignore the plain text of the NDAA and read section 2(b)(2)(C) out of the Secure Networks Act, which lists the capabilities of communications equipment or service that warrant inclusion on the Covered List. The Commission will thus place on the Covered List the determination found in section 889(f)(3)(A), that is, ''telecommunications equipment produced or provided by Huawei or ZTE'' capable of the functions outlined in sections 2(b)(2)(A), (B), or (C) of the Secure Networks Act.

54. The second determination the Commission will incorporate from the 2019 NDAA is video surveillance and telecommunications equipment produced by Hytera, Hikvision, and Dahua capable of the functions outlined in section 2(b)(2)(A)–(C) of the Secure Networks Act. Consistent with the Commission's proposal from the *2020 Supply Chain Second Further Notice,* it will incorporate onto the Covered List such equipment from Hytera, Hikvision, and Dahua, ''to the extent it is used for public safety or security,'' capable of the functions outlined in sections 2(b)(2)(A), (B), or (C) of the Secure Networks Act.

55. The third determination the Commission incorporates from the 2019 NDAA is ''[o]ther telecommunications or video surveillance services produced or provided by Huawei, ZTE, Hytera, Hikvision, and Dahua or using such equipment'' that are capable of the functions outlined in section 2(b)(2)(A)–(C) of the Secure Networks Act. Finally, the Commission will also include on the Covered List ''telecommunications or video surveillance equipment'' that the Department of Defense ''reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of'' China, but it is unaware of any such determination by the Department of Defense at this time.

56. *Determinations from appropriate national security agencies.* Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice,* because it is required to incorporate a specific determination made by an appropriate national security agency, the Commission will include in the definition of ''an appropriate national security agency'' any sub-agencies of the enumerated agencies provided in section 9(2) of the Secure Networks Act. The only party that commented on this subject, USTelecom, agrees that ''sub-agencies of enumerated 'appropriate national security agenc[ies]' should qualify [to make determinations under section 2(c)].''

57. *Form of determinations.* The Secure Networks Act grants the Commission no discretion to disregard determinations from any of these four enumerated sources. Although the Commission recognizes that each source may follow a different procedure to arrive at the conclusion that equipment or services, or classes of equipment or services, pose an unacceptable security risk, it nevertheless must incorporate their decisions into the Covered List. Accordingly, the Commission rejects CTIA's argument that the transparency of the originating source should control what kind of deference it gives to a national security determination, and Huawei's argument that an determination should only be incorporated if it identifies ''particular pieces or categories of equipment.'' Congress granted the Commission no authority to dictate to other agencies how to arrive at their determinations, and granted it no discretion to disregard or modify these determinations.

58. Consistent with the Commission's proposal from the *2020 Supply Chain Second Further Notice* and the text of the Secure Networks Act, it will publish, update, or modify the Covered List without providing notice or opportunity to comment. Section 2(a) of the Secure Networks Act states the Commission ''shall publish on its website [the Covered List]'' and section 2(d) states the Commission ''shall periodically update the [Covered List.]''. As the Commission stated in the *2020 Supply Chain Second Further Notice,* it reads this language ''to be mandatory—precluding us from altering the list beyond the specific updates (all tied to changes in section 2(c) determinations) required by its terms.'' Because the Commission is statutorily obligated to update the Covered List in light of new or modified determinations, it needs not provide notice *before* updating the Covered List to reflect new or modified determinations. Accordingly, when one of the enumerated sources makes a new or modified determination, the Commission will update the Covered List without first providing notice or seeking comment on these changes. To provide clear guidance for affected providers, however, the Public Safety and Homeland Security Bureau (PSHSB) will issue a Public Notice each time the Covered List is updated. The Secure Networks Act's section 3(a)(1) prohibition and section 5 reporting requirement will then apply to the communications equipment and services added to the Covered List 60 days after publication of the updated Covered List.

59. Because this notice process is based on the clear language of the Secure Networks Act, the Commission disagrees with commenters who argue this process to update the Covered List fails to provide proper notice for affected parties. Section 2(a) of the Secure Networks Act tasks the agency with publishing the Covered List no later than March 13, 2021. In taking action to publish this list, Congress clearly directs the agency to rely ''solely'' on the determinations from external sources. The Act then requires the Commission to enforce the provisions of the Act, including section 3(a)'s prohibition that applies to items on the Covered List 60 days after their inclusion. The text of the Secure Networks Act indicates Congress intended for an expedited regulatory process by establishing procedures ''so clearly different from those required by the APA that is must have intended to displace them.''

60. The Commission also disagrees with commenters who advocate for a notice period in addition to the one already provided by the Secure Networks Act to ''ensure that the Commission has an accurate factual basis upon which to make the technical determination required by the Act.'' For example, Huawei argues the notice period is crucial to ''ensure that appropriate due process protections are provided and that companies have the opportunity to respond to allegations and provide information relevant to the analyses required by the Secure Networks Act before the Commission places any equipment or services on the Covered List.'' Huawei contends that notice and comment ''from relevant stakeholders regarding the technical capabilities of equipment is a critical step for the Commission to conduct the analyses section 2(b)(2)(A) and (B) require.'' But under the Secure Networks Act, the Commission merely accepts the determination from the enumerated source and then add to the Covered List all communications equipment or service from that determination that is capable of the functions outlined in section 2(b)(2)(A)–(C). The Commission does not conduct its own analysis of the national security threat the equipment or services identified by these enumerated sources pose to the communications supply chain; the Secure Network Act requires the Commission to be deferential to the

source agency providing the determination. In addition, there is no need to solicit public comment when the Commission performs no technical analysis prior to including equipment or services on the Covered List.

61. To the extent necessary, the Commission also finds good cause to deviate from the standard rulemaking or formal adjudication process when publishing or updating the Covered List in response to determinations. As the Commission tentatively found in the *2020 Supply Chain Second Further Notice,* ''the Commission's placement of the equipment or service on the Covered List . . . is a non-discretionary, ministerial act.'' Because the Secure Networks Act provides the Commission no discretion when incorporating determinations onto the Covered List, its action is not subject to the notice and comment provisions of the APA. While the Commission expects that the source of the determination will either provide some opportunity for notice and comment prior to making the determination or have a justifiable reason, such as valid national security concerns, for deviating from this process, regardless of the process provided by the source of the determination, the Commission has no discretion to deviate from its role to publish and update the Covered List. When an enumerated source makes a determination that communications equipment or services pose an unacceptable risk to the national security of the United States or the security and safety of United States persons, the Commission will include it on the Covered List without seeking comment.

62. When the Commission publishes or updates the Covered List, it will do so in response to a new or modified determination from an agency specifically enumerated by the Secure Networks Act. The Commission itself changes or creates no new rule when doing so. Whether the determination originated from a process where the opportunity for notice and comment was present is irrelevant to the ministerial function the Commission performs by updating the Covered List. The Commission accordingly rejects NTCA's suggestion that it should use its designation process under § 54.9 of the Commission's rules in the Secure Networks Act designation process, as that view is untethered from the statutory requirements. The Commission therefore rejects arguments to the contrary, as inconsistent with and undermining the statutory process.

63. Moreover, inclusion on the Covered List does not mean providers are immediately prohibited from using the communications equipment—the Act's prohibition applies 60 days after the equipment or services are included on the Covered List. Similarly, such communications equipment or service must be reported pursuant to the reporting requirement in section 5 of the Secure Networks Act 60 days after the communications equipment or service has been placed on the Covered List. When updated, the PSHSB will issue a public notice indicating that the Covered List has been updated. Providers, manufacturers, and other interested parties will then have 60 days' notice before the prohibition and reporting requirement take effect and may in that time period seek whatever relief they believe is appropriate.

64. The Commission also disagrees with commenters who believe it should implement a notice period to allow time for industry to provide feedback to the Commission regarding potential effects of adding communications equipment and services to the Covered List. For example, NCTA believes the Commission should implement a ''notice and interim transition period prior to placement of new equipment or services on the list.'' Under this program, the Commission would allow industry to ''apprise the Commission of any potential impacts of its proposed updates or seek clarification regarding models of equipment or components that would be covered by the update.'' Dell argues that the Commission should seek ''confidential industry advice from trusted domestic technology companies . . .'' in order to ''establish the level of specificity that is required to determine the threat posed by equipment or service[s].'' Because the prohibition on the use of federal subsidies will not take effect until 60 days after the equipment or service's inclusion on the Covered List, the Act already provides a time period for industry to review and take appropriate action. Moreover, any interim period proposal ignores the plain language of the Secure Networks Act. If a designated government agency determines that communications equipment or services pose a threat to national security of the safety and security of United States persons, the Commission has no discretion and must add this equipment or service to the Covered List. The Commission rejects Huawei's arguments to the contrary, as they assume a degree of discretion it simply lacks under the statute.

65. Section 2(b) of the Secure Networks Act states that the Commission ''shall place'' on the Covered List ''any communications equipment or service'' that (1) ''is produced or provided by any entity'' ''if, based exclusively on the determinations'' from section 2(c), ''such equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons'' and (2) is ''capable'' of ''(A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles; (B) causing the network or a provider of advanced communications service to be disrupted remotely; or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.'' The Commission anticipates that some determinations will list specific communications equipment or services that ''pose[ ] an unacceptable risk to the national security of the United States and the security and safety of United States persons'' and others will list general categories or classes of equipment that pose such a risk. In the case of the former, the Commission will incorporate these national security determinations onto the Covered List automatically. With the latter, the Commission will incorporate these determinations onto the Covered List to the extent the class or category of equipment or service identified is ''capable'' of the 2(b)(2)(A)–(C) criteria.

66. *Specific determinations based on the section 2(b)(2)(C) criteria.* If a determination indicates that a specific piece of equipment or service poses an unacceptable risk to the national security of the United States and the security and safety of United States persons, the Commission will automatically include this determination on the Covered List. The Commission takes this approach because of the plain language in section 2(b)(2)(C) which lists, among other equipment or service capabilities mandating inclusion on the Covered List, whether the equipment or service poses an unacceptable risk to the national security of the United States or the security and safety of United States persons. If an enumerated source has already performed this analysis as part of its determination, the only action the Commission needs to take is to incorporate this determination onto the Covered List. The Commission notes that USTelecom agrees with this simple process because, when a national security determination makes a ''granular determination about 'covered equipment' the Commission is bound to accept it.'' The Commission's role is

limited to serving as ''the custodian of such determinations.''

67. The Commission rejects Huawei's arguments that section 2(b)(2)(C) should be interpreted more narrowly. Huawei argues the canon of surplusage dictates that, should the Commission automatically include equipment or services that have been explicitly deemed a national security threat by an enumerated source, it would read out of the statute the technical analysis found in sections 2(c)(2)(A) and (B). But it is Huawei's reading that gives no meaning to section 2(b)(2)(C), which requires inclusion on the list of any communications equipment or services subject to a national security determination if it ''otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.'' Huawei then claims a different canon, ejusdem generis, requires the Commission to use section 2(b)(2)(C) only to modify equipment subject to sections 2(b)(2)(A) and (B), but that would again would essentially read section 2(b)(2)(C) out of the statute. These arguments center around Huawei's contention that, by incorporating onto the Covered List specific determinations of particular pieces of equipment or services, the Commission is disregarding sections 2(b)(2)(A) and (B) because it would neglect to conduct a required analysis of the capabilities of equipment and service it includes on the Covered List. Those sections play an important role in determining which specific pieces of equipment or services belong on the Covered List when the Commission receives a more general determination. But when a determination covers a specific piece of equipment or service and the agency has indicated that such equipment or service poses a national security risk, the Commission is obligated to include it on the Covered List, particularly because one of the three capabilities that warrant inclusion on the list is whether the equipment or service is capable of ''otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.'' The Commission therefore rejects Huawei's argument that it claims the Secure Networks Act gives the Commission a ''broad, roving license'' to make national security decisions. Section 2(b)(2)(C) provides that ability to other agencies or Congress. The Commission's actions in this scenario are non-discretionary and ministerial. If the determination is specified to a particular piece of communications equipment or service, the Commission has no discretion to exclude that determination from the Covered List.

68. *Determinations identifying broader classes or categories of equipment or services.* In the *2020 Supply Chain Second Further Notice,* the Commission sought comment on how best to incorporate determinations that are made at ''different levels of granularity.'' Because the Commission will rely on determinations from other government agencies and sources, not every determination will be conveyed with the same level of specificity. When the Commission identifies a broader determination from a section 2(c) source that a class or category of communications equipment or service poses an unacceptable national security risk, the Commission will publish it on the Covered List to the extent the equipment or service identified is capable of the section 2(b)(2)(A)–(C) criteria. The Commission believes this procedure is best viewed through the lens of the determination the Commission received from section 889(f)(3)(A) of the 2019 NDAA. Congress provided the Commission with the determination that all ''telecommunications equipment produced or provided by Huawei or ZTE C (or any subsidiary or affiliate of such entities)'' poses a threat. This broader determination refers a class of equipment or service—telecommunications equipment produced or provided by Huawei or ZTE—but did not specify which specific pieces of communications equipment or services to add to the Covered List. In this case, and likewise when the Commission receives similarly broad determinations in the future, it will include on the Covered List ''telecommunications equipment produced by Huawei or ZTE that is capable of (A) routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles, (B) causing the networks of a provider of advanced communications service to be disrupted remotely, or (C) otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.''

69. This method for incorporating broader classes of equipment and services into the Covered List relies on the expertise and determinations of enumerated sources, and is supported by CTIA and USTelecom, which argue for a ''whole-of-government approach, led by DHS and supported by Commerce.'' By adopting this approach and continuing to be deferential to the enumerated sources making the determination, the Commission will ''continue to work closely with Executive Branch entities with expertise and responsibilities concerning telecommunications security, including supply chain security.''

70. The Commission disagrees with commenters who argue that more general determinations should not trigger inclusion on the Covered List. Huawei commented that ''the specified agencies must identify *particular* pieces or categories of equipment that, in their view, 'pose[ ] an unacceptable risk.'' Huawei believes that because the Secure Networks Act does not define ''specific,'' the Commission must use the ordinary meaning of the word, which is understood as ''constituting or falling into a specifiable category, restricted to a particular individual, situation, relation, or effect; free from ambiguity.'' Thus, Huawei asserts that the references to ''specific determinations'' in section 2(c) mean that only determinations as to individual types of equipment or services trigger the Commission's obligations to include such equipment or services on the Covered List. Huawei argues that ''[g]eneral guidance or mere expressions of concern regarding particular manufacturers or types of equipment does not constitute a 'specific determination' upon which the Commission can rely.'' The Commission disagrees. The Commission interprets the Secure Networks Act to require ''specific determinations'' to have a level of specificity sufficient to allow the Commission to incorporate the determination onto the Covered List. Should the Commission identify a determination, for example, that failed to indicate the source or type of communications equipment or service that the originating source found potentially insecure, it would be unable to incorporate this generic determination onto the Covered List. If, however, the originating source identifies a class or category of communications equipment or service, even at a broad level, such a determination provides the Commission enough information to include it on the Covered List. Furthermore, with more general determinations, the Commission does not place on the Covered List, for example, ''all Huawei equipment or services.'' Instead, the Commission limits inclusion on the Covered List to a specifiable category of Huawei equipment or services capable of the functions outlined in 2(b)(2)(A)–(B) or that otherwise poses an unacceptable

risk to the national security of the United States or the security and safety of United States persons. When the Commission identifies a determination, the Covered List will include the determination, subject to the 2(b)(2)(A)–(C) criteria.

71. The Secure Networks Act does not require the Commission to conduct a technical analysis of the communications equipment or service prior to including it on the Covered List. Section 2(b) merely states that, upon receipt of a determination from an enumerated source, the Commission ''shall place'' on the Covered List only the communications equipment and service from that determination that is capable of the functions outlined in section 2(b)(2)(A)–(C). That is precisely what the Commission will do. Accordingly, the Commission rejects the arguments of commenters that contend it should conduct various technical analyses. The Covered List, as NTCA requests, will serve as a ''single source for covered [ ] equipment and service.'' To the extent NTCA argues for additional specificity, it is not required by the text of the Secure Networks Act.

72. *Definition of ''capable'' for incorporation on the Covered List.* Section 2(b) requires the Commission to place on the Covered List communications equipment or service if, among other requirements, it is ''capable'' of the functions or impacts set forth in section 2(b)(2)(A)–(C). Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice,* it interprets ''capable'' for the purposes of fulfilling section 2(b)(2)(A)–(C), to include equipment or service that can possibly perform these functions, even if the subject equipment or service is not ordinarily used to perform the functions in section 2(b)(2)(A)–(C). The Commission takes this approach because it is unwilling to risk the deployment of unsecure equipment or services that would occur if it defined ''capable'' too narrowly. The term ''capable'' as presented in the Secure Networks Act is ambiguous and the Commission interprets it in light of the goals of the statute.

73. Although the Commission disagrees with Huawei that its decision to define ''capable'' broadly is ''misguided,'' it agrees that a piece of equipment or service's capabilities ''refers to the *present* functionality of equipment or a service'' as that is the ordinary interpretation of that word. The Commission's interpretation of ''capable'' tracks the word's definition in the Merriam-Webster Dictionary—''having traits conducive to or features permitting something.'' In patent law, where ''a claim [ ] recites capability and not actual operation, an accused device 'need only be capable of operating' in the described mode.'' ''The meaning of 'capable of' is explained as . . . 'the ability to perform.'' For the purposes of including communications equipment and services on the Covered List, the Commission defines ''capable'' to include the current possible uses of equipment or service. The Commission's approach does not extend this definition to the functionalities of communications equipment or services should they be modified in the future. The Commission's broad definition of ''capable'' in this context alone does not, as Huawei suggests, unreasonably extend the definition to equipment or services ''*potentially* having such attributes after modification.'' The Commission merely declines to narrow the scope of communications equipment or service's capability to the equipment or service's marketed use. To do otherwise would allow potentially insecure equipment or service to remain in communications networks.

74. *Clarifying inclusion on the Covered List.* The Commission also sought comment in the *2020 Supply Chain Second Further Notice* on a process to allow interested parties to clarify whether a specific piece of communications equipment or a specific service is included on the Covered List. Some commenters argue that the Commission should consider mechanisms to provide transparency on which specific pieces of communications equipment and service are included on the Covered List. As with any Commission proceeding, providers of advanced communications service and other interested parties may seek a declaratory ruling to ''terminat[e] a controversy'' or ''remov[e] uncertainty.'' To the extent a party is uncertain whether a specific piece of equipment is subject to a determination under section 2(c) of the Secure Networks Act, the party may seek a declaratory ruling. That said, the Commission lacks discretion to modify a determination under section 2(c), and it is skeptical that any equipment that an enumerated source has determined ''poses an unacceptable risk to the national security of the United States or the security and safety of United States persons'' would not also, at a minimum, ''pos[e] an unacceptable risk to the national security of the United States or the security and safety of United States persons.''

75. Once the Commission publishes the Covered List, PSHSB will issue a public notice indicating that the Covered List has been revised and that the section 3(a) prohibition and section 5(a) reporting requirement will take effect for communications equipment and service on the Covered List 60 days later. Pursuant to the Secure Networks Act, the Commission ''shall periodically update the [Covered List] to reflect changes in the determinations described [in section 2(c)].'' If one of the sources for determinations changes or modifies a determination, the Commission will update the Covered List accordingly. The Commission notes, however, that it has no discretion to reverse or modify determinations from other sources as the statute requires the Commission to accept and incorporate the determinations as provided. Should interested parties seek to reverse or modify the scope of one of these determinations, the party should petition the source of the determination.

76. Section 2(d) of the Secure Networks Act concerns how the Covered List should be updated to reflect new or revised determinations of covered communications equipment or services. Congress directed the Commission to ''periodically update the [Covered List] to reflect changes in the determinations described [in section 2(c)].'' In addition, the Commission ''shall monitor the making or reversing of the determinations'' from the enumerated sources in order to ''place additional communications equipment or services on the [Covered List] or to remove communications equipment and services from such list.'' If any of these determinations are reversed, the Commission ''shall remove such equipment or service from the list . . .'' unless the equipment or service's inclusion on the Covered List is based on a determination received from another enumerated source. Section 4(f) of the Secure Networks Act, discussed *infra,* provides options for when communications equipment or services are removed from the Covered List following an update or revocation of any determination. Secure Networks Act § 4(f). Finally, the Commission must notify the public for every twelve-month period during which the Commission does not update the Covered List. The Commission must indicate that ''no updates were necessary during such period to protect national security or to address changes in the determinations . . . .''

77. *No updates to Covered List unless Commission receives new or modified determination.* In the *2020 Supply Chain Second Further Notice,* the Commission sought comment on ''the process to update and publish the Covered List and solicit ideas and best

practices for ways to maintain the Covered List and keep it current and readily available.'' The Commission interpreted the Secure Networks Act to not give its discretion to make any updates to the Covered List outside of determinations made by the sources enumerated in section 2(c). The Commission noted that the text of section 2(d) ''does not appear to give it discretion not to update the Covered List based on changes in determinations, and hence it would be unclear what purpose a notice period would serve.''

78. The Commission believes the best interpretation of the Secure Networks Act is that it does not grant its authority to update the Covered List outside of these national security determinations, and thus, the Commission will make no changes or modifications to the Covered List unless it identifies a new or modified determination of covered communications equipment or services from any of the sources identified in section 2(c) of the Act. If one of the sources issues a new or modified determination, the Commission will update the Covered List to reflect this change. Once the Commission updates the Covered List, the PSHSB, in conjunction with WCB, will issue a Public Notice declaring that the Covered List has been updated to reflect a new or modified determination. This approach is consistent with NCTA's desire for the Commission to ''provide clear and prominent notice of decisions to remove vendors of equipment items from the Covered List.'' If the Commission identifies no updates or modifications in any twelve-month period, PSHSB shall issue a Public Notice indicating that ''no updates were necessary during such period to protect national security or to address changes in the determinations . . . .''

79. Section 3 of the Secure Networks Act prohibits funding from Federal programs made available to subsidize capital expenditures necessary for the provision of advanced communications service from being used to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered equipment or service previously purchased, rented, leased, or otherwise obtained. Currently, § 54.9 of the Commission's rules imposes a similar prohibition on the spending of USF support, yet broadly applies to equipment and services produced or provided by entities designated as posing a national security threat to the integrity of communications networks or the communications supply chain. In the *2020 Supply Chain Declaratory Ruling and Second Further Notice,* 85 FR 47211, August 4, 2020 and 85 FR 48134, August 10, 2020, the Commission found that § 54.9 substantially implements the prohibition under section 3 of the Secure Networks Act, but it nonetheless proposed a new rule, independent of § 54.9, to align the Commission's rules with the scope of the prohibition found in the Secure Networks Act. The Commission sought comment on that proposal and an effective period of 60 days after communications equipment or services are placed on the Covered List. The Commission also sought comment on the impact of the proposed rule on multiyear contracts or contracts with voluntary extensions between USF recipients and companies producing or providing communications equipment or services posing a supply chain security risk, if any such contracts exist.

80. Consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice,* it adopts a rule to enact section 3 of the Secure Networks Act by prohibiting the use of Federal subsidies made available through a program administered by the Commission and that provides funds to be used for the capital expenditures necessary for the provision of advanced communications service to purchase, rent, lease, or otherwise obtain any communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, and identified and published on the Covered List.

81. The new rule the Commission adopts, codified at § 54.10, prohibits the use of a Federal subsidy made available through a program administered by the Commission that provides funds for the capital expenditures necessary for the provision of advanced communications service to purchase, rent, lease, or otherwise obtain any covered communications equipment or service identified and published on the Covered List, or maintain any such covered communications equipment or service previously purchased, rented, leased, or otherwise obtained. The Commission has interpreted section 3 of the Secure Networks Act as intending to apply to all universal service programs but not other Federal subsidy programs to the extent those programs may tangentially or indirectly involve expenditures related to the provision of advanced communications service. The Commission acknowledges that there will be two processes to designate equipment or services as prohibited from federal funding—one for the designation of an entity as posing a national security threat to the integrity of communications networks or the communications supply chain, and one for the designation of specific equipment and services through the Covered List process outlined in section 2 of the Secure Networks Act. Certain equipment or services may be subject to either or both the prohibition under § 54.9 of the Commission's rules and the new § 54.10 prohibition enacting section 3 of the Secure Networks Act. Parties subject to these requirements are responsible for complying with both prohibitions, as applicable, and in accordance with any applicable effective dates. The Commission finds that the prohibitions in §§ 54.9 and 54.10 of the Commission's rules are consistent with, and fully implement, section 3(a) of the Secure Networks Act. In the *2020 Supply Chain Declaratory Ruling,* the Commission found that it satisfied the requirement to implement the section 3(a) prohibition within 180 days of enactment of the Secure Networks Act through its action in the *2019 Supply Chain Order;* therefore, the Commission's action has no bearing on section 3(b)'s implementation deadline. The new prohibition encompasses covered equipment and services found on or added to the Covered List, while the existing prohibition in § 54.9 applies to a somewhat overlapping group of products or services from companies designated as posing a threat to national security. As the Commission stated in the *2020 Supply Chain Second Further Notice,* the addition of § 54.10 will grant the Commission two different designation processes, ''one for the designation of an entity, as currently provided by [§ 54.9 of] the Commission's rules, and another, more targeted process, for the designation of specific communications equipment and services per section 2 of the Secure Networks Act.'' The new prohibition further applies to any funding programs administered by the Commission made available to subsidize capital expenditures for the provision of advanced communications service, including any future USF programs, whereas § 54.9 is limited to USF support. RWA recommends that the Commission apply the prohibition to both ''USF programs that fund capital expenditures and to USF programs that fund operational expenditures'' to encompass the broadest range of risky or compromised equipment. The Commission clarifies that, through both prohibitions under §§ 54.9 and 54.10 of the Commission's rules, the rules apply, respectively, to both USF funds and to Federal subsidies administered by the

Commission that provide funds for capital expenditures used for the provision of advanced communications services, which it has interpreted to mean universal service programs. Both prohibitions apply to all universal service funding from all current USF programs. The Commission believes that this approach will comprehensively encapsulate the universe of products and services that pose a risk to our nation's communications systems and prohibit spending of public funds consistent with congressional intent.

82. The two rules are intended to complement each other, and compliance should not impose additional burdens on providers of advanced communications service. CTIA raises concerns about the overlap of the two prohibitions, specifically that parties subject to both requirements are responsible for compliance with both prohibitions, and urges the Commission to ''promote consistency, pursue transparency, and work with agencies that have expertise on supply chain and national security.'' Although there is some overlap between the two prohibitions, the Commission believes that the rules are straightforward and transparent in their applicability to entities, funding, and equipment or services such that providers are able to comply. For example, the equipment and services designated under each rule will be published in accordance with the respective requirements (*i.e.,* the Commission's website for § 54.9, or the Covered List for § 54.10) such that entities can identify which equipment or services are subject to each prohibition.

83. CTIA urges the Commission to limit the new prohibition to subsidies under the USF programs, rather than expanding to include ''other programs administered by the Commission that primarily support the provision of advanced communications services'' and requests that the rule explicitly state the limitation to USF. The Commission finds additional limitation would be misplaced given its previously stated interpretation of the statute and its applicability. Furthermore, the Commission is compelled by the clear and direct language of the statute to make the language of § 54.10 potentially broader than USF programs. Section 3 of the Secure Networks Act applies only to Federal subsidies administered by the Commission used for capital expenditures necessary for the provision of advanced communications services which, as stated in the *2020 Supply Chain Declaratory Ruling,* the Commission interprets to encompass universal service programs. Consistent with the *2020 Supply Chain Declaratory Ruling,* the Commission reiterates that the prohibition does not apply to the Interstate Telecommunications Relay Service (TRS) Fund, as the TRS Fund does not subsidize capital expenditures necessary for the provision of advanced communications services. However, to the extent Congress creates additional programs in the future that provide a Federal subsidy administered by the Commission that provides funds to be used for capital expenditures necessary for the provision of advanced communications services, they would appear to fall under the prohibition in section 3 of the Secure Networks Act, and it would expect that § 54.10 would apply to those programs as well.

84. Consistent with the Commission's decision not to grandfather existing contracts under § 54.9 in the *2019 Supply Chain Order,* the Commission also declines to grandfather existing contracts for equipment or services on the Covered List under § 54.10 of the Commission's rules. Exempting or excluding covered equipment or services purchased under existing multiyear contracts would negate the purpose behind the Commission's rule in contravention of the clear and direct language in section 3 of the Secure Networks Act. Dell ''urge[s] the Commission to prioritize risk factors before contractual obligations,'' and the Commission believes its decision advances that directive. Furthermore, although NCTA supports grandfathering existing equipment acquired pursuant to multiyear contracts except in instances where the authorized Federal body making the risk determination cites compelling evidence of an ongoing threat to national security, the Commission finds that, given the process by which the referring agencies or entities make such determinations that trigger inclusion of equipment and services on the Covered List, it finds that there is compelling evidence that equipment and services on the Covered List do pose such a threat, and grandfathering is not warranted.

85. NCTA urges the Commission to avoid an ''unfair retroactive effect'' by grandfathering existing equipment acquired pursuant to multiyear contracts in certain circumstances. The Commission disagrees with NCTA's assessment of the rule's effect. Section 3 of the Secure Networks Act does not, in itself, require a future action that generates a retroactive effect; it merely prohibits prospective use of certain Federal subsidies to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List. As such, there can be no primary retroactivity in restricting the use of future Federal subsidies for covered equipment or services provided pursuant to existing contracts. Furthermore, the Commission relies on the presumption that, in passing the Secure Networks Act, Congress intended to apply section 3 to existing contracts absent manifest injustice. The Commission determines that the record does not support a finding of manifest injustice. Therefore, absent such a showing, the Commission declines to adopt a grandfathering exception to § 54.10.

86. Some commenters favor grandfathering existing equipment contracts in order to promote predictability and minimize network disruptions, and propose alternatives to allow for grandfathering in certain situations. For instance, CTIA suggests that rather than attempting to define *ex ante* what kinds of arrangements qualify for grandfathering, the Commission should ''exercise its discretion and work with the regulated community to build in permissible grandfathering that is consistent with fair process and sensible regulatory practice.'' NCTA further asks that the Commission clarify that ''where a provider has already been selected to provide services that receive USF support, the support will not end 60 days after equipment or services are added to the Covered List.''

87. The Commission declines to adopt these alternative proposals. The Commission finds that the urgency of the threat that allowing covered equipment and services to remain in its communications networks poses to our national security outweighs the potential burdens associated with failure to grandfather or exempt certain contracts. Because such exemptions would create security loopholes to the effectiveness of the prohibition, the Commission rejects commenters' proposals to grandfather existing equipment contracts for covered equipment or services.

88. *Effective date.* The prohibition on the use of Federal subsidies under § 54.10 of the Commission's rules that the Commission adopts takes effect 60 days after any particular communications equipment or services are placed on the Covered List, consistent with the Secure Networks Act. Furthermore, adopting a 60-day period between placement on the Covered List and the effectiveness of the prohibition on funds appropriately balances the consideration of the

compelling national security interests to promptly remove insecure equipment and services from the Commission's networks against the burdens on advanced communications service providers to identify covered equipment and services and make any adjustments to alternative funding to effectuate the prohibition. The Commission will require recipients of universal service support from each of the four USF programs to certify that they have complied with its new rule prohibiting the use of Federal subsidies for equipment and services on the Covered List.

89. Some commenters raise concerns about the 60-day period between when items are placed on the Covered List and when the prohibition under § 54.10 takes effect, and many propose alternatives. NTCA suggests that providers continue receiving USF support until federal funding is available to reimburse for the cost of replacement or the provider replaces the equipment in the normal course of business. CCA urges the Commission to be mindful of the strains the current public health crisis has placed on small and rural wireless carriers and advocates for a transition timeline that allows carriers to demonstrate progress through milestones. NCTA proposes the creation of a safe harbor ''for providers that are making a reasonable, good-faith effort to transition away from newly-banned equipment but cannot meet the 60-day removal timetable without significant disruptions to network operations or service delivery.''

90. The Commission disagrees with these commenters' assessments of the impact of the 60-day effective date of the § 54.10 prohibition and therefore declines to adopt their alternative proposals. First, setting the effective date of the prohibition at 60 days after covered equipment is placed on the Covered List is statutory, and the rule the Commission adopts codifies an effective date consistent with the statute. Second, the rule prohibits the use of Federal subsidies to purchase, rent, lease, or otherwise obtain covered communications equipment or service, or maintain covered communications equipment or service previously purchased, rented, leased, or otherwise obtained on the Covered List; it does not directly speak to a deadline to remove or replace that equipment. The Commission addresses issues regarding the transition periods for removal and replacement of covered equipment and services under the Reimbursement Program in this document. To the extent providers request a transition period to secure alternative funding, similar to the Commission's decision in the *2019 Supply Chain Order,* it finds that there is a compelling interest in protecting our national security, which necessitates prompt implementation of the prohibition. § 54.9 of the Commission's rules took effect immediately upon publication in the **Federal Register** because of the national security interests in moving expeditiously. The Commission is not granted the discretion to waive a statutory mandate; however, it believes 60 days is sufficient based on its experience with the effective date of § 54.9. Therefore, the Commission finds that 60 days is sufficient notice to prohibit spending of Federal subsidy funding on equipment and services added to the Covered List.

91. The Commission in the *2019 Supply Chain Further Notice* proposed a program to reimburse ETCs for reasonable transition costs associated with the removal and replacement of equipment and services produced or provided by entities posing a national security threat as designated by the process outlined in § 54.9 of the Commission's rules. Subsequently, the President signed into law the Secure Networks Act requiring the Commission to establish the Reimbursement Program. WCB then released a public notice seeking comment on the applicability of the Secure Networks Act on the Commission's proposed reimbursement mechanism.

92. The reimbursement program required by the Secure Networks Act largely mirrors the Commission's original proposal in purpose and process. Both are focused on reimbursing entities for the removal and replacement of equipment and services posing a national security risk. Both envision a reimbursement process focused on initial cost estimates and including procedures to protect against waste, fraud, and abuse. But there are also noticeable differences. For example, the Commission initially proposed limiting eligibility to ETCs, while the Secure Networks Act expands eligibility beyond ETCs to include all providers of advanced communications service with two million or fewer customers. The process for designating covered equipment and services also differs, which could change the scope of reimbursable expenses for the removal, replacement, and disposal of such equipment and services under the Commission's proposal versus the program required by Congress. The Commission concludes the Reimbursement Program effectively supersedes the Commission's original proposal, and it conforms it to the requirements set forth in the Secure Networks Act.

93. The Commission now establishes, as directed by the Secure Networks Act, the Reimbursement Program to reimburse the costs reasonably incurred by providers of advanced communication services with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks. The Commission will allow eligible providers to obtain reimbursement to remove and replace older covered communications equipment with upgraded technology and will reimburse providers for certain transition expenses incurred prior to the creation of this program. The Commission requires program participants to submit estimated costs to receive funding allocations. Recipients can then obtain funding disbursements on a rolling basis upon a showing of actual expenses incurred.

94. If aggregate demand exceeds available funding, the Commission will prioritize funding for ETCs and expenses for transitioning core networks over non-ETCs and non-core network transition expenses. Program recipients will have one year from the initial funding disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment. The Commission may grant a single, general six-month extension for all recipients and/or individual extensions of time if circumstances warrant. The Commission also adopts a number of measures as directed by the Secure Networks Act to combat waste, fraud, and abuse, including the filing of status updates, spending reports, and a final certification, requiring documentation retention, audits, reviews and field inspections, and seeking the repayment of disbursed funds for violations of the Secure Networks Act and the Reimbursement Program rules in addition to taking other possible enforcement actions.

95. *Eligible Providers.* As directed by section 4 of the Secure Networks Act, the Commission limits eligibility for the Reimbursement Program to providers of advanced communication service with two million or fewer customers. The Secure Networks Act identifies advanced communication service providers as providers of advanced telecommunications capability as defined in section 706 of the Telecommunications Act of 1996 (Telecommunications Act). Advanced telecommunications capability is defined in section 706 of the Telecommunications Act ''without

regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.'' As Blue Danube correctly notes, the advanced communications service term in the statute is ''straight forward.'' If Congress were to pass additional legislation defining eligibility for the reimbursement program, the Commission would modify its eligibility requirements.

96. The Commission has historically interpreted providers of advanced telecommunications capability, and thus providers of advanced communications services, to mean facilities-based providers, whether fixed or mobile, with a broadband connection to end users with at least 200 kbps in one direction. This standard is used by the Commission to identify providers required to report broadband deployment using the FCC Form 477. The few commenters addressing this issue generally support the use of this same speed threshold to determine providers of advanced communications service. Using this standard will maximize the pool of eligible applicants and help assist with the removal of insecure equipment that is older and slower than newer, more technologically up-to-date equipment from our Nation's interconnected networks.

97. Separately, for purposes of the Reimbursement Program, a school, library or health care provider, or consortium thereof, may also qualify as a provider of advanced communications service, and therefore be eligible to participate in the Reimbursement Program, if it provisions facilities-based broadband connections of at least 200 kbps in one direction to end users, which could include students, patrons, patients, or member institutions in the context of cooperative infrastructure sharing arrangements. This clarification addresses the concerns raised by Northern Michigan University as it seeks to remove and replace covered equipment from its LTE network that serves ''over 15,000 NMU students, K–12 families, and community members.'' However, a school, library, or health care provider that merely purchases advanced telecommunications or information services and is not a facilities-based network provider of services is not considered a provider of advanced communications services for purposes of the Reimbursement Program. Accordingly, the Commission disagrees with RWA's suggestion to interpret the statute to allow reimbursement eligibility for entities that only purchase but do not provide advanced communications services.

98. The Commission also takes this opportunity to clarify the demarcation point between eligible and non-eligible advanced communications service providers, *i.e.,* those with fewer than two million customers. The Secure Networks Act defines ''customers'' to mean ''with respect to a provider of advanced communications service—(A) the customers of such provider'' as well as the ''customers of any affiliate . . . of such provider.'' The statute references the definition of ''affiliate'' contained in section 3 of the Communications Act, which reads ''a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.'' The definition of affiliate further states ''[f]or purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent.''

99. The Commission reads the phrase ''customers of such provider'' and ''customers of any affiliate'' as having more than one possible interpretation. The language could refer only to those customers purchasing advanced communications service or could refer to any customer of the provider or affiliate regardless of the service or product purchased. The accompanying House Report states ''[s]ection 4 requires the FCC . . . to reimburse providers of advanced communications service with 2 million or fewer subscribers.'' This language suggests an intention to focus on the subscribers of the provider that purchase advanced communications service in determining eligibility. The House Report also states the Reimbursement Program is established ''to assist small communications providers with the costs of removing prohibited equipment and services from their networks.'' By limiting the meaning of ''customer'' to those purchasing advanced communications service, potentially a large company with a small number of advanced communications service customers could qualify for the Reimbursement Program. Given the overall intent of the program to assist with the removal of equipment and services posing a national security risk and the language in the House Report, the Commission chooses to interpret customer narrowly, which in turn will increase the pool of eligibility for the program. Accordingly, the Commission interprets ''customers of such provider'' and ''customers of any affiliate'' to mean those customers taking advanced communications service from the provider and its affiliates. A provider seeking to participate in the Reimbursement Program must have two million or fewer customers, as of the date its application is filed. If the provider's number of customers increases above two million after its application is filed, they will not lose their eligibility to participate in the Reimbursement Program by virtue of the customer increase.

100. To identify customers of advanced communications service, providers must count those customers purchasing a service that includes a broadband connection with a speed of at least 200 kbps in one direction. The Secure Networks Act states an advanced communications service has the meaning given the term advanced telecommunications capability. The Commission has historically interpreted ''advanced telecommunications service'' to mean a service with a broadband connection of at least 200 kbps in one direction. Accordingly, the Commission directs providers to count customers of broadband service meeting or exceeding this speed threshold for purposes of program eligibility. A subscriber merely purchasing traditional plain old telephone service would therefore not count as a subscriber of advanced communications service.

101. Lastly, to be eligible, the Secure Networks Act requires providers filing applications to make specific certifications per section 4(d)(4). Applicants must certify that ''as of the date of the submission of the application, the applicant—(i) has developed a plan for—(I) the permanent removal and replacement of any covered communications equipment or service that are in the communications network of the applicant as of such date; and (II) the disposal of the equipment or services removed . . . and has developed a specific timeline . . . for the permanent removal, replacement, and disposal of the covered communications equipment or services identified . . . , which timeline shall be submitted to the Commission as part of the application.'' The applicant must also certify on the date of its application's approval that it ''will not purchase, rent, lease, or otherwise obtain covered communications equipment or services, using reimbursement funds or any other funds (including funds derived from private sources); and . . . will consult and consider the standards, guidelines, and best practices set forth in the cybersecurity framework developed by the National Institute of Standards and Technology . . . in developing and tailoring the risk management practices

of the applicant.'' The Commission directs WCB to incorporate these certifications as part of the application submission process to ensure applicants are eligible for the Reimbursement Program.

102. *Covered Communications Equipment or Services.* The Secure Networks Act allows eligible providers to seek reimbursement for expenses associated solely with the permanent removal, replacement, and disposal of ''covered communications equipment or services'' as designated per section 2(a) of the Secure Networks Act. Specifically, eligible providers may seek reimbursement funds to remove, replace, and dispose of ''covered communications equipment or services purchased, rented, leased or otherwise obtained'' before August 14, 2018 if on the initial list published by the Commission, or no later than 60 days after the Commission adds further equipment and services to the initial list. Recipients are prohibited from using reimbursement funds to remove, replace, or dispose of covered communications equipment or service purchased, rented, or leased or otherwise obtained after these statutory cutoff dates. The Commission has no discretion to deviate from the scope of covered communications equipment or services provided under the Secure Networks Act. Accordingly, to the extent the Commission's original proposal in the *2019 Supply Chain Further Notice* suggested limiting eligibility to a broader or narrower category of equipment and services, it now instead follows the requirements contained in the Secure Networks Act.

103. As proposed in the *2019 Supply Chain Further Notice,* the Reimbursement Program will reimburse costs reasonably incurred for the removal, replacement, and disposal of covered equipment and services in accordance with the Secure Networks Act. The Commission notes that the Reimbursement Program does not modify rules that govern how universal service funds may be used in the various universal service programs. ETCs will still be required to certify, for example, that federal high-cost support was used only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. The reasonableness standard the Commission adopts is consistent with the standard applicable to the broadcast incentive auction reimbursement mechanism. This standard is also consistent with approach taken in the *Emerging Technologies* framework when assisting existing operators with relocation costs in transitioning to new facilities. A standard of reasonableness will provide the Commission with a sensible approach for evaluating reimbursement costs to help combat waste, fraud and abuse through the exclusion of excessive and otherwise unreasonable costs from the Reimbursement Program.

104. The Secure Networks Act does not expressly establish a standard for evaluating costs for reimbursement. The statute simply requires the Commission to reimburse providers for the permanent removal, replacement, and disposal of covered communications equipment and services. The Commission therefore proposed to apply a standard of reasonableness when evaluating requests for reimbursement. One commenter, the Rural Wireless Broadband Coalition, urged the Commission to ''follow the principle'' of reimbursing any reasonable cost. Other commenters, while not engaging directly with the proposed reasonableness standard, implicitly supported this approach by commenting on the need for certainty in knowing upfront what expenses are reimbursable, advocating for the inclusion of various expenses as reasonable, and supporting use of the same standard as used in the broadcast incentive auction reimbursement mechanism.

105. The Commission sees no reason to deviate from using a standard of reasonableness, as proposed, for purposes of the Reimbursement Program. First, using a standard of reasonableness will help guide objective determinations of whether to include or deny costs for reimbursement and ensure that excessive, unreasonable costs do not jeopardize the available funding needed by all participating providers to transition away from networks posing a national security risk. Second, by using an existing standard, the Commission can leverage its prior experience with the broadcast incentive auction reimbursement mechanism standard and the *Emerging Technologies* framework to benefit the Reimbursement Program. There already exists in the incentive auction context a Catalog of Expenses, identifying categories of expenses considered reasonable for purposes of reimbursement. The Commission can look to these efforts to assist its determinations and help identify the types of expenses considered reasonable during a transition process in implementing the Reimbursement Program. While the equipment and services replaced may differ, the same basic steps apply here, as in planning and implementing a network transition while attempting to minimize disruptions for customers/users. Lastly, using the existing standard provides regulatory consistency between similarly situated program participants of both the broadcast incentive auction, other wireless proceedings involving the relocation of existing operators, and the instant Reimbursement Program. A fundamental precept of administrative law is to treat similarly situated entities in a similar manner.

106. The Commission will thus consider eligible for reimbursement costs reasonably incurred for the timely removal, replacement, and disposal of covered equipment and services obtained prior to the statutory cutoff dates. The Commission interpreted ''costs reasonably incurred'' in the broadcast incentive auction reimbursement mechanism context as requiring the reimbursement of ''costs that are reasonable to provide facilities comparable to those . . . reasonably replaced.'' The Commission has further interpreted ''[t]hese costs [to] include both 'hard' expenses, such as new equipment and tower rigging, and 'soft' expenses, including legal and engineering services.'' The Commission sees no reason to deviate from this model and will apply it to the instant Reimbursement Program. Although the Commission cannot forecast all types of reasonable expenses, it does provide guidance to help participants with their transition planning. The appropriate scope of ''costs reasonably incurred'' will necessarily be decided on a case-by-case basis, and the Commission delegates authority to WCB to make reimbursement determinations and to finalize a catalog to help participants estimate their reimbursable costs.

107. The Commission considers as reasonable replacement facilities comparable to the facilities in use by the provider prior to the removal, replacement, and disposal of covered communications equipment or service. The Commission recognizes, however, when replacing older technology that a certain level of technological upgrade is inevitable. Accordingly, the Commission will permit Reimbursement Program participants to obtain reimbursement for reasonable costs incurred for replacing older mobile wireless networks with fourth generation Long Term Evolution (4G LTE) equipment or service that are 5G ready.

108. The reimbursement program is intended ''to assist small communications providers with the costs of removing prohibited equipment and services from their networks and replacing prohibited equipment with

more secure communications equipment and services.'' Language from the House Report demonstrates that Congress ''expects the Commission, when implementing regulations . . . to preclude network upgrades that go beyond the replacement of covered communications equipment or services from eligibility; however, [Congress] expects there to be a transition from 3G to 4G or even 5G-ready equipment in instances where equipment being replaced was initially deployed several years ago.''

109. The Commission sought comment in the *2019 Supply Chain Further Notice* on whether it should use the same ''comparability standard'' used in the broadcast incentive auction reimbursement mechanism. In the broadcast proceeding, the Commission said that reasonable reimbursement costs include ''costs that are reasonable to provide facilities comparable those that [an existing operator] had prior to the auction.'' The Commission further stated that it did ''not anticipate providing reimbursement for optional features beyond those already present'' but recognized when replacing older equipment that the new ''equipment necessarily may include improved functionality.'' The Commission uses a similar comparable facilities standard when relocating incumbent operators under the *Emerging Technologies* framework. One commenter, the Rural Wireless Association, urged the Commission to ''closely mirror the structure used for the Broadcast Incentive Auction.'' Another commenter, Rise Broadband, said a comparability standard for replacement costs is essential. Otherwise, commenters generally favored allowing some level of technological upgrade, especially when replacing older technology that is unlikely to have a comparable replacement.

110. Consistent with approach taken on equipment upgrades for the broadcast incentive auction, the Commission expects, as a general matter, eligible providers to ''obtain the lowest-cost equipment that most closely replaces their existing equipment.'' That said, the Commission recognizes the replacement of older legacy technology will inevitably require the use of newer equipment and services that have additional capabilities. Accordingly, consistent with the intent of Congress, the Commission will allow, and indeed encourage, eligible providers replacing third generation and older equipment to obtain reimbursement for the cost of 4G LTE replacement equipment that is 5G-ready.

111. The record indicates new equipment supporting older, second- and third generation wireless technology services is unavailable, and even acquiring such equipment and services on the secondary market is proving increasingly difficult and in some instances impossible. The reimbursement program is not limited to replacing covered equipment and services in wireless networks, but the Commission recognizes the initial focus is on the equipment and services provided by Huawei and ZTE, which is most often found with the provision of wireless services. Accordingly, while much of this discussion is focused on replacing wireless technology, the underlying rationale applies equally in the non-wireless context. And from a policy perspective, investing money on outdated and soon-to-be decommissioned equipment and service is of little benefit and an inefficient and wasteful use of Federal support. The Commission will therefore allow providers replacing older technology to obtain reimbursement for the cost of new replacement equipment that is 4G LTE compatible and is capable of subsequently being upgraded to provide 5G service. However, operators that elect ''to purchase optional equipment capability or make other upgrades'' beyond those reasonably needed to replace existing equipment must do so using their own funds, consistent with the approach the Commission took in the broadcast incentive auction proceeding and the recent C-Band auction proceeding.

112. By taking this approach on comparable facilities and technology upgrades, the Commission rejects alternative proposals for determining reimbursement amounts based on the value of the equipment being replaced. If, however, eligible providers are simply removing and disposing of covered equipment and service without replacement, *e.g.,* simply shutting down an older network, then the Commission would consider reimbursing the provider for the cost of the depreciated value of the decommissioned equipment. For example, NTCH and NTCA suggested that to avoid the ''impossibility'' of evaluating what constitute appropriate replacements, the Commission should simply reimburse the original cost of the covered equipment and services plus an additional 25%. This approach, however, may not result in providing sufficient reimbursement funding for providers if the cost of the replacement equipment exceeds the reimbursement support allocated to the recipient. In addition, the Commission finds PRTC's proposal to reimburse both the present-day value of the replaced equipment and the cost of the replacement equipment unreasonable, giving the provider a windfall and an unfair competitive advantage over other providers.

113. The Commission next delegates to WCB the responsibility to develop and finalize a Catalog of Eligible Expenses and Estimated Costs (Catalog of Eligible Expenses) to inform the Reimbursement Program. The Secure Networks Act requires the Commission to ''develop a list of suggested replacements'' for covered equipment and services and for applicants to submit ''initial reimbursement cost estimate[s] at the time of application.'' The Commission is also required to ''take reasonable steps to mitigate the administrative burdens and costs associated with the application process, while taking into account the need to avoid waste, fraud, and abuse.'' In the broadcast incentive auction reimbursement mechanism, the use of a catalog to estimate relocation costs played a critical role in the successful processing of reimbursement applications. The Commission seeks to duplicate that success here by using a Catalog of Eligible Expenses as suggested in the record. The catalog will identify reimbursable costs with as much specificity as possible, provide guidance to entities seeking reimbursement, streamline the reimbursement process, and increase accountability. Listing in the catalog, however, is not a guarantee of reimbursement for any individual expense, and all claimed expenses are subject to review by the Commission staff to ensure each expense and request for reimbursement is reasonable.

114. The Catalog of Eligible Expenses will also help the Commission and applicants satisfy the Secure Networks Act's requirements not only by helping applicants with transition planning and estimating costs for application submissions, but also with identifying potential replacement equipment and services and expediting the Commission's reimbursement request review process. As CCA points out, the removal, replacement and disposal of covered equipment and services in a mobile wireless network is a complex, multi-step process that is likely to encompass a range of expenses, including: Drive testing to determine baseline coverage; evaluating spectrum and backhaul capabilities; ordering new equipment; installing new network core and RAN equipment; potentially leasing space on or building new towers and

obtaining any associated permits and approvals; testing and optimizing the network; and migrating traffic and decommissioning covered equipment and services. Because there will likely be a range of expenses that could vary among providers, the Catalog of Eligible Expenses will be used to provide helpful guidance regarding the kinds and amounts of expenses that will be reimbursed. Accordingly, the Catalog of Eligible Expenses will not be a definitive list of all reimbursable expenses but a means to facilitate the reimbursement process. Given the importance of the Catalog of Eligible Expenses to the Reimbursement Program, Commission staff have already begun work to develop it, and the Commission expects to release it as soon as possible.

115. The Commission next turns to the acceptable timing of costs incurred by providers to comply with the Commission's requirement. Some providers have already started the process to remove and replace problematic equipment from Huawei and ZTE from their networks. The Commission applauds these providers for proactively taking steps to increase the security of their networks notwithstanding the uncertainty of Federal government assistance. As such, the Commission will allow providers to obtain reimbursement for costs reasonably incurred prior to the creation and funding of the Reimbursement Program, for the removal, replacement, and disposal of covered equipment and services.

116. The Secure Networks Act expressly limits reimbursement support to the removal, replacement, and disposal of covered equipment and services obtained before certain dates. For covered equipment and services placed by the Commission on the initial Covered List required by section 2(a) of the Secure Networks Act, the cutoff date is August 14, 2018, which is the day after the 2019 NDAA was signed into law. For equipment and services subsequently added to the Covered List required by section 2(a), the provider must have obtained the equipment or service no later than 60 days after being placed on the Covered List to obtain reimbursement for costs associated with its removal, replacement, and disposal. The cutoff deadlines are explicit in the statute, and the Commission lacks discretion to use different cutoff dates for the purchase of covered communications equipment or service that is eligible for the reimbursement of removal, replacement, and disposal costs. Because of the statutory cutoff date, the Commission lacks discretion to consider an alternative cutoff date.

117. The 2019 NDAA prohibits the head of an executive agency from obligating or expending ''loan or grant funds to procure or obtain, extend or renew a contract to procure or obtain, or enter into a contract (or extend or renew a contract) to procure or obtain'' telecommunications and video surveillance equipment produced by entities reasonably believed to be owned or controlled by a foreign country. The 2019 NDAA specifically identified Huawei and ZTE as producers of covered equipment, putting the general public on official notice that the Federal government considered the equipment and services produced by these entities to pose a potential national security risk.

118. Following the 2019 NDAA's enactment and as the instant rulemaking proceeding progressed, providers increasingly began planning and taking steps to proactively remove, replace, and dispose of covered equipment and services from their networks. Providers urged the Commission to reimburse costs associated with these efforts even if incurred prior to the creation of any reimbursement program. The Commission will not penalize these providers for taking decisive, proactive steps to secure their networks before the reimbursement program is created and funded. Indeed, in order to protect the nation's communications networks, the Commission encourages providers to remove and replace covered equipment and services before the Reimbursement Program begins. For any expenses incurred before the commencement of the Reimbursement Program providers may not be reimbursed for unreasonable expenses. The Commission will apply the same standard, *i.e.,* costs reasonably incurred, to determine whether an expense is eligible for reimbursement. Accordingly, for covered equipment and services placed on the initial list required by section 2(a) of the Secure Networks Act, the Commission will reimburse reasonable costs associated with the removal, replacement, and disposal of covered equipment that were incurred on or after April 17, 2018, the date the Commission adopted the *2018 Supply Chain Notice,* 83 FR 19196, May 2, 2018, commencing this proceeding. The adoption date of the *2018 Supply Chain Notice* was the first clear indication that the Commission was considering taking action to remove covered equipment from U.S. networks. Costs incurred before that date are ineligible for reimbursement. For equipment and services subsequently added to the initial list, the provider must incur the costs of removal, replacement, and disposal on or after the date the equipment or services are placed on the list for the reasonably incurred cost to qualify for reimbursement.

119. The Commission recognizes the removal, replacement, and disposal of covered equipment may, in the case of mobile wireless networks, entail setting up parallel network core and RAN components and then migrating existing customers to the new network. The Commission expects providers will endeavor to mitigate service disruptions to effectuate a seamless transition for customers. Consistent with the Commission's proposal in the *2019 Supply Chain Further Notice,* to the extent providers experience a reduction in revenues as a result of a temporary loss in service, reduced coverage, or otherwise as a result of the transition, it will not reimburse providers for the lost revenues in the Reimbursement Program.

120. Allowing reimbursement for lost revenues would increase the costs of the Reimbursement Program substantially, and risk exhausting funding prematurely without reimbursing many eligible providers. The Commission is also concerned that evaluating the reasonableness of requests for reimbursement for lost revenues is challenging and speculative and may result in over-reimbursement. The Commission believes scarce program funding is better spent by assisting as many eligible providers as possible with the replacement costs directly related to the transition instead of trying to ensure providers are also reimbursed for lost revenues. Moreover, the Commission expects program participants will strive to minimize service disruptions for customers during the transition process to mitigate revenue loss. Accordingly, the Commission disagrees with Mark Twain Communications Company and deem lost revenues an unreasonable and ineligible expense for purposes of the reimbursement program.

121. The Secure Networks Act limits funding use to the removal, replacement, and disposal of covered communications equipment and services. Even with covered communications equipment and services, to use funds for the removal, replacement, and disposal, the Secure Networks Act requires the recipient to have obtained the equipment or service before a certain statutorily specified cutoff date. Specifically, for covered communications equipment or services published on the Commission's initial Covered List, the recipient must have obtained the equipment or service

before August 14, 2018. For communications equipment or service subsequently added to the Covered List, the recipient must have obtained the equipment or service no later than 60 days after being added to the Covered List. Separately, the Secure Networks Act prohibits recipients from using funds to ''purchase, rent, lease, or otherwise obtain any covered communications equipment or service.'' Recipients are also not allowed to use ''other funds (including funds derived from private sources)'' to ''purchase, rent, lease, or otherwise obtain any covered communications equipment or service.'' Requests for the reimbursement of expenses falling within the scope of these statutory prohibitions are considered unreasonable per se and thus ineligible.

122. Rural Wireless Broadband Coalition asks whether the statutory limit on funding use prohibits recipients from operating and maintaining covered communications equipment or service in their networks during the removal, replacement, and disposal process. The transition process will likely involve standing up a replacement network before migrating traffic to the replacement network and decommissioning the covered communications equipment or service in the old network. Recipients would thus need to continue operating and therefore maintain the old network containing covered communications equipment or service during the transition process to mitigate service disruptions for existing customers. According to the Rural Wireless Broadband Coalition, keeping the old network operational may involve replacing defective equipment that is covered, and because such equipment is typically proprietary, it would likely require, for purposes of interoperability, a replacement that is also supplied by the same supplier and covered.

123. The Commission reads the statute as clearly prohibiting the use of funds by recipients to obtain equipment or service that is on the Covered List even if such equipment is needed to maintain operations during a transition process. Notwithstanding this limitation, a provider possessing covered communications equipment spares obtained before becoming a Reimbursement Program recipient could use funds to install and maintain that covered communications equipment during the transition process. If, however, the recipient receives Universal Service support, then there may be other applicable rules that prohibit the use of funding to install and maintain covered communications equipment or service. The provider, however, must remove and dispose of all covered communications equipment by the time of the final certification.

124. The Commission in the *2019 Supply Chain Further Notice* proposed a ''detailed reimbursement application process'' like the reimbursement mechanism used in the broadcast incentive auction proceeding ''to confirm that funding is being used only to replace covered equipment and services, rather than to deploy services to new areas or replace aging equipment or services that are not covered.'' Applicants would ''provide details of the covered equipment and services being replaced, the replacement equipment and services, and the estimated costs of replacement.'' To help guide applicants, the Commission sought comments on ''efficient ways'' to develop replacement cost estimates. The Commission separately sought comment on whether to ''prioritize payments for the replacement of certain equipment and services that are identified as posing the greatest risk to the security of networks, and what categories of equipment and services should that prioritization include.'' Comments were also sought on measures to prevent waste, fraud, and abuse, including applicant certifications, deadlines for completing removal and replacement, periodic compliance audits, investigations, and enforcement penalties.

125. The Secure Networks Act establishes specific requirements applicable to the application process for the reimbursement program. Specifically, ''[t]he Commission shall require an applicant to provide an initial reimbursement cost estimate at the time of application, with supporting materials substantiating the costs.'' The Commission is required to act on applications within 90 days after the date of submission. If there is an excessive number of applications, the Commission can extend this deadline by no more than 45 days. The Commission must also give applicants a 15-day period to cure a material deficiency in the application as determined by the Commission ''(including by lacking an adequate cost estimate or adequate supporting materials) . . . before denying the application.'' The statute states that ''[i]f such period would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.'' The Secure Networks Act also includes provisions for the removal, replacement, and disposal term and extensions thereof, status updates, measures to avoid waste, fraud, and abuse, and education efforts. The statute also addresses enforcement actions and additional penalties relevant to the reimbursement program. The Commission sought comment on the impact of section 7 in the *2020 Supply Chain Second Further Notic*e.

126. The Commission now adopts a reimbursement process like the one used in the broadcast incentive auction reimbursement mechanism that provides allocations to eligible providers based on their estimated costs. Program recipients can then obtain funding disbursements upon showing of actual expenses incurred. If aggregate demand exceeds available funding, the Commission will prioritize funding requests from ETCs subject to a remove and replace requirement before funding the requests of non-ETCs. Among non-ETCs, the Commission will further prioritize funding to those that voluntarily provided it with cost estimate data in response to the Supply Chain Security Information Collection over those that did not. Additionally, if the Commission is unable to fully fund either all ETCs or all non-ETCs, it will prioritize funding for transitioning core networks over funding non-core network expenses. Program recipients will have one year from the initial disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment or services with the potential for a general and individual extensions of time.

127. The Commission's goals in developing a reimbursement process are threefold. First, the Commission strives to create a simple and straightforward process, providing certainty to participants while minimizing the costs associated with reimbursement and the administrative burden on both affected parties and the Commission. Second, the reimbursement mechanism should facilitate the prompt and efficient distribution of funds for the expeditious removal, replacement, and disposal of covered communications equipment and services posing a national security risk from the networks of participating providers. Third, the program should fairly cover the eligible costs reasonably incurred for reimbursement and include measures to prevent waste, fraud, and abuse. As the Secure Networks Act instructs the Commission, ''[i]n developing the application process . . . , the Commission shall take reasonable steps to mitigate the administrative burden and costs associated with the application process, while taking into account the need to avoid waste, fraud, and abuse in the Program.''

128. The Reimbursement Program will allocate funds on the applicant's behalf to the U.S. Treasury for draw down by applicants on a rolling basis upon the showing of expenses actually incurred. This approach is consistent with the one used in the broadcast incentive auction reimbursement mechanism which has proven successful in the efficient and expeditious disbursement of funds for transitioning networks.

129. The Secure Networks Act states ''[n]othing in this section shall be construed to prohibit the Commission from making a reimbursement under the Program to a provider of advanced communications service before the provider incurs the cost of the permanent removal, replacement, and disposal of the covered communications equipment or service for which the application of the provider has been approved . . . .'' This language permits the Commission to make funding disbursements in advance of costs actually incurred but does not require any such advance payments. The Commission has concerns, however, about providing advanced funding because once disbursed, its ability to ensure the applicant spends the money as intended to avoid waste, fraud, and abuse is greatly diminished. If the Commission later finds the applicant has not used the money as intended and in compliance with the Secure Networks Act and the Commission's rules, then reclaiming the money from the applicant following advance disbursement can prove challenging. Accordingly, rather than disbursing large amounts upfront to program participants, the Commission will use an initial funding allocation process based on cost estimates, and then allow rolling disbursements based on showings of actual costs incurred. This approach provides recipients with the upfront knowledge of available funds for purposes of planning and engaging lenders and vendors. The Commission finds that this methodology best achieves Congress's goal of mitigating the administrative burden and costs of the program while taking steps to avoid waste, fraud, and abuse. By adopting a rolling reimbursement process, the Commission declines to provide funding upfront before costs are actually incurred as suggested by the Secure Networks Coalition. The Commission expects the reimbursement process, as shown in the broadcast incentive auction context, will sufficiently meet the financial needs of providers, including smaller providers, in a timely manner while ensuring appropriate agency oversight over the disbursement and use of funds for their intended purpose. Some commenters urge the Commission to ''establish a payment schedule and clear milestones for payments so that carriers know when they will be able to obtain payments to facilitate a transition.'' They argue that given the scope and scale of expenses, waiting for reimbursement until the transition is complete is unworkable. As NetNumber states, ''the Commission should provide for milestone payments to ensure service providers receive sufficient funding at every stage of the network transition process.'' The Commission surmises the milestone process suggested is akin to draws on a construction loan whereby a lender releases a certain percentage of the total loan amount upon satisfaction of certain construction milestones, *e.g.,* obtaining the necessary permits, pouring the foundation, completing the close-in inspection, and so forth.

130. The Commission finds milestones would add an unnecessary level of complexity to the reimbursement mechanism. For such a system to work, the Commission would need to determine the appropriate deployment milestones, the percentage of funding to disburse at each stage, the documentation needed to demonstrate milestone completion, and some inspection verification process to ensure the milestones are indeed satisfied prior to disbursing funds. By instead having a rolling system of disbursements throughout the transition project based on the submission of documentation of eligible expenses incurred, the Commission successfully addresses any concerns some providers may have of delayed payments until the network transition is complete. Accordingly, the Commission declines to use a transition funding disbursement mechanism based on milestones. While the Commission declines to impose milestone-based disbursements, it delegates the task of determining the specific timing of disbursements to WCB as part of its implementation of the Reimbursement Program with the goal of efficiently and expeditiously disbursing funds to recipients.

131. Lastly, the Commission declines to provide ''bonuses'' for completing the removal, replacement, and removal process ahead of the applicable deadline as suggested by Blue Danube. The Secure Networks Act already provides an aggressive one-year deadline for completing the transition process. This provides ample incentives for Reimbursement Program recipients to act quickly to complete the process. Accordingly, the Commission finds additional incentive payments unnecessary.

132. The Secure Networks Act directs the Commission to ''develop an application process'' that ''require[s] an applicant to provide an initial reimbursement cost estimate at the time of application, with supporting materials substantiating the costs.'' Consistent with the statute, to participate in the Reimbursement Program, eligible providers are required to submit initial estimates of the costs to be reasonably incurred for the removal, replacement, and disposal of covered communications equipment or services to participate in the reimbursement program. The Commission directs WCB to establish an initial 30-day filing window for the submission of cost estimates and to establish subsequent filing windows as necessary should support remain, or additional support become available to fund additional requests. Participants are also statutorily required to submit, in addition to cost estimates, ''supporting materials substantiating the costs,'' a ''specific timeline . . . for the permanent removal, replacement and disposal of the covered communications equipment or services,'' and the certifications required by section 4(d)(4) as to the development of a transition plan and the use of funds if approved and in developing and tailoring risk management practices.

133. The Commission has separately tasked WCB with developing and finalizing a Catalog of Eligible Expenses to identify reimbursable costs with as much specificity as possible to help entities in preparing initial cost estimates. Applicants can reference the final Catalog of Eligible Expenses, which will contain a list of many, but not necessarily all, of the relevant expenses in lieu of providing additional supporting documentation to justify the specific cost estimate. If an applicant believes the predetermined estimate does not fully account for its specific circumstances or a predetermined cost estimate is not provided in the Catalog of Eligible Expenses for the cost identified by the applicant, the applicant can provide its own individualized cost estimate. Applicants providing such individualized cost estimates will be required to submit supporting documentation and to certify the estimate is made in good faith.

134. Regardless of whether they are claiming predetermined cost estimates or their own individualized estimated costs, each applicant will be required to certify under penalty of perjury, inter alia, that: (1) It believes in good faith that it will reasonably incur all of the

estimated costs that it claims as eligible for reimbursement; (2) it will use all money received from the Reimbursement Program only for expenses it believes are eligible for reimbursement; (3) it will comply with all policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program; (4) it will maintain for 10 years detailed records, including receipts, of all costs eligible for reimbursement actually incurred; and (5) it will file all required documentation for its expenses. Similar certifications were required by the Commission with the broadcast incentive auction reimbursement mechanism. In addition, a 10-year record retention requirement is consistent with the record keeping required for the broadcast incentive auction reimbursement program. The Commission will also require applicants to provide detailed information on the covered communications equipment or services they are removing, replacing, and disposing to assist the Commission in evaluating whether the estimated costs reported are reasonably incurred.

135. For entities that choose to provide their own cost estimate, *i.e.,* either a cost estimate higher than the predetermined cost estimate or an individualized cost estimate for an expense for which the Commission does not provide a predetermined cost estimate, WCB will review the required justification for the estimate and may accept it or substitute a different amount for purposes of calculating the initial allocation. The Commission is statutorily authorized to require applicants to update initial cost estimates and/or submit additional supporting cost estimate materials. If the applicant has already incurred costs eligible for reimbursement, *e.g.,* the applicant already started transitioning its network prior to the acceptance of applications, then it should report its actual expenses with supporting documentation and indicate which costs are actual and not estimated in its submission. Doing so will allow WCB to factor in the actual costs when determining the funding allocation. WCB may ultimately determine, based on its reasonableness review, that an applicant should receive a different allocation from that claimed on the application.

136. After an applicant submits estimated cost forms, WCB will review them to determine completeness, the applicant's eligibility for reimbursement, and the reasonableness of the cost estimates provided, and will allocate funding accordingly for draw down by applicants. The funding amount allocated represents the maximum amount eligible for draw down by an eligible provider unless a subsequent funding allocation is made. This approach is consistent with the suggestion of NetNumber to ''cap reimbursement for service providers at their estimated replacement costs for covered equipment and services in their networks.'' The funding amount allocated represents the maximum amount eligible for draw down by an eligible provider unless a subsequent funding allocation is made. This approach is consistent with the suggestion of NetNumber to ''cap reimbursement for service providers at their estimated replacement costs for covered equipment and services in their networks.''

137. Per the Secure Networks Act, WCB must act on applications within 90 days of submission. For purposes of calculating the 90-day deadline, the Commission will consider the date of submission as the date on which the filing window closes for accepting reimbursement requests. This approach is consistent with the Commission's historical treatment of applications submitted during a filing window as all being filed on the last day of the filing window. A filing window also allows WCB to efficiently review and act on applications in batch and not in piecemeal fashion, and is necessary to manage demand for funding. If there is an excessive number of applications, WCB can extend this deadline by no more than 45 days. After the initial filing window closes, the Commission expects WCB to release a public notice announcing the applications accepted for filing and indicate whether an extension of time of up to 45 days to review applications is justified. Applicants are allowed a 15-day period to cure a material deficiency in the application as determined by WCB ''(including by lacking an adequate cost estimate or adequate supporting materials) . . . before denying the application.'' The statute states that ''[i]f such period would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.'' WCB will notify applicants of material deficiencies via Public Notice. If the 15-day cure period, ''would extend beyond the deadline . . . for approving or denying the application, such deadline shall be extended through the end of such period.'' If WCB denies the application, the filer will be allowed to resubmit its application or submit a new filing at a later date. Resubmitted applications previously denied or new applications from filers of previously denied applications will be subjected to a subsequent filing window if there is available funding. If the Commission were to process such filings as part of the applications submitted in the initial filing window, it would delay the award of funding allocations as the Commission must ensure aggregate demand does not exceed the available funds before issuing all allocations for requests filed in the initial filing window. Once WCB completes its review, it will issue an allocation from the Program to the provider, which will be available to the provider to draw down as expenses are incurred.

138. The Commission has requested Congress to appropriate $2,000,000,000 to fund the Reimbursement Program. To date, Congress has not yet appropriated any funds. Even if the eventual appropriation is substantial, the potential exists for the costs reasonably incurred for the removal, replacement, and disposal of covered communications equipment or services to exceed the funding appropriated. ETCs with two million or fewer customers reported in the Commission's Supply Chain Security Information Collection that it would cost $1.62 billion to remove and replace Huawei and ZTE equipment in their networks. And this figure does not account for other providers of advanced communications service that would be eligible to participate in the reimbursement program.

139. In the *2019 Supply Chain Further Notice,* the Commission sought comment on whether ''[t]o best target available funds,'' the Commission should ''prioritize[ ] payments for the replacement of certain equipment and services that are identified as posing the greatest risk to the security of networks, and what categories of equipment and services should that prioritization include.'' The Commission also sought comment on whether to ''cap the amount eligible for each individual funding request.'' In the subsequently enacted Secure Networks Act, Congress did not provide for, or expressly prohibit, any funding prioritization scheme. The statute does instruct the Commission to ''make reasonable efforts to ensure that reimbursement funds are distributed equitably among all applicants . . . according to the needs of the applicants, as identified by the applications of the applicant.'' The Commission is also required to notify Congress on the need for additional funding should anticipated demand exceed $1 billion. WCB sought further comment on the impact of the Secure

Networks Act on the proposed reimbursement program in April 2020. Only three parties commented on this issue with WTA generally supporting the prioritization of ETCs receiving USF support over other providers, NetNumber suggesting the Commission use funding caps based on the type of service provider and the nature of the project, and RWA asking the Commission to prorate reimbursement where each recipient gets a set percentage of the appropriated funding.

140. The Commission decides to establish a prioritization paradigm in the event the estimated costs for replacement submitted by the providers during the initial or any subsequent filing window in the aggregate exceed the total amount of funding available as appropriated by Congress for reimbursement requests. The Commission finds prioritization preferable to the alternatives suggested by NetNumber and RWA. Capping fund amounts depending on the nature of the removal, replacement, and disposal project and service provider type presents added complexity to the allocation process and fails to ensure demand will not exceed the total amount of available funding as the number of requests are unlimited. NetNumber suggests the Commission use funding caps but ensure ''fair compensation for the full deployment cost for replacement equipment.'' If there is no limit on the number of requests filed, then NetNumber's approach could lead to a funding deficit as the total demand, even when using a capped funding approach, could exceed the total amount of available funding. The Commission also finds that prorating support equally among all participants based on a set percentage of available funding, as the only means of allocating support, fails to account for the individual needs of the applicants and runs counter to the directive in the Secure Networks Act.

141. Under the prioritization scheme the Commission adopts, it will first allocate funding to eligible providers that are ETCs subject to a remove-and-replace requirement under the Commission's rules. If funding is insufficient to meet the total demand from this subcategory of eligible providers, then the Commission will prioritize funding for transitioning the core networks of these eligible providers before allocating funds to non-core network related expenses, including reasonable costs incurred for removing, replacing, and disposing of a provider's radio access network. The Catalog of Eligible Expenses cost catalog will include additional detail as to what are considered core and non-core network related expenses. If after allocating support to ETCs for both core and non-core network expenses funding is still available, the Commission will then allocate funding to non-ETC eligible provider applicants, prioritizing those non-ETCs that provided cost estimate data in response to the Commission Supply Chain Security Information Collection over other non-ETCs. The Commission will further prioritize funding for core network transition costs over non-core network transition costs within each non-ETC category. If available funding is insufficient to satisfy all requests in a certain prioritization category, then the Commission will prorate the available funding equally across all requests falling in that category.

FUNDING PRIORITIZATION CATEGORIES

Priority 1: Advanced communications service providers with 2 million or fewer customers that are Eligible Telecommunications Carriers subject to section [54.11] (new removal and replacement requirement).	Priority 1a: * Costs reasonably incurred for transitioning core network(s). Priority 1b: * Costs reasonably incurred for non-core network transition.
Priority 2: Non-ETC providers of advanced communications service with 2 million or fewer customers that participated in the Supply Chain Security Information Collection, OMB Control No. 3060–1270.	Priority 2a: * Costs reasonably incurred for transitioning core network(s). Priority 2b: * Costs reasonably incurred for non-core network transition.
Priority 3: Other non-ETC providers of advanced communications service with 2 million or fewer customers.	Priority 3a: * Costs reasonably incurred for transitioning core network(s). Priority 3b: * Costs reasonably incurred for non-core network transition.

* If available funding is insufficient to satisfy all requests in this prioritization subcategory, then prorate the funding available equally among all requests in subcategory.

142. In considering prioritization of funding, the Commission interprets the Secure Networks Act as requiring it to make reasonable efforts to treat all applicants on a just and fair basis while accounting for the applicants' individual circumstances. Accordingly, the Commission may find some applicants have a greater and more urgent need for funding than other applicants. The Commission thus does not interpret the statute as requiring equal funding or treatment but instead requiring it to make reasonable efforts to treat similarly situated applicants fairly.

143. While the presence of covered communications equipment or services threatens network security for all eligible providers equally, the Commission finds ETCs who are receiving USF support stand in a different position vis-à-vis other providers. Congress and the Commission have undertaken significant efforts over the twenty-plus years to subsidize the costs of ETCs to provide service in high-cost, hard-to-serve areas to facilitate universal access to essential telecommunications and broadband services to all Americans. And these efforts have borne fruit, resulting in the affordable availability of essential communications services for hard-to-reach Americans. ETCs in many instances represent the only provider of such services in the most rural areas of our country. Accordingly, the Commission finds the protection of ETC networks—networks which are funded through USF and serve on the front lines of providing universal service—from national security threats to be of the utmost importance. PTA–FL does not expressly advocate an alternative prioritization approach but notes, without citing any statistics, that some non-ETCs are also sole source providers. PTA–FL also states non-ETCs have a greater need for reimbursement support than ETCs because their covered equipment was acquired without using USF support. Notwithstanding these assertions, the Commission has made a substantial investment to help ETCs provide service in areas where the economics often do not support viable service offerings. Facing the possibility of service disruptions absent continued support due to the remove-and-replace prohibition the Commission adopts, it

finds, notwithstanding PTA–FL's recent filing, that ETCs stand in a different position than non-ETCs, justifying a prioritization in the allocation of reimbursement support. Perhaps most significantly, in this document the Commission requires ETCs receiving universal service support to remove covered equipment and services from their networks. Failure to comply will result in the loss of future universal service funding. ETCs, which often provide service in areas where providers are less likely to be able to recover their costs from subscribers, are more sensitive to the possibility that they could lose universal service funding. ETCs thus face greater consequences than non-ETC providers if the transition does not occur in a timely manner. The potential for enforcement liability or reduced universal service funding further distinguishes ETCs from the circumstances of other applicants. Based on these factors, the Commission finds there is a greater urgency to expeditiously accommodate the transition of ETC networks over other applicants. Accordingly, if initial funding is insufficient to satisfy reimbursement requests, the Commission will first prioritize funding to ETCs over non-ETC applicants. By adopting a prioritization scheme, the Commission declines to follow the suggestions of RWA to grant an equitable percentage of funding to all applicants ''proportionate to need . . . . if there is an insufficient amount of funds initially appropriated.'' The Commission will, however, pro rate funding within a prioritization subcategory if insufficient funds remain for all requests in the subcategory.

144. Among non-ETC applicants, the Commission will further prioritize funding, as recently suggested by RWA, to first allocate funding to those non-ETCs that voluntarily provided cost estimate data in response to the Supply Chain Security Information Collection over other non-ETC applicants. The estimated cost to remove and replace covered equipment as reported by the Supply Chain Security Information Collection participants with two million or fewer customers totaled $1.62 billion with costs reported by all filers totaling $1.84 billion. This number includes data reported not only by ETCs required to report but also non-ETCs that were encouraged to report on a voluntary basis. The Commission asked Congress to appropriate $2 billion in funding for the Reimbursement Program, taking into account the cost data collected in the Supply Chain Security Information Collection. If Reimbursement Program demand were to substantially exceed $2 billion in appropriated funding due to the emergence of providers not participating in the Supply Chain Security Information Collection, then those non-ETCs that participated voluntarily in the collection could go without or with reduced funding simply because the costs of non-participating non-ETCs were not reported, and thus not considered. The Commission finds this result inequitable. Accordingly, the Commission will prioritize funding for participating non-ETCs over other non-ETCs.

145. If funding proves insufficient to meet the estimated reimbursement costs reasonably incurred for ETCs or non-ETCs, the Commission will further prioritize funding for expenses to transition the core networks of providers over non-core network expenses. To demarcate core network transition and non-core network transition expenses, applicant will need to report estimated costs for such activities separately in their submission.

146. Commenters indicate replacing the core network is the logical first step in a network transition and may have the greatest impact on eliminating a national security risk from the network. For example, CCA states ''[t]he core is where the routing functions and 'intelligence' resides in today's networks, so starting with the core is a natural step both in transitioning networks and prioritizing any national security risks.'' WTA also notes that ''limiting removal and replacement to core equipment could save the transition time and money as the equipment that is least likely to be a threat is on the edge of the network.'' While the Commission believes having covered communications equipment and service in any portion of the network poses a national security risk, it agrees that prioritizing funding for core network transition expenses makes sense logically from a network migration standpoint and will greatly mitigate risks in the network. SNC states that replacing the core without also replacing the radio access network may raise interoperability issues but such concerns do not dissuade the Commission from finding that funding is best prioritized to most efficiently address national security risks by first assisting with the replacement of the core network over a provider's radio access network when demand exceeds available funding. Accordingly, the Commission instructs WCB to further prioritize the allocation of funding among applicants.

147. If available funding is insufficient to satisfy all funding requests in a prioritization subcategory, the Commission will prorate funding among all requests in the subcategory to ensure that total funding allocated does not exceed the funding available. Specifically, WCB will reduce each applicant's funding allocation request by an equal percentage to bring down the total funding allocation within the available support limit. This process will thus result in the equitable distribution of funding among applicants within the prioritization subcategory, consistent with the statute, while still allocating more funding to those applicants with higher transition costs. WCB will determine a pro-rata factor by dividing the total amount of available funding by the total amount of funding requested. WCB will then multiply the pro-rata factor by the total amount of support requested by each applicant and will allocate funds to each eligible applicant in the prioritization subcategory consistent with this calculation. The net result is each eligible applicant in that subcategory will receive less support than requested by the same pro-rata factor to bring the overall support amount committed within the applicable limit.

148. Following the acceptance of applications submitted during the relevant filing window, WCB will assess the aggregate demand of the applications filed during the applicable filing window to determine whether demand exceeds available funding, thereby triggering the need for funding prioritization. In conducting this assessment, WCB should make a cursory review of the applications to determine if any requests are clearly ineligible for funding, *e.g.,* equipment to be removed is not on the Covered List ineligible or there appears to be a duplicate request from an applicant, and should not be included in the aggregate demand assessment. Per the Secure Networks Act, the Commission must give applicants a 15-day period to cure any material defect in the application before denying the application. This cursory review to eliminate clearly ineligible or erroneous applications will help to ensure a more accurate assessment of aggregate demand to determine whether to apply funding prioritization.

149. WCB will need to account for the administrative cost of operating the reimbursement program when assessing aggregate demand to the extent such costs are funded by a congressional appropriation and do not count towards funding available for reimbursement requests.

150. Following the allocation of funds to eligible providers and after eligible

providers incur actual costs, they will need to file reimbursement claims along with any required supporting invoices and other cost documentation, as directed by WCB, to obtain reimbursement funds from their allocation. Entities may, and likely will, submit multiple reimbursement requests as they incur expenses throughout the reimbursement period. WCB will review reimbursement claims to ensure that disbursements are made only for costs reasonably incurred.

151. If an actual cost exceeds the estimated cost for a particular line item, the program participant will need to note the nature of the variation in the reimbursement claim filing, *e.g.,* the recipient had to change equipment vendors resulting in higher replacement costs than estimated. The Commission understands the difficulty in accurately estimating costs and expect some degree of variation between estimated and actual costs. Ultimately, while the Commission will exercise some degree of flexibility with such variations, the Reimbursement Program participant cannot draw down more than the total funding amount allocated to it and can only receive reimbursement for reasonable costs incurred. If a recipient's costs exceed the funding allocation, then the recipient will need to seek an additional allocation of funding, if funding remains available.

152. To ensure the timely use of allocated funds as intended, the Commission will require recipients to submit all applicable reimbursement claims by a set date following the expiration of the term for completing the removal, replacement, and disposal of covered communications equipment and services. Without a deadline, outstanding funding would have to remain allocated indefinitely to satisfy possible future reimbursement claims filed for actual expenses incurred even if the recipient had no intention of filing any future claims. The effect would be to essentially strand funding and prevent the reallocation of unused funds to other Reimbursement Program participants. Imposing a deadline for the filing of reimbursement claims will address these concerns.

153. The Commission recently imposed a deadline on the filing of invoices to receive committed funds in the Rural Health Care Program to address similar concerns. The Commission similarly adopted an invoicing deadline for the E-Rate Program. In that proceeding, the Commission found an invoicing deadline of 120 days following the expiration of the one-year service delivery deadline, with the possibility of a one-time 120 day extension, sufficient to give program participants time to submit claims for expenses incurred while still providing the certainty needed for the efficient de-obligation of funding for use by future program participants. For the same reasons, the Commission will apply the approach used in the Rural Health Care Program to the Reimbursement Program. Recipients are required to file all reimburse claims within 120 days following the expiration of the removal, replacement, and disposal term. Prior to the expiration of the 120-day deadline, recipients can request and receive a 120-day extension of the reimbursement claim deadline, if timely requested. After the expiration of the reimbursement claim deadline, any allocated but as-yet unclaimed funds will revert automatically to the Reimbursement Program for reallocation to other participants pursuant to a future filing window. If a petition for an extension of the removal, replacement, and disposal term is pending when the term expires, then automatic reversion of the unallocated funds is stayed until, and if, the extension request is denied. Additional details on the removal, replacement, and disposal term, and extensions thereof, are provided in the subsequent section.

154. The Secure Networks Act requires, unless there is an extension provided for by the statute, Reimbursement Program recipients to complete the removal, replacement, and disposal of covered communications equipment or service ''not later than 1 year after the date on which the Commission distributes reimbursement funds to the recipient.'' The Commission concludes the one year window for project completion commences when the applicant makes the initial draw down disbursement of funding during the funding distribution stage. Thus, the one-year deadline will vary among recipients depending on when each recipient chooses to accept its initial draw down disbursement. The Commission finds this approach most accurately complies with a straight-forward reading of the statute and that it provides applicants a substantial amount of control over when the one-year window opens since the applicant chooses when to accept the initial draw-down.

155. The Commission recognizes there is concern among providers that the network transition process will likely take more than a year to complete. Congress has made clear its intent, however, and the Commission lacks discretion to deviate from what the statute requires. By tying the completion term to the actual initial disbursement of funds, the Commission adheres to the statutory requirement but also provides some flexibility to applicants. Because the Commission has declined to use a milestone-based phased funding approach, the suggestion to commence the one-year project deadline to the final disbursement is unworkable. At the same time, the Commission acknowledges applicants may defer taking their initial disbursement to further delay commencement of the one-year deadline. Such actions, in turn, may delay the network transitions to remove, replace, and dispose of equipment and service posing a national security risk. To ensure the efficient and expeditious use of funding to facilitate network transitions, the Commission will require recipients to file to receive their initial disbursement within [one year] of receiving the funding allocation approval. Failure to file for an initial disbursement within one year of receipt of funding allocation approval will result in the automatic reversion of the funding allocation to the program fund for reallocation to other or future program participants.

156. *Term Extensions.* The Secure Networks Act authorizes the Commission to grant extensions of time to complete the removal, replacement and disposal of covered communications equipment and service. The Commission may grant a ''general'' six-month extension ''to all recipients of reimbursements . . . if the Commission: (i) finds that the supply of replacement communications equipment or services needed by the recipients to achieve the purposes of the Program is inadequate to meet the needs of the recipients; and (ii) provides notice and a detailed justification for granting the extension to'' Congress. The Commission is also authorized to grant ''individual'' extensions on a case-by-case basis to program recipients pursuant to petition for a period of time of up to six months. To grant an individual extension, the Commission must find that, ''due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal.'' According to the legislative history, ''[t]he Committee expects the Commission to not find it the fault of a recipient of the program if such recipient has a shortage of qualified workers, either employees or contracted third-parties, to complete the removal of covered equipment and replacement of new equipment under the timeframe established.''

157. The general extension provision authorizes the Commission to issue *sua sponte* a one-time six-month extension

to all program recipients. Interpreting this provision to allow for more multiple general six month extensions for all participants without regard to the circumstances of each individual applicant would seem to run counter to the intent of Congress of having a one-year term deadline and would seem to moot, or at least significantly diminish, the need for, or relevance of allowing, individual extensions. Following the funding allocation stage, the Commission directs WCB to assess the supply of replacement equipment in the marketplace. The Commission expects WCB, in making this assessment, to account for the information reported by program recipients in the status updates filed as required by the Secure Networks Act. WCB shall inform the Commission of its assessment in a timely manner so as to give the Commission sufficient time to provide notice and justification to Congress and to issue a general extension of time before the initial one-year deadline expires for program recipients.

158. In reading the statutory provision on individual extensions, the Commission agrees with commenters who assert that the provision allows it to grant more than one extension to a recipient. The Secure Networks Act states that the Commission may grant a petition for an extension, but does not provide any direct limit as to the number of extensions that may be granted. Instead, the only limit to granting an extension is whether the Commission finds that, ''due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal.'' The Commission interprets this language to mean that it may grant more than one individual extension as factors beyond the control of an applicant may exist for more than six months, an interpretation endorsed by all commenters. The Commission also agrees with commenters that the statute specifically allows it to grant both a general and individual extensions if the circumstances warrant. The Commission also agrees with commenters that it may not issue a single, across-the-board extension that exceeds six months. The Commission believes this is an important safety valve for recipients to complete their network transitions. The Commission directs WCB to address petitions for extensions in the first instance consistent with the following principles. In order to ensure prompt replacement in accordance with the goals of the Act, petitions for extension will only be granted where the program recipient demonstrates the delay is due to factors beyond its control. In making this determination, the Commission directs WCB to be guided by the Commission's precedent in dealing with similar requests involving wireless facilities under § 1.946 of the Commission's rules. § 1.946(e) allows for extensions of time ''if the licensee shows that failure to meet the construction or coverage deadline is due to involuntary loss of site or other causes beyond its control.'' The rule further provides that ''[e]xtension requests will not be granted for failure to meet a construction or coverage deadline due to delays caused by a failure to obtain financing, to obtain an antenna site, or to order equipment in a timely manner. If the licensee orders equipment within 90 days of its initial license grant, a presumption of diligence is established.'' The rule further provides that ''[e]xtension requests will not be granted for failure to meet a construction or coverage deadline because the licensee undergoes a transfer of control or because the licensee intends to assign the authorization. The Commission will not grant extension requests solely to allow a transferee or assignee to complete facilities that the transferor or assignor failed to construct.'' The Commission encourages WCB to provide guidance as necessary to program recipients to help them in seeking an extension of time. This addresses the request of CCA, asking the Commission to provide clear guidance on how it will implement the provision on individual extensions and what will be expected from applicants to satisfy an extension request.

159. *Applicability of USF Support Certification Requirement.* The new remove-and-replace rule that the Commission adopts requires ETCs to certify prior to receiving USF support that they do not use equipment or services identified on the Covered List. The Commission recognizes Reimbursement Program recipients will likely need to utilize their existing covered communications equipment or service on a temporary basis during the transition process to mitigate service disruptions for existing customers. Accordingly, Reimbursement Program recipients are not subject to the new certification requirement until after the expiration of their removal, replacement, and disposal term. However, once the term has expired, the provider will be subject to the certification requirement going forward when seeking to obtain USF support.

160. *Effect of Removal from the Covered List.* The Secure Networks Act provides a process for addressing situations when communications equipment or service is removed from the Covered List following the filing of an application for reimbursement. If this situation occurs, then according to the Secure Networks Act, an applicant may either: (1) Return the reimbursement funds received and be released from any further removal, replacement, and disposal requirements; or (2) retain the reimbursement funds received and remain subject to the applicable removal, replacement, and disposal requirements. For purposes of the Reimbursement Program established in this document, the Commission interprets this statutory provision to mean that if the Covered List removal occurs after an application is filed and approved, then it will give the applicant the option to either proceed with or withdraw from the Reimbursement Program altogether. If withdrawing, then the applicant would need to notify the Commission as such and return any reimbursement funds previously disbursed to the Commission where applicable. If withdrawing, any funding allocated but not yet disbursed to the applicant would automatically revert to the Commission for potential reallocation to other applicants pursuant to a subsequently established filing window. If continuing with the Reimbursement Program, then the applicant must continue to comply with all applicable program requirements and obligations. Per the Secure Networks Act, if a program recipient needs an ''assurance'' as to whether the reimbursement funds have been returned, then ''the assurance may be satisfied [by the recipient] making an assurance that such funds have been returned.'' That said, the Commission will provide recipients with confirmation of reimbursement funds returned.

161. The Commission declines to implement a preapproval process for transition plans. Both CCA and NetNumber urge the Commission to provide a mechanism by which providers can obtain an upfront approval or at least additional guidance for their network transition plans. These commenters note the complexity of transitioning a network and explain how upfront approval and guidance would mitigate wasted time and resources on a plan the Commission ultimately does not support. The upfront approval mechanism would apparently need to precede the filing window for submitting reimbursement cost estimates.

162. Although the Commission sees the benefits of having a preapproval process, it is concerned the addition of

another procedural layer will unnecessarily delay the allocation of funding for the removal, replacement, and disposal of covered communications equipment and service from the networks of eligible providers. Because of the national security implications of continuing to have insecure equipment in the Commission's communications networks, it is striving to receive applications within twelve months of the adoption of this document. Adding a processing layer to pre-approve transition plans would require building in further time for implementation and the redirection of resources to reviewing and approving transition plans, instead of immediately implementing a system to receive applications. Moreover, the Commission will separately be providing participants with guidance on replacement equipment and cost estimates. The Commission finds the additional guidance will sufficiently help applicants in formulating their network transition plans and should alleviate the concerns the commenters express. Accordingly, the Commission declines at this time to establish a preapproval process for transition plans as suggested by CCA and NetNumber. For the same reasons, the Commission declines a similar suggestion by SNC, to the extent SNC's proposals differs from the process the Commission adopts, to have two separate application rounds upfront to obtain a funding allocation, *i.e.,* one to requests funds for planning and another for replacement and implementation.

163. The Secure Networks Act directs the Commission to adopt regulations requiring the ''disposal'' of covered communications equipment and services by Reimbursement Program recipients to prevent the use of such equipment or services in the networks of advanced communications service providers. Disposal is defined as the act of disposing. To dispose of something means ''to get rid of,'' ''to deal with conclusively,'' ''to transfer to the control of another.'' While the act of disposing typically means to get rid of or to transfer control of something to another, the Commission reads ''disposal'' in connection with the statutory language ''to prevent such equipment or services from being used in the networks of providers'' as requiring the destruction of the equipment or service by the recipient so as to make the equipment or service inoperable and incapable of use. The Commission adopts a regulation consistent with its interpretation and will require recipients to dispose of covered communications equipment and service in a manner to prevent the use of the equipment or service in the networks of other providers.

164. The Commission disagrees with PRTC that the statute would allow the Commission to permit the transfer of covered communications equipment or service to non-U.S. providers in an operable state that would allow for use of the equipment or service in another provider's network, whether foreign or domestic. At the same time, the Commission agrees with CCA and will allow providers to satisfy its disposal requirements ''by documenting their transfer of removed equipment to third parties tasked with destruction or other disposal of the equipment.'' Regardless of the method of disposal or destruction, the Commission requires participants to retain detailed documentation to verify compliance with this requirement. The Commission expects WCB to provide participants with additional guidance to help participants with the disposal and verification process.

165. The Commission directs WCB to create one or more forms to be used by entities to claim reimbursement from the Reimbursement Program, to report on their use of money disbursed and the status of their construction efforts, and for any other Reimbursement Program-related purposes. The Commission also directs WCB to establish the timing and calculate the amount of the allocations to eligible entities from the Reimbursement Program, develop a final Catalog of Eligible Expenses with the assistance of a contractor, and make other determinations regarding eligible costs and the reimbursement process. The Commission further directs WCB to adopt the necessary policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program to protect against waste, fraud, and abuse and to protect Reimbursement Program funds in the event of bankruptcy of a support recipient. The Commission expects WCB through the implementation process will address many of the procedural details highlighted by the Secure Networks Coalition with input as needed from the public.

166. WCB will consult with the Office of General Counsel and the Office of the Managing Director (OMD) in carrying out these tasks. The Commission also encourages the WCB to work, as necessary, with other appropriate Bureaus and Offices in implementing and maintaining the Reimbursement Program. The Commission authorizes WCB to engage contractors to assist in the reimbursement process and the administration of the Reimbursement Program. Lastly, as required by the Secure Networks Act, the Commission directs WCB with the assistance of the Consumer and Governmental Affairs Bureau to ''engage in education efforts with providers of advanced communications service'' to encourage participation in the Reimbursement Program and to assist such providers in submitting applications.

167. The Secure Networks Act requires the Commission to take ''all necessary steps'' to combat waste, fraud, and abuse in the Reimbursement Program. The Secure Networks Act and the associated House Report specified that these steps shall include, but are not limited to, requiring recipients to submit status updates, detailed spending reports and documentation of invoices, and conducting routine audits and random field investigations of recipients to ensure compliance with Program requirements and this Act. The Commission sought comment in the *Section 4 Public Notice,* 85 FR 26653, May 5, 2020, and the *2019 Supply Chain Second Further Notice* on these statutory obligations. The Commission now adopts rules to protect against the waste, fraud, and abuse of taxpayer money consistent with the Secure Networks Act.

168. *Status Updates.* While the Commission did not receive any comments on how to implement this statutory provision, it will proceed as directed by the Secure Networks Act and require program recipients to file a status update ''once every 90 days beginning on the date on which the Commission approves an application for a reimbursement.'' Recipients must file the first report within 90 days of receiving their funding allocation. Although the statute allows the Commission to require more frequently filed updates, it finds an update every 90 days sufficient to keep the Commission informed of ongoing developments while not unduly burdening program recipients and diverting limited administrative resources away from the network transition process. These updates will help the Commission monitor the overall pace of the removal, replacement, and disposal process and whether recipients are acting consistently with the timelines provided to the Commission or whether unexpected challenges are causing delay.

169. In the update, the recipients shall report on the efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing its covered communications equipment or

services. Recipients shall also report in detail on the availability of replacement equipment in the marketplace so the Commission can assess whether a general, six-month extension permitted by the statute is appropriate. The report must include a certification that affirms the information in the status report is accurate. After the program recipient has notified the Commission of the completion of the permanent removal, replacement, and disposal of the covered communications equipment or service pursuant to a final certification, updates are no longer required.

170. The Commission directs WCB to provide additional details on the filing requirements and contents for such status updates. Per the statute, the Commission directs WCB to publicly post on the Commission's website the status update filings within 30 days of submission. The Commission further directs WCB to prepare a report for Congress within every 180 days following the funding allocation stage. The report shall provide an update on the Commission's implementation efforts and ''the work by recipients of reimbursements . . . to permanently remove, replace, and dispose of covered communications equipment or services.''

171. *Spending Reports.* The Secure Networks Act directs the Commission to require Reimbursement Program recipients to submit ''reports regarding how reimbursement funds have been spent, including detailed accounting of the covered communications equipment or services permanently removed and disposed of, and the replacement equipment or services purchased, rented, leased or otherwise obtained, using reimbursement funds.'' Like status updates, spending reports help mitigate waste, fraud, and abuse by allowing the Commission to monitor the recipient's funding use to help make sure funds are spent as intended. The statute requires the filing of spending reports on a regular basis but does not otherwise indicate the filing frequency.

172. The Commission sought and received limited comment on the implementation of this statutory provision. The lone commenter, the Rural Wireless Broadband Coalition, understands the benefits of having recipients file such reports but encourages the Commission to limit the filing frequency to a semi-annual basis. According to Rural Wireless Broadband Coalition, [p]roducing these detailed accountings will be a burdensome, time-consuming exercise for small wireless carriers, requiring them to dedicate scarce resources to track, record, assemble, review, and report extensive data related to the removal, replacement, and disposal of covered equipment.''

173. The Commission is sensitive to the reporting burden highlighted by Rural Wireless Broadband Coalition. While the removal, replacement, and disposal term is for a one-year period with possible extensions of time for up to six-months, the Commission finds that requiring filings twice a year will provide information with sufficient frequency to allow the Commission to monitor against waste, fraud, and abuse while mitigating the reporting burden on recipients. Accordingly, the Commission will require Reimbursement Program recipients to file semiannually. Spending reports will be due within 10 calendar days after the end of January and July, starting with the recipient's initial draw down of disbursement funds and terminating once the recipient has filed a final spending report showing the expenditure of all funds received as compared to the estimated costs submitted. A final spending report will be due following the filing of a final certification by the recipient.

174. The Commission directs WCB to provide Reimbursement Program recipients with additional details on the filing of and information contained in the spending reports. The Commission also directs WCB to make filed spending reports available to the public via a portal on the Commission's website. The Commission will consider detailed accounting information on the covered communications equipment or services permanently removed and disposed of, and the replacement equipment or services purchased, rented, leased, or otherwise obtained, using reimbursement funds presumptively confidential and will withhold such disaggregated information from routine public inspection.

175. *Final Certification.* The Secure Networks Act directs the Commission to require Reimbursement Program recipients to file a final certification ''in a form and at an appropriate time to be determined by the Commission.'' In the final certification, the Reimbursement Program recipient must indicate whether it has fully complied with (or is in the process of complying with) all terms and conditions of the Program and the commitments made in the application of the recipient for the reimbursement; has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement; and has fully complied with (or is in the process of complying with) the timeline submitted by the recipient. The statute also requires the filing of an updated certification if at the time the final certification is filed, the recipient has not fully complied with and completed its obligations under the Reimbursement Program.

176. No comments were filed addressing the final certification required by the Secure Networks Act. As the Commission lacks discretion to deviate from clear statutory requirements, it adopts a rule requiring recipients to file a final certification and updates as necessary per the statute. The Commission will require recipients to file the final certification within 10 calendar days of the expiration of the removal, replacement and disposal term because the final certification relates to the completion of the removal, replacement, and disposal process. The final certification will relate to the state of compliance and project completion as of the end of the removal, replacement and disposal term. Subsequently filed final certification updates will relate to the state of compliance and project completion as of the date the update is filed. Notwithstanding the statutory allowance for a final certification update, the failure to complete the removal, replacement, and disposal process in accordance with the Reimbursement Program's requirements by the end of the removal, replacement and disposal term, as evidenced in the filing of the final certification as initially filed, may result in the assessment of fines, forfeitures, and/or other enforcement actions against the recipient. The Commission directs WCB to provide additional details on the filing requirements and contents for the final certification and associated updates.

177. *Documentation Retention Requirement.* Reimbursement Program recipients are required to provide documentation, including relevant invoices and receipts, to support requests for the disbursement of reimbursement funds for reasonable expenses actually incurred during the removal, replacement, and disposal process. This documentation helps the Commission assess whether funding is being used as intended for reasonable costs, helps the Commission compare actual costs to submitted estimated costs, and helps to ensure disbursements for actual costs do not exceed the recipients funding allocation. While commenters did not

address document retention, the Commission finds it prudent in its effort to combat waste, fraud, and abuse to require program recipients to retain all documentation related to their requests for funding reimbursement for actual expenses incurred. Recipients must retain the documentation for a period of 10 years after the date the final disbursement payment is received from the Reimbursement Program. The retained documentation will assist the Commission with any subsequent investigations should an issue of waste, fraud, and abuse arise following the completion of the removal, replacement, and disposal process. A 10-year period of time for retaining documentation is consistent with the Commission's retention requirement for both the E-Rate program and the broadcast incentive auction reimbursement program and coincides with the 10-year statute of limitations under the False Claims Act.

178. *Audits, Reviews, and Field Investigations.* In the *2019 Supply Chain Further Notice* the Commission proposed subjecting program recipients to periodic compliance audits and other inquiries, including investigations as appropriate, to ensure compliance with the Commission's rules and orders. The Commission did not receive any comments on this issue. The Commission now directs OMD, or a third-party identified by OMD, to prepare a system to audit Reimbursement Program recipients to ensure compliance with the Commission's rules. Consistent with the Commission's experience regarding the USF, the Commission finds that audits are the most effective way to determine compliance with the Commission's rule requirements. To facilitate audits and field investigations, the Commission requires Reimbursement Program recipients to provide consent to allow vendors or contractors used by the recipient to release confidential information to the auditor, reviewer, or other representative. Recipients must also allow any representative appointed by the Commission to enter the premises of the recipient to conduct compliance inspections.

179. *Enforcement.* In the *2020 Supply Chain Second Further Notice,* the Commission sought comment on implementing the enforcement measures contained in section 7 of the Secure Networks Act. The Commission received only one comment, from CCA, on the issue. As provided for in the statute, a violation of the Secure Networks Act or a regulation adopted pursuant to this statute shall constitute a violation of the Communications Act. As such, the Commission's authority to impose fines and forfeitures pursuant to section 503 of the Communications Act and § 1.80 of the Commission's rules, 47 CFR 1.80, will apply equally to violations of the Secure Networks Act and Commission regulation adopted pursuant to the Secure Networks Act. Potential violators are not limited to Reimbursement Program recipients but could also include consultants, vendors and contractors that assist entities participating in Reimbursement Program. In addition, as directed by the Secure Networks Act and consistent with the Commission's proposal in the *2020 Supply Chain Second Further Notice* and the Secure Networks Act the Commission requires Reimbursement Program recipients found in violation of its rules or the ''commitments made by the recipient in the application for the reimbursement'' to repay funds disbursed via the Reimbursement Program. Prior to requiring repayment, WCB will send notice of the violation to the alleged violator and give the alleged violator 180 days to cure the violation as required by the Secure Networks Act. In addition to taking steps necessary to address a non-compliant situation, curing a violation may simply involve a response showing that a violation has been cured. The cure period will provide alleged violators with ample time to resolve issues of non-compliance before the Commission proceeds with taking further enforcement action.

180. Section 7(c) of the Secure Networks Act requires the Commission to take immediate action to recover all reimbursement funds awarded to a recipient if the recipient is required to repay funding due to a violation. CCA urged the Commission ''to include in its enforcement procedures a reasonable opportunity for carriers to cure before repayment or other penalty action is triggered. The statute already provides program participants a 180-day period to cure violations prior to initiating repayment actions, and so the Commission finds going beyond what is already required unnecessary. Accordingly, consistent with the Commission's proposals in the *2020 Supply Chain Second Further Notice,* it will initiate a repayment action by sending a request for repayment to the recipient immediately following the expiration of the opportunity to cure if the recipient fails to respond to the notice of violation, indicating the violation is cured. If the alleged violator does respond to the notice but is ultimately determined by the Commission not to have cured the violation, the Commission will then request repayment following that determination.

181. The Commission directs the Enforcement Bureau (EB) to take all steps necessary to initiate enforcement actions against Reimbursement Program violators and to recover any outstanding repayment amounts once a violation of the Reimbursement Program is referred by WCB to EB. Participants found to violate the Commission's rules will also be referred to ''all appropriate law enforcement agencies or officials for further action under applicable criminal and civil laws.'' Any person or entity that violates the Reimbursement Program rules will also be banned from further participation in the section 4 reimbursement program, and the person or entity may also be barred from participating in other Commission programs, including Universal Service support programs.

182. Section 4(d)(1) of the Secure Networks Act requires the Commission to develop a list of suggested replacements (Replacement List) for the equipment and services being removed, replaced, and destroyed. Specifically, Congress directed the Replacement List to include ''both physical and virtual communications equipment, application and management software, and services or categories of replacements of both physical and virtual communications equipment, application and management software.'' The list of suggested replacements must also be technology neutral and may not advantage the use of reimbursement funds for capital expenditures over operational expenditures. The Commission sought comment on how to develop the Replacement List in April 2020.

183. Consistent with the Commission's statutory obligation, it establishes, and will publish on its website, a Replacement List that will identify the categories of suggested replacements of real and virtual hardware and software equipment and services to guide of providers removing covered communications equipment from their networks. The Commission agrees with commenters that the Secure Networks Act provides the Commission with the flexibility to choose either to create a list of suggested replacements or categories of replacements. The Commission also agrees that the Replacement List should include categories of replacements rather than try to identify suggested replacements, because, as commenters assert, creating a list of suggested replacements would have negative consequences, such as the Commission being seen as picking

favored equipment and manufacturers and imposing *de facto* mandates of specific equipment. The Commission agrees with commenters that it should provide carriers with the flexibility to select the equipment or services that fit their needs from categories of equipment and services. The Commission is wary of actions that could harm its communications networks, or result in mandatory purchases of specific equipment included on the Replacement List. The Commission therefore will list categories of suggested replacements on the Reimbursement List.

184. Further, were the Commission to try to identify specific equipment and services, it would risk inadvertently overlooking some equipment or manufacturers because ''the number and diversity of telecommunications equipment is enormous, with varying model numbers, releases, and configurations.'' There is no available resource with such information in the record. The Commission believes the better approach in developing the Replacement List is to identify categories of replacement equipment and services that providers of advanced communications service could then look to as they determine the proper equipment and services for their networks.

185. Others suggest that rather than creating a list of permissible hardware and software equipment and services, the Commission should make a list of manufacturers from whom the products and services might be purchased. The Secure Networks Act specifically requires the Commission to produce a list of ''Suggested Replacements.'' Identifying manufacturers would give the imprimatur of government approval and create a government approved list of manufacturers. An approved government listing could influence purchases and appear to convey that the Commission believes certain equipment meets quality and security metrics, which would require intensive review of products to ensure that the Replacement List was accurate and up-to-date. It could also lead to security threats as companies rely on the Commission's ''seal of approval'' in lieu of conducting their own research into the security of certain equipment. Further, entities seeking to enter the market may be dissuaded if their customers are only able to purchase equipment from manufacturers approved by the Commission, harming competition and innovation right as the move to Open Radio Access Networks (O–RAN) and virtualized networks opens up markets to new competitors. For these reasons, the Commission declines to name specific manufacturers and instead find that a Replacement List with categories of suggested equipment and services to guide providers of advanced communications service is the better interpretation of its obligation.

186. In compiling this Replacement List, the Commission will use the categories of equipment and services in its recently completed information collection as guidance for specific categories on the Replacement List. Specifically, in the *2019 Supply Chain Order,* the Commission directed the Office of Economics and Analytics (OEA) and WCB to conduct an information collection to determine whether ETCs own equipment or services from Huawei and ZTE; what that equipment is and services are; the costs associated with purchasing and/or installing such equipment and services; and the costs associated with removing and replacing such equipment and services. Additionally, the Catalog of Expenses adopted as part of the Reimbursement Program will inform the Replacement List by helping to target the type of equipment that will be removed and replaced. The Commission may also review efforts from other Federal partners, such as the Federal Acquisition Security Council, or the Department of Homeland Security's Information and Communications Technology Supply Chain Risk Management Task Force, if those efforts are relevant to the Replacement List. The Federal Acquisition Security Council was established pursuant to the SECURE Technology Act and the Information and Communications Technology Supply Chain Risk Management Task Force is a public-private supply chain risk management partnership established in to identify and develop consensus strategies that enhance supply chain security.

187. The Commission agrees with commenters that the Replacement List should include equipment and services equipped, or upgradable to, be used in O–RAN, or in virtualized networks. Including O–RAN equipment and services, which ''could transform 5G network architecture, costs, and security,'' is consistent with the Secure Networks Act's requirement that the Replacement List be technologically neutral. The Secure Networks Act allows for the inclusion of services such as O–RAN and virtualized network equipment ''to the extent that the Commission determines that communications services can serve as an adequate substitute for the installation of communications equipment.'' The record shows that these communications services can serve as an adequate substitute for communications equipment. The Commission makes such a finding here. The Commission encourages providers participating in the Reimbursement Program to consider this promising technology, along with all other available technologies as they make their procurement decisions.

188. One commenter asserts that the Commission should use a software overlay to allow companies with covered communications equipment and services to keep the equipment in their networks until obsolescence, potentially enabling reimbursement funding to cover more networks. They argue the software overlay will make the replacement of the risky of covered equipment more efficient ''with proven and fully tested technology (tested by [the U.S. government]), that installs as software on 3rd party communications equipment and mitigates the covered equipment manufacturers'' ability to remotely access, manipulate traffic, access private and proprietary data and make configuration changes.'' They further suggest that these software technologies provide the ability to defend the United States communications and data infrastructure, regardless of the location and source of manufacturing allowing time for ''rip and replace'' actions to be accelerated at lower cost.

189. Were the Commission to adopt this proposal, covered, potentially harmful equipment could remain in its networks for years, increasing the risks to the Commission's networks. The Commission believes the better approach given the language in the Secure Networks Act is take every measure possible to immediately reduce and eliminate the risk by removing the equipment promptly. Additionally, the Reimbursement Program requires that reimbursement funds be used solely for the purposes of ''permanent removal of covered communications equipment and services . . . .'' The public interest and its statutory goals would be best served by the approach the Commission has adopted.

190. The Commission also declines at this time to rely solely on a third party to create a list of suggested categories or the list of replacement equipment and services, as advocated by one commenter. First, the Secure Networks Act requires the Replacement List to be technologically neutral. Trade associations or membership organizations may be inherently biased toward the interests of their membership. Rather than risk the impression of self-dealing, the

Commission believes it is more prudent to maintain control of the Replacement List. Second, although the Commission recognizes the challenges inherent in creating the Replacement List, the Secure Networks Act is clear that the Commission ''shall'' develop the Replacement List. Outsourcing the task to a third-party trade association or similar organization could be an unlawful subdelegation and risk the appearance of abdicating the Commission's responsibility.

191. *Maintenance of the List.* The Commission agrees with commenters that the list of suggested equipment and service should be transparent and current. The Commission will update the list of suggested equipment and services, and program recipients and interested third parties may also provide information about suggested equipment and services to assist the Commission in keeping the list current and reflective of changes in the market. The Commission finds that the list should be updated at least annually to ensure that it stays current with new technologies and innovations while also providing access to evolving next-generation communications capabilities to all consumers. Updating the Replacement List annually is consistent with the minimum schedule that Congress set for the Commission to update the list of covered communications equipment and services. The Commission believes updating its list of equipment and services that pose a threat to national security risks and its Replacement Lists together will provide consistency and clarity for providers seeking to comply with the Commission's rules.

192. The Commission declines to update the list quarterly, as some commenters argue. By adopting a Replacement List featuring categories of equipment and services, the Commission is expressly declining to attempt to evaluate every piece of equipment or software released. The Commission finds that the relevant categories of equipment and services are unlikely to change quarterly, and that an annual review is sufficient to keep the list current and foster a competitive marketplace. An annual update will be much more comprehensive and avoid the need for providers to constantly check the Commission's website prior to investing in their networks. For these same reasons, the Commission declines to update the list at even shorter intervals, such as monthly. The Commission does, however, note that the list may be updated at a shorter interval if the Commission deems it necessary.

193. The Commission directs WCB to issue a Public Notice at least annually announcing the updates to the Replacement List.

194. In the *2019 Supply Chain Order,* the Commission sought to understand the scope of potentially prohibited equipment or services in the communications supply chain to help inform its rulemaking. As a result, it adopted the *2019 Supply Chain Information Collection Order,* which required ETCs, and their non-ETC affiliates and subsidiaries, to report on the existence, or lack thereof, of any of their equipment and services obtained from Huawei and ZTE. ETCs had to submit information on the type of equipment or service obtained from these covered companies; the cost to purchase and/or install such equipment and services; and the cost to remove and replace such equipment and services. All submissions were required to be certified. OEA and WCB collected and compiled this data, and the results were published in September 2020.

195. Section 5 of the Secure Networks Act requires that ''providers of advanced communications service'' report annually if they have ''purchased, rented, leased, or otherwise obtained any covered communications equipment or service, ''on or after'' August 14, 2018 or 60 days after an equipment or service has been placed on the Covered List. In other words, any equipment or service on the Covered List based on one of these two specifications must be reported. Section 5 also requires that providers of advanced communications service who have indicated in the information collection that their network contains covered equipment or services, based on the specifications in this document, submit a ''detailed justification'' for obtaining such equipment or services, as well as information indicating whether the covered equipment or services has subsequently been removed and replaced and information about plans to continue the purchase, rent, lease, installation, or use of such covered equipment or services. Any providers that certify to the Commission that they do not have any equipment or services are not required to submit annual reports unless they acquire covered equipment or services after their last certification.

196. In the *2020 Supply Chain Second Further Notice,* the Commission proposed to require that advanced communications service providers report the type, location, date obtained, and any removal and replacement plans of covered equipment and services in their networks. The Commission also sought comment on the appropriate information needed to satisfy the ''detailed justification'' requirement of the Secure Networks Act.

197. Consistent with the Secure Networks Act and the Commission's proposal in the *2020 Supply Chain Second Further Notice,* the Commission implements a new data collection requirement applying to all providers of advanced communications service. The Commission requires that providers of advanced communications service annually report on covered communications equipment or services in their networks. Specifically, with respect to equipment or services on the initial Covered List acquired on or after August 14, 2018, or equipment or services added to the Covered List that were purchased 60 days or more after the Covered List is subsequently updated, providers must report the type of covered communications equipment or service purchased, rented or leased; location of the equipment or service; date the equipment or service was procured; removal or replacement plans for the equipment or service, including cost to replace; amount paid for the equipment or service; the supplier for the equipment or service; and a detailed justification for obtaining such covered equipment and service.

198. The detailed justification must thoroughly explain the provider's reasons for obtaining the covered equipment and/or services, including why the provider chose to obtain covered equipment and services rather than equipment and services not on the Covered List. These reasons can include technical or compatibility issues or the source of the vendor was not known by the provider. Providers must also indicate whether the equipment and services were published on the Covered List at the time of purchase, and whether the covered equipment and services supports any other covered equipment and services that do not need to be reported, because, for example, the equipment or services were obtained before August 14, 2018. This information is not only required pursuant to the Secure Networks Act but will inform future Commission action to address security issues in communications networks.

199. The Commission will release to the public a list of providers that have reported covered equipment or services in their networks, consistent with the *2019 Supply Chain Information Collection Order.* The Commission believes that the public interest in knowing whether providers have covered equipment and services in their networks outweighs any interest the

carrier may have in keeping such information confidential. The Commission rejects NCTA's argument to the contrary. NCTA argues that because the Secure Networks Act directed that status updates under the reimbursement program would be made public under section 4(d)(8) while remaining silent on whether the section 5 results should be made public, Congress intended that section 5 results remain confidential. The Commission disagrees. Instead, Congress provided the Commission with significant discretion as to the ''form'' and manner of these reports, and it believes the public interest in knowing whether covered communications equipment and services acquired after August 14, 2018 are in providers of advanced communications service networks outweigh any countervailing interest of the provider in keeping such information confidential. Moreover, at the time it passed the Secure Networks Act, Congress was aware of the Commission's intention to publish a list of ETCs with Huawei and ZTE equipment in their networks based on the *2019 Supply Chain Information Collection Order,* and the Commission believes Congress's silence as to whether the section 5 results should be made public is better interpreted as endorsing a similar approach to the *2019 Supply Chain Information Collection Order* rather than NCTA's reading. Other information, such as location of the equipment and services; removal or replacement plans that include sensitive information; the specific type of equipment or service; and any other provider specific information will be presumptively confidential. The Commission believes that this information would likely qualify as trade secrets under the Freedom of Information Act.

200. The Commission directs OEA to administer the collection, which includes creating a form for submission through an online portal. The form will require that all providers certify that the information provided is true and accurate subject to federal regulations. The form will have the option for providers to certify that they do not have any covered equipment and services. Those providers that certify that they do not have any covered equipment and services will not need to refile annually unless circumstances change, and they acquire any of these covered equipment and services or if equipment they currently use is subsequently added to the Covered List. However, a provider of advanced communications service that certifies that its network does have covered equipment or services will need to continue to file an annual report, including the justification, until the provider can certify that its network no longer contains covered equipment or services. The Secure Networks Act only allows entities that respond to the information collection with a negative response to cease filing unless their subsequently purchase, rent, lease, or obtain covered communications equipment and services.

201. The Commission reiterates that this information collection requirement does not have any effect on the *2019 Supply Chain Information Collection Order* and its subsequent results. The *2019 Supply Chain Information Collection Order* has closed, and the Commission has publicly reported its results. The results of the *2019 Supply Chain Information Collection Order* helped inform the Commission of the extent of Huawei and ZTE equipment in its communications networks and provided information about the cost of replacing such equipment. USTelecom argues that the Secure Networks Act's information collection should supersede the *2019 Supply Chain Information Collection Order,* but that argument has been mooted by the release of results from the *2019 Supply Chain Information Collection Order.* Moreover, the *2019 Supply Chain Information Collection Order* and the new information collection are distinct. The new information collection, as required by Congress in the Secure Networks Act, will inform the Commission and public about advanced communications service provider action regarding covered communications equipment or services on or after August 14, 2018. As the Commission explained in the *2020 Supply Chain Second Further Notice,* the *2019 Supply Chain Information Collection Order* only covered ETCs. ETCs were required to report any Huawei and ZTE equipment and services in their networks, or their subsidiaries or affiliates, regardless of when they were obtained.

202. *Effective Date.* For the first annual filing, certified responses to this information collection from providers of advanced communication service will be due through the portal no later than 90 days after OEA issues a public notice announcing the availability of the new reporting portal. Although the Commission proposed a six-month window in the proposed rules appendix of the *2020 Supply Chain Second Further Notice,* a 90-day period would provide the Commission and the public with quicker notification of potential security risks to U.S. communications networks. The Commission finds that a 90-day period is sufficient time for providers to complete the first annual report for two reasons. First, it will likely take OEA time to prepare the portal for the annual submissions. The Commission expects providers of advanced communications service to begin work for the certification and reporting requirement before OEA issues the Public Notice, providing sufficient time for providers to gather the information when added to the 90 days after the Public Notice is published. Second, 90 days is roughly consistent with the amount of time the Commission gave ETCs, their subsidiaries, and affiliates, to comply with the first information collection, including an extension of time to respond. Thereafter, all providers of advanced communications service required to comply with this information collection must submit their certified response through the portal no later than March 31 for the previous year.

203. Based on presently available information obtained through the Commission's Information Collection, the Commission estimates the cost of requiring the removal and replacement of covered equipment and services within the next two years to be $1.8 billion for all ETCs. In the *2019 Supply Chain Order,* the Commission preliminarily estimated the total cost to be between $600 million and $2 billion dollars. Not all of that amount, however, is subject to reimbursement. The ETCs that appear to initially qualify for reimbursement under the Secure Networks Act report it would require approximately $1.6 billion to replace their equipment. Yet, as the Commission concluded in the *2019 Supply Chain Order,* it finds that the affected equipment has a 10-year life and that this Order will impact investment decisions starting in 2021. The Commission therefore expects to see some replacements, like those normally occurring under attrition at the end of both 2020 and 2021, covering two years and including up to 20% of the original equipment. Hence, the Commission expects the required replacement costs for the Huawei or ZTE asset base occurring at the end of the period for all ETCs may be as low as $1.5 billion (*i.e.,* about 80% of $1.8 billion) and the reimbursement amount for qualifying ETCs may be as low as $1.3 billion (*i.e.,* 80% of $1.6 billion).

204. The Commission nonetheless concludes that, even if total replacement cost is as high as $1.8 billion reported by all ETCs, that cost will be far exceeded by the benefits obtained by addressing the important national

security concerns raised by the enumerated sources who make national security determinations. As the Commission explained in the *2019 Supply Chain Order,* the benefits of removing covered equipment and services ''extend to [hard] to quantify matters, such as preventing untrustworthy elements in the communications network from impacting our nation's defense, public safety, and homeland security operations, our military readiness, and our critical infrastructure, let alone the collateral damage such as loss of life that may occur with any mass disruption to our nation's communications networks.''

205. The other rules enacted in the Order are mandated by the Secure Networks Act and the Commission has no discretion to diverge from statutory direction. The Commission estimates the reporting costs of complying with the new reporting requirement, mandated by section 5 of the Secure Networks Act, to be approximately $600,000, being the product the per provider cost of $167 and the Commission's estimate of reporting providers of advanced communications services of approximately 3,500 ($167 * 3,500 = $584,500, which the Commission rounds to $600,000 recognizing its calculations are only approximations). The Commission estimates that complying would take 3 hours for each ETC subject to that collection, at a cost of about $167 per carrier, as the reporting requirements for the new collection are similar to those in the *2019 Supply Chain Information Collection.* The Commission estimates there are approximately 3,500 providers of advanced communications service, *i.e.,* providers that would have to report under the present collection, as follows. There are 3,822 current 477 filings. Some of these are from filers that affiliated with each other. The Commission associated affiliated 477 filers with a unique ''parent'' filer, dropping the affiliates from its count. Of the remaining 477 filers, the Commission dropped filers who only engage in fixed line resale and do not supply mobile service. This left 3,579 filers, which, recognizing the Commission's process involves approximation, it rounds to 3,500. This reporting cost estimate is higher than the cost of the data collection of the *2019 Supply Chain Information Collection* because the universe of respondents includes all providers of advanced communications service, not just ETCs. The Commission anticipates that the new prohibition on Federal subsidy programs administered by the Commission will not have incremental net costs beyond those already imposed by § 54.9 of the Commission's rules. The Commission accordingly finds that its requirements will achieve the stated objectives of Congress's mandated rules in the most cost-effective manner. Huawei argues that the ''significant upfront costs as well as ongoing expenditures . . . will make it extremely difficult to comply with a removal and replacement mandate.'' Huawei believes a cost benefit analysis ''likely would result in inequitable disbursement or reimbursement funds because some carriers may have spent more on covered company equipment that other carriers'' and, for non-ETCs, ''the magnitude of equipment replacements costs is not something they can afford.'' The Commission disagrees. For non-ETCs, the requirement to remove and replace equipment applies only to those providers which voluntarily choose to participate in the Reimbursement Program. And the Commission received no comments from ETCs who would be ineligible to participate in the Reimbursement Program stating the requirement to remove and replace covered equipment or services is not feasible. Finally, the design of the Reimbursement Program, including section 4 of the Secure Networks Act and the rules the Commission adopts, will ensure an equitable allocation of funds to replace covered equipment and services.

III. Procedural Matters

A. Paperwork Reduction Act of 1995 Analysis

206. This document contains modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the modified information collection requirements contained in this proceeding. In addition, the Commission notes that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, *see* 44 U.S.C. 3506(c)(4), the Commission previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.

B. Congressional Review Act

207. 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 major under the Congressional Review Act, 5 U.S.C. 804(2). The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. 801(a)(1)(A).

208. *Final Regulatory Flexibility Analysis.* The Regulatory Flexibility Act of 1980 (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a FRFA concerning the possible impact of the rule changes contained in the Report and Order on small entities.

209. The Commission sought written comment on the proposals in the *2019 Supply Chain Further Notice* and *2020 Supply Chain Second Further Notice,* including comment on the Initial Regulatory Flexibility Analysis (IRFA). The present Final Regulatory Flexibility Analysis (FRFA) addresses comments received on the IRFAs and conforms to the RFA.

210. Consistent with the Commission's obligation to be responsible stewards of the public funds used in USF programs and increasing concern about ensuring communications supply chain integrity, and as directed by the Secure Networks Act, the Second Report and Order (Order) adopts rules to implement sections 2, 3, 4, 5, and 7 of the Secure Networks Act and to require recipients of reimbursement funds under the Reimbursement Program and ETCs receiving USF support to remove and replace from their network operations communications equipment and services included on the covered list required by section 2 of the Covered List.

211. Specifically, in addition to the requirement to remove-and-replace, the Commission adopts several rules to implement provisions of the Secure Networks Act. The Commission implements section 2 of the Secure Networks Act by publishing on its website the Covered List of communications equipment or services determined to pose a risk to national security, pursuant to the sources of determinations identified in section 2(c) of the Secure Networks Act. The

Commission adopts a rule to prohibit the use of Federal subsidies made available through a program administered by the Commission to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, and identified and published on the Covered List. The Commission establishes, as directed by section 4 of the Secure Networks Act, the Reimbursement Program to reimburse costs reasonably incurred by providers of advanced communications service with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks. To further administer the Reimbursement Program, the Commission establishes, and will publish on its website, a list of suggested replacements (Replacement List) for the equipment and services being removed, replaced, and destroyed, and establishes a reporting requirement and new information collection to require providers of advanced communications service to report covered communications equipment and service in their networks.

212. Small entities potentially affected by the rules herein include eligible schools and libraries, eligible rural non-profit and public health care providers, and the eligible service providers offering them services, including telecommunications service providers, internet Service Providers, and vendors of the services and equipment used for telecommunications and broadband networks.

213. *Requirement to Remove and Replace Covered Equipment and Services.* The Order requires recipients of reimbursement funds under the Reimbursement Program and ETCs receiving USF support to remove and replace from their network operations covered equipment and services included on the Covered List. The Order conditions this obligation to remove and replace covered equipment and services upon a congressional appropriation to fund the Reimbursement Program. The Order limits the scope of the remove-and-replace requirement to equipment and services on the Covered List. Applicants for funds through the Reimbursement Program shall satisfy compliance with the remove-and-replace obligation in accordance with the deadlines and transition periods associated with the Reimbursement Program. Entities required to comply that are not recipients of funding through the Reimbursement Program must remove covered equipment and services within one year after WCB issues a Public Notice announcing the acceptance of applications filed during the initial filing window to participate in the Reimbursement Program. ETC recipients of USF support must certify that they have complied with our new rule requiring the removal of equipment and services on the Covered List.

214. *Covered List.* Consistent with the Secure Networks Act, no later than March 12, 2021, the Commission will publish on its website the Covered List of communications equipment or services determined to pose an unacceptable risk to the national security of the United States or the security and safety of United States persons. The Order establishes that the Commission will publish, update, or modify the Covered List without providing notice or opportunity to comment; however, PSHSB will issue a Public Notice every time the Covered List is updated. As directed by the Secure Networks Act, the Order states that the Commission may only accept determinations from the four sources enumerated in the Secure Networks Act, and will incorporate national security determinations into the Covered List automatically, when identifying specific communications equipment or services that ''pose[ ] an unacceptable risk to the national security of the United States and the security and safety of United States persons,'' or to the extent the class or category of equipment or service identified is ''capable'' of the 2(b)(2)(A)–(C) criteria, when listed in general categories or classes of equipment that pose such a risk. The Commission will periodically update or modify the Covered List to reflect changes in determinations and will notify the public for every twelve-month period during which the Commission does not update the Covered List.

215. *Restriction on Use of Federal Subsidies.* Pursuant to section 3 of the Secure Networks Act, the Order adopts a rule that no Federal subsidy made available through a program administered by the Commission for capital expenditures necessary for the provision of advanced communications service shall be used to purchase, rent, lease, or otherwise obtain any covered communications equipment or service, or maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained, as identified and published on the Covered List. The Commission has interpreted section 3 of the Secure Networks Act as intending to apply to all universal service programs but not other Federal subsidy programs to the extent those programs may tangentially or indirectly involve expenditures related to the provision of advanced communications service. In the Order, the Commission declines to grandfather existing contracts for equipment or services on the Covered List under § 54.10 of the Commission's rules. The prohibition on the use of Federal subsidies takes effect 60 days after any particular communications equipment or services are placed on the Covered List, consistent with the Secure Networks Act. The Order requires recipients of universal service support from each of the four USF programs to certify that they have complied with the new rule prohibiting the use of Federal subsidies for equipment and services on the Covered List.

216. *Reimbursement Program.* The Order establishes, as directed by the Secure Networks Act, the Secure and Trusted Communications Reimbursement Program (Reimbursement Program) to reimburse the costs reasonably incurred by providers of advanced communication services with two million or fewer customers to permanently remove, replace, and dispose of covered communications equipment and services from their networks. In the Order, the Commission allows eligible providers to obtain reimbursement to remove and replace older covered communications equipment with upgraded technology and will reimburse providers for certain transition expenses incurred prior to the creation of this program. Program participants are required to submit estimated costs to receive funding allocations, and recipients can then obtain funding disbursements on a rolling basis upon a showing of actual expenses incurred. If aggregate demand exceeds available funding, the Order prioritizes funding for ETCs and expenses for transitioning core networks over non-ETCs and non-core network transition expenses. Program recipients will have one year from the initial funding disbursement to complete the permanent removal, replacement, and disposal of covered communications equipment, and the Commission may grant a single, general six-month extension for all recipients and/or individual extensions of time if circumstances warrant.

217. *Status Updates.* As directed by the Secure Networks Act, the Order requires program recipients to file a status update ''once every 90 days beginning on the date on which the Commission approves an application for a reimbursement.'' Recipients should file the first report within 90 days of

receiving their allocation. In the update, the recipients shall report on the efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing its covered communications equipment or services. Recipients shall also report in detail on the availability of replacement equipment in the marketplace so the Commission can assess whether a general, six-month extension permitted by the statute is appropriate. The report must also include information that the entity has fully complied with (or is in the process of complying with) all terms and conditions of the Program; has fully complied with (or is in the process of complying with) the commitments made in the application of the recipient for the reimbursement; has permanently removed from the communications network of the recipient, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application of the recipient for the reimbursement; and has fully complied with (or is in the process of complying with) the timeline submitted by the recipient. The report must include a certification that affirms the information in the status report is accurate. After the program recipient has notified the Commission of the completion of the permanent removal, replacement, and disposal of the covered communications equipment or service pursuant to a final certification, updates are no longer required.

218. *Steps to Mitigate Waste, Fraud, and Abuse.* The Order directs OMD, or a third-party identified by OMD, to prepare a system to audit Reimbursement Program recipients to ensure compliance with the Commission's rules. The Order requires recipients found in violation of the Commission's rules or the ''commitments made by the recipient in the application for the reimbursement'' to repay funds disbursed via the Reimbursement Program. Prior to requiring repayment, the Commission will provide notice of the violation, and will give the violator 180 days to cure the violation. The Commission initiates such action by sending a request for repayment to the recipient immediately following the expiration of the opportunity to cure if the recipient does not respond to the notice of violation. If the alleged violator does not respond to the notice or does not repay the amounts due, the Commission will demand repayment. Participants that are found to violate the Commission's rules will also be referred to ''all appropriate law enforcement agencies or officials for further action under applicable criminal and civil laws.'' Any person or entity that violates the Reimbursement Program rules will also be banned from further participation in the section 4 Reimbursement Program, and the person or entity may also be barred from participating in other Commission programs, including Universal Service support programs.

219. *Replacement List.* The Order establishes, and the Commission will publish on its website, a Replacement List that will identify the categories of suggested replacements of real and virtual hardware and software equipment and services to guide of providers removing covered communications equipment from their networks. The Replacement List of suggested equipment and services will be updated at least annually, and program recipients and interested third-parties may also provide information about suggested equipment and services to assist in keeping the list current and informed based upon changes in the market.

220. *Reporting Requirement.* The Order requires that providers of advanced communications service annually report the type of covered communications equipment or service purchased, rented or leased; location of the equipment or service; date the equipment or service was procured; removal or replacement plans for the equipment or service, including cost to replace; amount paid for the equipment or service; the supplier for the equipment or service; and a detailed justification for obtaining such covered equipment and service. All covered communications equipment or services on the initial Covered List published under section 2(a) of the Secure Networks Act that was purchased, leased, or otherwise obtained by a provider on or after August 14, 2018 must be reported. Additional covered equipment or services added to the list must be reported in the next annual report that is at least 60 days after the list is updated. Those providers needing to submit a detailed justification must thoroughly explain their reasons for obtaining the covered equipment and/or services. The Commission will release to the public a list of providers that have reported covered equipment or services in their networks, consistent with the *2019 Supply Chain Information Collection Order.* For the first annual filing, certified responses to this information collection from providers of advanced communication service will be due through the portal no later than 90 days after OEA issues a public notice announcing the availability of the new reporting portal.

221. The RFA requires an agency to describe the steps the agency has taken to minimize the significant economic impact on small entities of the final rule, consistent with the stated objectives of the applicable statutes, including a statement of the factual, policy, and legal reasons in support of the final rule, and why any significant alternatives to the rule considered by the agency and which affect the impact on small entities were rejected.

222. Several of the rules in the Order are adopted pursuant to statutory obligation under the Secure Networks Act. However, where the Commission has discretion in its interpretation or implementation of the Secure Networks Act provisions, or adopts rules pursuant to alternative statutory authority, the scope of the rules is narrowly tailored so as to lessen the impact on small entities. The rules adopted in the Order appropriately consider the burdens on smaller providers against the Commission's goal of protecting its communications networks and communications supply chain from communications equipment and services that pose a national security threat, while facilitating the transition to safer and more secure alternatives.

223. Consistent with the Commission's proposal in the *2019 Supply Chain Further Notice,* the requirement to remove and replace covered equipment and services is contingent upon appropriation from Congress, rather than making the requirement effective before funding is secured or based upon funding obtained through alternative measures, such as USF. Waiting until appropriated funding is available will reduce the burdens imposed upon smaller providers by ensuring that funds are available to cover reimbursable expenses through the Reimbursement Program. Additionally, the Order ties the administration of the remove-and-replace requirement to the administration of the Reimbursement Program, including limiting the scope of the requirement to equipment and services on the Covered List, which will allow providers to easily identify equipment and services to remove and replace from their networks. Using the Covered List to determine the scope of equipment and services applicable to the remove-and-replace requirement, as well as the prohibition on the use of Federal subsidies in § 54.10 of the Commission's rules and the Reimbursement Program, will enable

small providers to easily identify equipment and services for compliance with these rules.

224. Consistent with the statutory mandates in the Secure Networks Act, the Order establishes a program to reimburse eligible providers of advanced communications service for costs reasonably incurred to remove, replace, and dispose of covered equipment and services on the Covered List. As a general matter, when obtaining replacement products for reimbursement, the Commission expects eligible providers to ''obtain the lowest-cost equipment that most closely replaces their existing equipment'' yet will allow, and indeed encourage, eligible providers replacing third generation and older equipment to obtain reimbursement for the cost of 4G LTE replacement equipment that is 5G-ready. This will put recipients, including smaller providers, on equal footing to their prior position before incurring the costs of removing and replacing the covered equipment and services and, ultimately, end up placing recipients in a slightly better position than they were before having to replace the covered equipment and services.

225. Although one commenter advocated that the Commission release reimbursement funding upfront to provide financial security for smaller providers, the Order determines that the Reimbursement Program will allocate funds on a rolling basis, similar to the administration of the broadcast incentive auction. This methodology, which sufficiently met the financial needs of providers, including smaller providers, in the broadcast incentive auction context, best achieves Congress's goal of mitigating the administrative burden and costs of the program while taking steps to avoid waste, fraud, and abuse. Consistent with the Secure Networks Act, the Order further sets a term of one year from the date upon which funding is received for recipients to remove, replace, and dispose of covered equipment or services, though the Secure Networks Act authorizes the Commission to grant six-month extensions of time, either on a general or case-by-case basis, for compliance.

226. Lastly, the Commission will update the list of suggested equipment and services contained on the Replacement List at least annually to ensure that the list stays current and transparent, which will help small and rural providers required to remove and replace covered equipment and services access advanced products and services when transitioning away from covered equipment and services in their networks.

227. Pursuant to § 1.3 of the Commission's rules, any provision of the Commission's rules may be waived by the Commission on its own motion or on petition ''if good cause therefor is shown.'' The Order permits entities to seek a waiver of the requirements if permitted by statute. In these ways, the Order seeks to minimize the economic burden of these rules on small entities.

IV. Ordering Clauses

228. Accordingly, *it is ordered* that, pursuant to the authority contained in sections 1–4, 201(b), 214, 229, 254, 303(r), 403, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151–154, 201(b), 214, 229, 254, 303(r), 403, 503, sections 2, 3, 4, 5, and 7 of the Secure Networks Act, 47 U.S.C. 1601, 1602, 1603, 1604, and 1606, section 889 of the 2019 NDAA, Public Law 115–232, and §§ 1.1 and 1.412 of the Commission's rules and 47 CFR 1.1, the Report and Order *is adopted.*

229. *It is further ordered* that Parts 1 and 54 of the Commission's rules *are amended* as set forth in the following.

230. *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), the Report and Order *shall be effective* 60 days after publication of the Report and Order in the **Federal Register**, with the exception §§ 1.50004(c), (d)(1), (g), (h)(2), (j)–(n), 1.50007, and 54.11, which contain new or modified information collection requirements that require review and approval by the OMB under the Paperwork Reduction Act. The Commission will announce the effective date of those sections in the **Federal Register** after receiving OMB approval.

List of Subjects

47 CFR Part 1

Administrative practice and procedure, Civil rights, Claims, Communications, Communications common carriers, Communications equipment, Cuba, Drug abuse, Environmental impact statements, Equal access to justice, Equal employment opportunity, Federal buildings and facilities, Government employees, Historic preservation, Income taxes, Indemnity payments, Individuals with disabilities, internet, Investigations, Lawyers, Metric system, Penalties, Radio, Reporting and recordkeeping requirements, Security measures, Satellites, Telecommunications, Telephone, Television, Wages.

47 CFR Part 54

Communications common carriers, Health facilities, Infants and children, internet, Libraries, Puerto Rico, Reporting and recordkeeping requirements, Schools, Telecommunications, Telephone, Virgin Islands.

Federal Communications Commission

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1 and 54 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. Effective March 15, 2021, add Subpart DD consisting of §§ 1.50000 through 1.50007 to read as follows:

Subpart DD—Secure and Trusted Communications Networks

Authority: 47 U.S.C. chs. 5, 15.

Sec.

1.50000 Purpose.
1.50001 Definitions.
1.50002 Covered List.
1.50003 Updates to the Covered List.
1.50004 Secure and Trusted Communications Networks Reimbursement Program.
1.50005 Enforcement.
1.50006 Replacement List.
1.50007 [Reserved]

Subpart DD—Secure and Trusted Communications Networks

§ 1.50000 Purpose.

The purpose of this subpart is to implement the Secure and Trusted Communications Networks Act of 2019, Public Law 116–124, 133 Stat. 158.

§ 1.50001 Definitions.

For purposes of this subpart:

(a) *Advanced communications service.* The term ''advanced communications service'' means high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology with connection speeds of at least 200 kbps in either direction.

(b) *Appropriate national security agency.* The term ''appropriate national security agency'' means:

(1) The Department of Homeland Security;

(2) The Department of Defense;

(3) The Office of the Director of National Intelligence;

(4) The National Security Agency; and

(5) The Federal Bureau of Investigation.

(c) *Communications equipment or service.* The term ''communications equipment or service'' means any equipment or service used in fixed and mobile networks that provides advanced communication service, provided the equipment or service includes or uses electronic components.

(d) *Covered communications equipment or service.* The term ''covered communications equipment or service'' means any communications equipment or service that is included on the Covered List developed pursuant to § 1.50002.

(e) *Determinations.* The term ''determination'' means any determination from sources identified in § 1.50002(b)(1)(i)–(iv) that communications equipment or service pose an unacceptable risk to the national security of the United States or the security and safety of United States persons.

(f) *Covered List.* The Covered List is a regularly updated list of covered communications equipment and services.

(g) *Reimbursement Program.* The Reimbursement Program means the program established by section 4 of the Secure and Trusted Communications Networks Act of 2019, Public Law 116–124, 133 Stat. 158, codified at 47 U.S.C. 1603, as implemented by the Commission in § 1.50004.

(h) *Reimbursement Program recipient (or recipient).* The term ''Reimbursement Program recipient'' or ''recipient'' means an eligible advanced communications service provider that has requested via application and been approved for funding in the Reimbursement Program, regardless of whether the provider has received reimbursement funds.

(i) *Replacement List.* The Replacement List is a list of categories of suggested replacements for covered communications equipment or service.

§ 1.50002 Covered List.

(a) *Publication of the Covered List.* The Public Safety and Homeland Security Bureau shall publish the Covered List on the Commission's website and shall maintain and update the Covered List in accordance with § 1.50003.

(b) *Inclusion on the Covered List.* The Public Safety and Homeland Security Bureau shall place on the Covered List any communications equipment or service that:

(1) Is produced or provided by any entity if, based exclusively on the following determinations, such equipment or service poses an unacceptable risk to the national security of the United States or the security and safety of United States persons:

(i) A specific determination made by any executive branch interagency body with appropriate national security expertise, including the Federal Acquisition Security Council established under section 1222(a) of title 41, United States Code;

(ii) A specific determination made by the Department of Commerce pursuant to Executive Order No. 13873 (3 CFR, 2019 Comp., p 317); relating to securing the information and communications technology and services supply chain);

(iii) Equipment or service being covered telecommunications equipment or services, as defined in section 889(f)(3) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115–232; 132 Stat. 1918); or

(iv) A specific determination made by an appropriate national security agency;

(2) And is capable of:

(i) Routing or redirecting user data traffic or permitting visibility into any user data or packets that such equipment or service transmits or otherwise handles;

(ii) Causing the networks of a provider of advanced communications services to be disrupted remotely; or

(iii) Otherwise posing an unacceptable risk to the national security of the United States or the security and safety of United States persons.

§ 1.50003 Updates to the Covered List.

(a) The Public Safety and Homeland Security Bureau shall monitor the status of determinations in order to update the Covered List.

(b) If a determination regarding covered communications equipment or service on the Covered List is reversed or modified, the Public Safety and Homeland Security Bureau shall remove from or modify the entry of such equipment or service on the Covered List, except the Public Safety and Homeland Security Bureau may not remove such equipment or service from the Covered List if any other of the sources identified in § 1.50002(b)(1)(i) through (iv) maintains a determination supporting inclusion on the Covered List of such equipment or service.

(c) After each 12-month period during which the Covered List is not updated, the Public Safety and Homeland Security Bureau will issue a Public Notice indicating that no updates were necessary during such period.

§ 1.50004 Secure and Trusted Communications Networks Reimbursement Program.

(a) *Eligibility.* Providers of advanced communications service with two million or fewer customers are eligible to participate in the Reimbursement Program to reimburse such providers for costs reasonably incurred for the replacement, removal, and disposal of covered communications equipment or services if:

(1) The covered communications equipment or service to be removed, replaced, or disposed of was purchased, rented, leased or otherwise obtained before August 14, 2018 and on the initial Covered List published per § 1.50002; or

(2) The covered communications equipment or service was added to the Covered List per § 1.50003, then no later than 60 days after the date of addition to the Covered List;

(3) The provider certifies:

(i) As of the date of the submission of the application, the provider has developed:

(A) A plan for the permanent removal and replacement of any covered communications equipment or service that is in the communications network of the provider as of such date; and the disposal of the equipment or services removed; and

(B) A specific timeline for the permanent removal, replacement, and disposal of the covered communications equipment or service, which timeline shall be submitted to the Commission as part of the application per paragraph (c)(1)(iv) of this section; and

(ii) beginning on the date of the approval of the application, the provider:

(A) Will not purchase, rent, lease, or otherwise obtain covered communications equipment or service, using reimbursement funds or any other funds (including funds derived from private sources); and

(B) In developing and tailoring the risk management practices of the applicant, will consult and consider the standards, guidelines, and best practices set forth in the cybersecurity framework developed by the National Institute of Standards and Technology.

(b) *Filing window.* The Wireline Competition Bureau shall announce the opening of an initial application filing window for eligible providers seeking to

participate in the Reimbursement Program for the reimbursement of costs reasonably incurred for the removal, replacement, and disposal of covered communications equipment and services. The Wireline Competition Bureau may implement additional filing windows as necessary and shall provide notice before opening any additional filing window, and include in that notice the amount of funding available. The Wireline Competition Bureau shall treat all eligible providers filing an application within any filing window as if their applications were simultaneously received. Funding requests submitted outside of a filing window will not be accepted.

(c) [Reserved]

(d) *Application review process.* The Wireline Competition Bureau will review applications to determine whether the application is complete, whether the applicant is eligible for the Reimbursement Program, and to assess the reasonableness of the cost estimates provided by the applicant. The Wireline Competition Bureau shall approve or deny applications to receive a funding allocation from the Reimbursement Program within 90 days after the close of the applicable filing window. The Wireline Competition Bureau may extend the deadline for granting or denying applications for up to an additional 45 days if it determines that an excessive number of applications have been filed during the window and additional time is needed to review the applications.

(1) [Reserved]

(2) Denial of an application shall not preclude the applicant from submitting a new application for reimbursement in a subsequent filing window.

(e) *Funding allocation.* Once an application is approved, the Wireline Competition Bureau will allocate funding on the applicant's behalf to the United States Treasury for draw down by the Reimbursement Program recipient as expenses are incurred pursuant to the funding disbursement process provided for in paragraph (g) of this section.

(f) *Prioritization of support.* The Wireline Competition Bureau shall issue funding allocations in accordance with this section after the close of a filing window. After a filing window closes, the Wireline Competition Bureau shall calculate the total demand for Reimbursement Program support submitted by all eligible providers during the filing window period. If the total demand received during the filing window exceeds the total funds available, then the Wireline Competition Bureau shall allocate the available funds consistent with the following priority schedule:

TABLE 1 TO PARAGRAPH (f)—PRIORITIZATION SCHEDULE

Priority 1: Advanced communication service providers with 2 million or fewer customers that are Eligible Telecommunication Carriers subject to section [54.11] (new removal and replacement requirement).	*Priority 1a:* Costs reasonably incurred for transitioning core network(s). *Priority 1b:* Costs reasonably incurred for non-core network transition.
Priority 2: Non-ETC providers of advanced communications service with 2 million or fewer customers that participated in the Supply Chain Security Information Collection, OMB Control No. 3060–1270.	*Priority 2a:** Costs reasonably incurred for transitioning core network(s). *Priority 2b:** Costs reasonably incurred for non-core network transition.
Priority 3: Other non-Eligible Telecommunication Carriers that are providers of advanced communication service with 2 million or fewer customers.	*Priority 3a:* Costs reasonably incurred for transitioning core network(s). *Priority 3b:* Costs reasonably incurred for non-core network transition.

(1) *Application of prioritization schedule.* The Wireline Competition Bureau shall issue full funding allocations for all eligible providers in the Priority 1 prioritization category before issuing funding allocations in any subsequent prioritization categories. The Wireline Competition Bureau shall continue to review all funding requests and issue funding allocations by prioritization category until there are no available funds remaining. If there is insufficient funding to fully fund all requests in a particular prioritization category, then the Wireline Competition Bureau will pro-rate the available funding among all eligible providers in that prioritization category. Requests for funds in subsequent prioritization categories will be denied for lack of available funding.

(2) *Pro-rata reductions.* When pro-rata reductions are required per paragraph (f)(1) of this section, the Wireline Competition Bureau shall:

(i) Divide the total remaining funds available by the demand within the specific prioritization category to produce a pro-rata factor;

(ii) Multiply the pro-rata factor by the total dollar amount requested by each recipient in the prioritization category; and

(iii) Allocate funds to each recipient consistent with this calculation.

(g) [Reserved]

(h) *Removal, replacement, and disposal term.* Reimbursement Program recipients must complete the permanent removal, replacement, and disposal of covered communications equipment or service within one year of receiving the initial draw down disbursement from their funding allocation.

(1) *General extension.* The Commission may extend by a period of six months the removal, replacement, and disposal term to all Reimbursement Program recipients if the Commission:

(i) Finds that the supply of replacement communications equipment or services needed by the recipients to achieve the purposes of the Reimbursement Program is inadequate to meet the needs of the recipients; and

(ii) Provides notice and detailed justification for granting the extension to:

(A) The Committee on Energy and Commerce of the House of Representatives; and

(B) The Committee on Commerce, Science, and Transportation of the Senate.

(2) *Individual extensions.* Prior to the expiration of the removal, replacement and disposal term, a Reimbursement Program recipient may petition the Wireline Competition Bureau for an extension of the term. The Wireline Competition Bureau may grant an extension for up to six months after finding, that due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal by the end of the term. The Wireline Competition Bureau may grant more than one extension request to a recipient if circumstances warrant.

(i) *Limitations on funding use.* A Reimbursement Program recipient may not:

(1) Use reimbursement funds to remove, replace or dispose of any covered communications equipment or service purchased, rented, leased, or otherwise obtained:

(i) On or after August 14, 2018, if on the initial Covered List published per § 1.50002; or

(ii) On or after 60 days after the date of addition to the Covered List if the communications equipment or services were subsequently added to the Covered List per § 1.50003; or

(2) Purchase, rent, lease, or otherwise obtain any covered communications equipment or service, using reimbursement funds or any other funds (including funds derived from private sources).

(j)–(n) [Reserved]

(o) *Audits, reviews, and field investigations.* Recipients shall be subject to audits and other investigations to evaluate their compliance with the statutory and regulatory requirements for the Reimbursement Program. Recipients must provide consent to allow vendors or contractors used by the recipient in connection with the Reimbursement Program to release confidential information to the auditor, reviewer, or other representative. Recipients shall permit any representative (including any auditor) appointed by the Commission to enter their premises to conduct compliance inspections.

(p) *Delegation of authority.* The Commission delegates authority to the Wireline Competition Bureau, to adopt the necessary policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program to protect against waste, fraud, and abuse and in the event of bankruptcy, to establish a Catalog of Expenses Eligible for Reimbursement and predetermined cost estimates, review the estimated cost forms, issue funding allocations for costs reasonably incurred, set filing deadlines and review information and documentation regarding progress reports, allocations, and final accountings.

§ 1.50005 Enforcement.

(a) *Violations.* In addition to the penalties provided under the Communications Act of 1934, as amended, and section 1.80 of this chapter, if a Reimbursement Program recipient violates the Secure and Trusted Communications Networks Act of 2019, Public Law 116–124, 133 Stat. 158, the Commission's rules implementing the statute, or the commitments made by the recipient in the application for reimbursement, the recipient:

(1) Shall repay to the Commission all reimbursement funds provided to the recipient under the Reimbursement Program;

(2) Shall be barred from further participation in the Reimbursement Program;

(3) Shall be referred to all appropriate law enforcement agencies or officials for further action under applicable criminal and civil law; and

(4) May be barred by the Commission from participation in other programs of the Commission, including the Federal universal service support programs established under section 254 of the Communications Act of 1934, as amended.

(b) *Notice and opportunity to cure.* The penalties described in paragraph (a) of this section shall not apply to a recipient unless:

(1) The Commission, the Wireline Competition Bureau, or the Enforcement Bureau provides the recipient with notice of the violation; and

(2) The recipient fails to cure the violation within 180 days after such notice.

(c) *Recovery of funds.* The Commission will immediately take action to recover all reimbursement funds awarded to a recipient under the Program in any case in which such recipient is required to repay reimbursement funds under paragraph (a) of this section.

§ 1.50006 Replacement List.

(a) *Development of List.* The Commission shall develop a list of categories of suggested replacements of physical and virtual communications equipment, application and management software, and services for the covered communications equipment or services listed on the Covered List pursuant to §§ 1.50002 and 1.50003 of this subpart.

(1) In compiling the Replacement List, the Commission may review efforts from, or overseen by, other Federal partners to inform the Replacement List.

(2) The Replacement List shall include categories of physical and virtual communications equipment, application and management software, and services that allows carriers the flexibility to select the equipment or services that fit their needs from categories of equipment and services.

(3) The Wireline Competition Bureau shall publish the Replacement List on the Commission's website.

(b) *Maintenance of the List.* The Wireline Competition Bureau shall issue a Public Notice announcing any updates to the Replacement List. If there are no updates to the Replacement List in a calendar year, the Wireline Competition Bureau shall issue a Public Notice announcing that no updates that have been made to the Replacement List.

(c) *Neutrality.* The Replacement List must be technology neutral and may not advantage the use of reimbursement funds for capital expenditures over operational expenditures.

§ 1.50007 [Reserved]

■ 3. Delayed indefinitely, in § 1.50004, add paragraphs (c), (d)(1), (g), (h)(2), and (j) through (n) to read as follows:

§ 1.50004 Secure and Trusted Communications Networks Reimbursement Program.

* * * * *

(c) *Application requests for funding.* During a filing window, eligible providers may request a funding allocation from the Reimbursement Program for the reimbursement of costs reasonably incurred for the permanent removal, replacement, and disposal of covered communications equipment or service.

(1) Requests for funding allocations must include:

(i) An estimate of costs reasonably incurred for the permanent removal, replacement, and disposal of covered communications equipment or service from the eligible provider's network. Eligible providers may rely upon the predetermined estimated costs identified in the Catalog of Expenses Eligible for Reimbursement made available by the Wireline Competition Bureau. Eligible providers that submit their own cost estimates must submit supporting documentation and certify that the estimate is made in good faith.

(ii) Detailed information on the covered communications equipment or service being removed, replaced and disposed of;

(iii) The certifications set forth in paragraph (a)(3) of this section;

(iv) A specific timeline for the permanent removal, replacement, and disposal of the covered communications equipment or services; and

(v) The eligible provider certifies in good faith:

(A) It will reasonably incur the estimated costs claimed as eligible for reimbursement;

(B) It will use all money received from the Reimbursement Program only for expenses eligible for reimbursement;

(C) It will comply with all policies and procedures relating to allocations, draw downs, payments, obligations, and expenditures of money from the Reimbursement Program;

(D) It will maintain detailed records, including receipts, of all costs eligible for reimbursement actually incurred for a period of 10 years; and

(E) It will file all required documentation for its expenses.

(d) * * *

(1) If the Wireline Competition Bureau determines that an application is materially deficient (including by lacking an adequate cost estimate or adequate supporting materials), the Wireline Competition Bureau shall provide the applicant a 15-day period to cure the defect before denying the application. If the cure period would extend beyond the deadline under this paragraph (d) for approving or denying the application, such deadline shall be extended through the end of the cure period.

* * * * *

(g) *Funding disbursements.* Following the approval and issuance by the Wireline Competition Bureau of a funding allocation, a Reimbursement Program recipient may file a reimbursement claim request for the draw down disbursement of funds from the recipient's funding allocation. The recipient must show in the reimbursement claim actual expenses reasonably incurred for the removal, replacement, and disposal of covered communications equipment or service. The Wireline Competition Bureau will review and grant or deny reimbursement claims for actual costs reasonably incurred.

(1) *Initial reimbursement claim.* Within one year of the approval of its Reimbursement Program application, a recipient must file at least one reimbursement claim. Failure to file a reimbursement claim within the one-year period will result in the reclamation of all allocated funding from the Reimbursement Program recipient and revert to the Reimbursement Program fund for potential allocation to other Reimbursement Program participants.

(2) *Reimbursement claim deadline.* All reimbursement claims must be filed by the Reimbursement Program recipient within 120 days of expiration of the removal, replacement and disposal term. Following the expiration of the reimbursement claim deadline, any remaining and unclaimed funding allocated to the Reimbursement Program recipient will automatically be reclaimed and revert to the Reimbursement Program fund for potential allocation to other Reimbursement Program participants.

(3) *Extension of reimbursement claim deadline.* A Reimbursement Program recipient may request a single extension of the reimbursement claim deadline by no later than the deadline discussed in paragraph (g)(2). The Wireline Competition Bureau shall grant any timely filed extension request of the reimbursement claim filing deadline for no more than 120 days.

(h) * * *

(2) *Individual extensions.* Prior to the expiration of the removal, replacement and disposal term, a Reimbursement Program recipient may petition the Wireline Competition Bureau for an extension of the term. The Wireline Competition Bureau may grant an extension for up to six months after finding, that due to no fault of such recipient, such recipient is unable to complete the permanent removal, replacement, and disposal by the end of the term. The Wireline Competition Bureau may grant more than one extension request to a recipient if circumstances warrant.

* * * * *

(j) *Disposal requirements.* Reimbursement Program recipients must dispose of the covered communications equipment or service in a manner to prevent the equipment or service from being used in the networks of other providers of advanced communications service. The disposal must result in the destruction of the covered communications equipment or service, making the covered communications equipment or service inoperable permanently. Reimbursement Program recipients must retain documentation demonstrating compliance with this requirement.

(k) *Status updates.* Reimbursement Program recipients must file a status update with the Commission once every 90 days beginning on the date on which the Wireline Competition Bureau approves the recipient's application for reimbursement and until the recipient has filed the final certification.

(1) Status updates must include:

(i) Efforts undertaken, and challenges encountered, in permanently removing, replacing, and disposing of the covered communications equipment or service;

(ii) The availability of replacement equipment in the marketplace;

(iii) Whether the recipient has fully complied with (or is in the process of complying with) all requirements of the Reimbursement Program;

(iv) Whether the recipient has fully complied with (or is in the process of complying with) the commitments made in the recipient's application;

(v) Whether the recipient has permanently removed from its communications network, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the recipient's network as of the date of the submission of the recipient's application; and

(vi) Whether the recipient has fully complied with (or is in the process of complying with) the timeline submitted by the recipient as required by paragraph (c)(1)(iv) of this section.

(2) The Wireline Competition Bureau will publicly post on the Commission's website the status update filings within 30 days of submission.

(3) Within 180 days of completing the funding allocation stage provided for in paragraph (e), the Wireline Competition Bureau shall prepare a report for Congress providing an update on the Commission's implementation efforts and the work by recipients to permanently remove, replace, and dispose of covered communications equipment and service from their networks.

(l) *Spending reports.* Within 10 days after the end of January and July, Reimbursement Program recipients must file reports with the Commission regarding how reimbursement funds have been spent, including detailed accounting of the covered communications equipment or service permanently removed and disposed of, and the replacement equipment or service purchased, rented, leased, or otherwise obtained, using reimbursement funds.

(1) This requirement applies starting with the recipient's initial receipt of disbursement funds per paragraph (g) of this section and terminates once the recipient has filed a final spending report. certification.

(2) Following the filing of its final certification per paragraph (m) of this section, certifying that the recipient has completed the removal, replacement, and disposal process, the recipient must file a final spending report showing the expenditure of all funds received as compared to estimated costs identified in its application for funding.

(3) The Wireline Competition Bureau will make versions of the spending reports available on the Commission's website subject to confidentiality concerns consistent with the Commission's rules.

(m) *Final certification.* Within 10 days following the expiration of the removal, replacement, and disposal term, Reimbursement Program recipient shall file a final certification with the Commission.

(1) The final certification shall indicate whether the recipient has fully complied with (or is in the process of complying with) all terms and conditions of the Reimbursement Program, the commitments made in the application of the recipient for the reimbursement, and the timeline submitted by the recipient as required by paragraph (c) of this section. In addition, the final certification shall indicate whether the recipient has permanently removed from its communications network, replaced, and disposed of (or is in the process of permanently removing, replacing, and disposing of) all covered communications equipment or services that were in the network of the recipient as of the date of the submission of the application by the recipient for the reimbursement.

(2) If a recipient submits a certification under this paragraph stating the recipient has not fully complied with the obligations detailed in paragraph (m)(1) of this section, then the recipient must file an updated certification when the recipient has fully complied.

(n) *Documentation retention requirement.* Each Reimbursement Program recipient is required to retain all relevant documents, including invoices and receipts, pertaining to all costs eligible for reimbursement actually incurred for the removal, replacement, and disposal of covered communications equipment or services for a period ending not less than 10 years after the date on which it receives final disbursement from the Reimbursement Program.

* * * * *

■ 5. Delayed indefinitely, add § 1.50007 to subpart DD to read as follows:

§ 1.50007 Reports on covered communications equipment or services.

(a) *Contents of Report.* Each provider of advanced communications service must submit an annual report to the Commission that:

(1) Identifies any covered communications equipment or service that was purchased, rented, leased or otherwise obtained on or after:

(i) August 14, 2018, in the case of any covered communications equipment or service on the initial list published pursuant to § 1.50002; or

(ii) Within 60 days after the date on which the Commission places such equipment or service on the list required by § 1.50003;

(2) Provides details on the covered communications equipment or services in its network subject to reporting pursuant to paragraph (a)(1) of this section, including the type, location, date purchased, rented, leased or otherwise obtained, and any removal and replacement plans;

(3) Provides a detailed justification as to why the facilities-based provider of broadband service purchased, rented, leased or otherwise obtained the covered communications equipment or service;

(4) Provides information about whether any such covered communications equipment or service has subsequently been removed and replaced pursuant to Commission's reimbursement program contained in § 1.50004 of this subpart;

(5) Provides information about whether such provider plans to continue to purchase, rent, lease, or otherwise obtain, or install or use, such covered communications equipment or service and, if so, why; and

(6) Includes a certification as to the accuracy of the information reported by an appropriate official of the filer, along with the title of the certifying official.

(b) *Reporting deadline.* Providers of advanced communications service shall file initial reports within 90 days after the Office of Economics and Analytics issues a public notice announcing the availability of the new reporting platform. Thereafter, filers must submit reports once per year on or before March 31st, reporting information as of December 31st of the previous year.

(c) *Reporting exception.* If a provider of advanced communications service certifies to the Commission that such provider does not have any covered communications equipment or service in the network of such provider, such provider is not required to submit a report under this section after making such certification, unless such provider later purchases, rents, leases or otherwise obtains any covered communications equipment or service.

(d) *Authority to update.* The Office of Economics and Analytics may, consistent with these rules, implement any technical improvements, changes to the format and type of data submitted, or other clarifications to the report and its instructions.

PART 54—UNIVERSAL SERVICE

■ 5. The authority citation for part 54 is revised to read as follows:

Authority: 47 U.S.C. 151, 154(i), 155, 201, 205, 214, 219, 220, 229, 254, 303(r), 403, 1004, 1302, and 1601–1609, unless otherwise noted.

■ 6. Effective March 15, 2021, add § 54.10 to read as follows:

§ 54.10 Prohibition on use of certain Federal subsidies.

(a) A Federal subsidy made available through a program administered by the Commission that provides funds to be used for the capital expenditures necessary for the provision of advanced communications service may not be used to:

(1) Purchase, rent, lease, or otherwise obtain any covered communications equipment or service; or

(2) Maintain any covered communications equipment or service previously purchased, rented, leased, or otherwise obtained.

(b) The term ''covered communications equipment or service'' is defined in § 1.50001 of this chapter.

(c) The prohibition in paragraph (a) of this section applies to any covered communications equipment or service beginning on the date that is 60 days after the date on which such equipment or service is placed on a published list pursuant to § 1.50003 of this chapter. In the case of any covered communications equipment or service that is on the initial list published pursuant to § 1.50002 of this chapter, such equipment or service shall be treated as being placed on the list on the date which such list is published.

■ 7. Delayed indefinitely, add § 54.11 to read as follows:

§ 54.11 Requirement to remove and replace.

(a) Each Eligible Telecommunications Carrier receiving Universal Service Fund support must certify prior to receiving a funding commitment or support that it does not use covered communications equipment or services.

(b) For purposes of paragraph (a) of this section, covered communications equipment or services means any communications equipment or service that is on the Covered list found in § 1.50002 of this chapter.

(c) The certification required in paragraph (a) of this section is not applicable until one year after the date the Commission releases a Public Notice announcing the acceptance of applications for filing during the initial filing window of the Reimbursement Program per § 1.50004(b) of this chapter.

(d) Reimbursement Program recipients, as defined in § 1.50001(h) of this chapter, are not subject to paragraph (a) of this section until after the expiration of their applicable removal, replacement, and disposal term per § 1.50004(h).

[FR Doc. 2021–00052 Filed 1–12–21; 8:45 am]

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FEDERAL REGISTER

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Part V

The President

Memorandum of January 8, 2021—Providing an Order of Succession Within the United States International Development Finance Corporation

Proclamation 10132—Honoring United States Capitol Police Officers

Federal Register
Vol. 86, No. 8
Wednesday, January 13, 2021

Presidential Documents

Title 3—

The President

Memorandum of January 8, 2021

Providing an Order of Succession Within the United States International Development Finance Corporation

Memorandum for the Chief Executive Officer of the United States International Development Finance Corporation

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Vacancies Reform Act of 1998, as amended, 5 U.S.C. 3345 *et seq.* (the ''Act''), I hereby direct the following:

Section 1. *Order of Succession.* Subject to the provisions of section 2 of this memorandum, and to the limitations set forth in the Act, the following officers of the United States International Development Finance Corporation (DFC), in the order listed, shall act as and perform the functions and duties of the office of the Chief Executive Officer of DFC during any period in which the Chief Executive Officer of DFC has died, resigned, or otherwise become unable to perform the functions and duties of the office of the Chief Executive Officer of DFC:

(a) Deputy Chief Executive Officer;

(b) Chief Operating Officer;

(c) Executive Vice President for Strategy;

(d) Chief of Staff;

(e) Vice President and General Counsel;

(f) Deputy General Counsel;

(g) Vice President, Structured Finance and Insurance;

(h) Vice President, Development Credit; and

(i) Chief Financial Officer and Vice President, Finance.

Sec. 2. *Exceptions.* (a) No individual who is serving in an office listed in section 1 of this memorandum in an acting capacity shall, by virtue of so serving, act as Chief Executive Officer of DFC pursuant to this memorandum.

(b) No individual who is serving in an office listed in section 1 of this memorandum shall act as Chief Executive Officer of DFC unless that individual is otherwise eligible to so serve under the Act.

(c) Notwithstanding the provisions of this memorandum, the President retains discretion, to the extent permitted by law, to depart from this memorandum in designating an acting Chief Executive Officer of DFC.

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

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

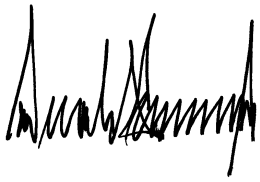
(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

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

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by

any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 4. You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 8, 2021

[FR Doc. 2021–00829
Filed 1–12–21; 11:15 am]
Billing code 3210–02–P

Presidential Documents

Proclamation 10132 of January 10, 2021

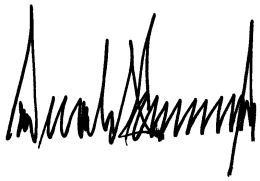
Honoring United States Capitol Police Officers

By the President of the United States of America

A Proclamation

As a sign of respect for the service and sacrifice of United States Capitol Police Officers Brian D. Sicknick and Howard Liebengood, and all Capitol Police Officers and law enforcement across this great Nation, by the authority vested in me as President of the United States by the Constitution and the laws of the United States of America, I hereby order that the flag of the United States shall be flown at half-staff at the White House and upon all public buildings and grounds, at all military posts and naval stations, and on all naval vessels of the Federal Government in the District of Columbia and throughout the United States and its Territories and possessions until sunset, January 13, 2021. I also direct that the flag shall be flown at half-staff for the same length of time at all United States embassies, legations, consular offices, and other facilities abroad, including all military facilities and naval vessels and stations.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of January, in the year of our Lord two thousand twenty-one, and of the Independence of the United States of America the two hundred and forty-fifth.



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